HEAR YE * HEAR YE * HEAR YE

E Più


WHAT IS PAST
IS PROLOGUE

HEAR YE * HEAR YE * HEAR YE

E Più

Joseph W. Bellacosa

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2022

Ad Majorem Dei Gloriam
(To the Greater Glory of God)

DEDICATION

Volume III ("E PIÙ" [formerly projected with a title "RERUNS"], completes the set after volume I, "ECHOS," and volume II, "ENCORES"). I gratefully dedicate this preservation project to the many teachers, mentors and colleagues, whom I encountered along the paths of my public service and academic careers. The three-volume set contains favorites from among my writings over many decades that have suffused my life with their generous sharing of experience and common sense. I pay it forward a bit by infusing their values and wisdom into my life's works, reflected in entries collected in these pamphlets.

Joseph W. Bellacosa
Summer 2022

HEAR YE * HEAR YE * HEAR YE

E Più

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PREFACE

The entries in this volume revisit the catalogue of my judicial opinions, and include a few surprise selections. The previous two volumes contain a sampling of extra-judicial writings composed during my career as a judge, law professor, and retiree. The previous selections reflect my extra-curricular interests at the time of composition, and through a refracted look-back prism, they may provide fresh insights.

" *'E PIÙ"* – Volume III, after Volumes I & II "ECHOS" & "ENCORES," is unique because it canvasses my core institutional work as a Judge. With the benefit of mellowing of years, this collection allows me to reprise my favorite and most impactful judicial opinions, presented in simple order of chronological date of decision. They are chosen from among the 500 or so that I authored at the New York State Court of Appeals in Albany from 1987 to 2000. I retired that year to return to St. John's University School of Law to become Dean and again a Professor of Law, after which I fully retired in 2004 from institutional affiliations.

Like the first two compilations, though of different subject material, I add no introductory or explanatory text, other than a Preface and a Table of Contents. The words of the Opinions, literally, are what legal linguists refer to as *res ipsa loquitur* (they speak for themselves – then, and now again!). My Criminal Procedure Law Practice Commentaries (8 volumes from 1974 to 1985) and some post-retirement lectures (*Mirabile Dictu,* with "power point" slides) did not fit the pamphlet format for these volumes, so I exempted them from any inclusion.

The idea to start this project percolated through nudges from some family and friends, with the goal of preserving what I fancifully viewed as some personal "treasures." The exercise filled some down-time during the 2020-2021 periods of the "COVID Cloister," and a happy bonus allows me to pre-empt the sad prospect of a wholesale dumpster discard - way down the road apiece by my beloved family.

At this rosy reflective stage of life, I am grateful for this fun-filled journey down memory lanes, exercised as a whimsical archeological "dig" that saved some fossils.

Joseph W. Bellacosa
Summer 2022

~ 1 ~

People v. Marrero

(classic mistake of law excuse and
defense rejected and conviction upheld)
69 N Y 2nd 382 – Majority Opinion [4-3] [1987]

69 N.Y.2d 382, 507 N.E.2d 1068, 515 N.Y.S.2d 212, 89 A.L.R.4th 1001

The People of the State of New York, Respondent,
v.
Julio Marrero, Appellant.

Court of Appeals of New York
38
Argued January 13, 1987;
decided April 2, 1987

CITE TITLE AS: People v Marrero

SUMMARY

Appeal, by permission of an Associate Judge of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the First Judicial Department, entered November 12, 1985, which affirmed a judgment of the Supreme Court (Jerome Hornblass, J.), rendered in New York County upon a verdict convicting defendant of criminal possession of a weapon in the third degree.

People v Marrero, 114 AD2d 1053, affirmed.

OPINION OF THE COURT

Bellacosa, J.

The defense of mistake of law (Penal Law § 15.20 [2] [a], [d]) is not available to a Federal corrections officer arrested in a Manhattan social club for possession of a loaded .38 caliber automatic pistol who claimed he mistakenly believed he was entitled, pursuant to the interplay of CPL 2.10, 1.20 and Penal Law § 265.20, to carry a handgun without a permit as a peace officer.

In a prior phase of this criminal proceeding, defendant's motion to dismiss the indictment upon which he now stands convicted was granted (94 Misc 2d 367); then it was reversed and the indictment reinstated by a divided Appellate Division (71 AD2d 346); next, defendant allowed an appeal from that order, certified to the Court of Appeals, to lapse and be dismissed (Oct. 22, 1980). Thus, review of that aspect of the case is precluded *(People v Corley,* 67 NY2d 105).

On the trial of the case, the court rejected the defendant's argument that his personal misunderstanding of the statutory definition of a peace officer is enough to excuse him from ***385** criminal liability under New York's mistake of law statute (Penal Law § 15.20). The court refused to charge the jury on this issue and defendant was convicted of criminal possession of a weapon in the third degree. We affirm the Appellate Division order upholding the conviction.

Defendant was a Federal corrections officer in Danbury, Connecticut, and asserted that status at the time of his arrest in 1977. He claimed at trial that there were various interpretations of fellow officers and teachers, as well as the peace officer statute itself, upon which he relied for his mistaken belief that he could carry a weapon with legal impunity.

The starting point for our analysis is the New York mistake statute as an outgrowth of the dogmatic common-law maxim that ignorance of the law is no excuse. The central issue is whether defendant's personal misreading or misunderstanding of a statute may excuse criminal conduct in the circumstances of this case.

The common-law rule on mistake of law was clearly articulated in *Gardner v People* (62 NY 299). In *Gardner,* the defendants misread a statute and mistakenly believed that their conduct was legal. The court insisted, however, that the "mistake of law" did not relieve the defendants of criminal liability. The statute at issue, relating to the removal of election officers, required that prior to removal, written notice must be given to the officer sought to be removed. The statute provided one exception to the notice requirement: "removal * * * shall only be made after notice in writing * * * unless made while the inspector is actually on duty on a day of registration, revision of registration, or election, and for improper conduct" (L 1872, ch 675, § 13). The defendants construed the statute to mean that an election officer could be removed without notice for improper conduct at any time. The court ruled that removal without notice could only occur for improper conduct on a day of registration, revision of registration or election.

In ruling that the defendant's misinterpretation of the statute was no defense, the court said: "The defendants made a mistake of law. Such mistakes do not excuse the commission of prohibited acts. 'The rule on the subject appears to be, that in acts *mala in se,* the intent governs, but in those *mala prohibita,* the only inquiry is, has the law been violated?' (3 Den., 403). The act prohibited must be intentionally done. A mistake as to the fact of doing the act will excuse the party, ***386** but if the act is intentionally done, the statute declares it a misdemeanor, irrespective of the motive or intent * * * The evidence offered [showed] that the defendants were of [the] opinion that the statute did not require notice to be given before removal. This opinion, if entertained in good faith, mitigated the character of the act, but was not a defence *[sic]" (Gardner v People,* 62 NY 299, 304, *supra).* This is to be contrasted with *People v Weiss* (276 NY 384) where, in a kidnapping case, the trial court precluded testimony that the defendants acted with the honest belief that seizing and confining the child was done with "authority of law". We held it was error to exclude such testimony since a good-faith belief in the legality of the conduct would negate an express and necessary element of the crime of kidnapping, i.e., intent, without authority of law, to confine or imprison another. Subject to the mistake statute, the instant case, of course, falls within the *Gardner* rationale because the weapons possession statute violated by this defendant imposes liability irrespective of one's intent.

The desirability of the *Gardner*-type outcome, which was to encourage the societal benefit of individuals' knowledge of and respect for the law, is underscored by Justice Holmes' statement: "It is no doubt true that there are many cases in which the criminal could not have known that he was breaking the law, but to admit the excuse at all would be to encourage ignorance where the law-maker has determined to make men know and obey, and justice to the individual is rightly outweighed by the larger interests on the other side of the scales" (Holmes, The Common Law, at 48 [1881]).

The revisors of New York's Penal Law intended no fundamental departure from this common-law rule in Penal Law § 15.20, which provides in pertinent part:

"§ 15.20. *Effect of ignorance or mistake upon liability.*

* * *

"2. A person is not relieved of criminal liability for conduct because he engages in such conduct under a mistaken belief that it does not, as a matter of law, constitute an offense, unless such mistaken belief is founded upon an official statement of the law contained in (a) a statute or other enactment * * * (d) an interpretation of the statute or law relating to the offense,

officially made or issued by a public servant, agency, or body legally charged or empowered with the responsibility *387 or privilege of administering, enforcing or interpreting such statute or law."

This section was added to the Penal Law as part of the wholesale revision of the Penal Law in 1965 (L 1965, ch 1030). When this provision was first proposed, commentators viewed the new language as codifying "the established common law maxim on mistake of law, while at the same time recognizing a defense when the erroneous belief is founded upon an 'official statement of the law' " (Note, *Proposed Penal Law of New York*, 64 Colum L Rev 1469, 1486 [1964]).

The defendant claims as a first prong of his defense that he is entitled to raise the defense of mistake of law under section 15.20 (2) (a) because his mistaken belief that his conduct was legal was founded upon an official statement of the law contained in the statute itself. Defendant argues that his mistaken interpretation of the statute was reasonable in view of the alleged ambiguous wording of the peace officer exemption statute, and that his "reasonable" interpretation of an "official statement" is enough to satisfy the requirements of subdivision (2) (a). However, the whole thrust of this exceptional exculpatory concept, in derogation of the traditional and common-law principle, was intended to be a very narrow escape valve. Application in this case would invert that thrust and make mistake of law a generally applied or available defense instead of an unusual exception which the very opening words of the mistake statute make so clear, i.e., "A person is not relieved of criminal liability for conduct * * * unless" (Penal Law § 15.20). The momentarily enticing argument by defendant that his view of the statute would only allow a defendant to get the issue generally before a jury further supports the contrary view because that consequence is precisely what would give the defense the unintended broad practical application.

The prosecution further counters defendant's argument by asserting that one cannot claim the protection of mistake of law under section 15.20 (2) (a) simply by misconstruing the meaning of a statute but must instead establish that the statute relied on actually permitted the conduct in question and was only later found to be erroneous. To buttress that argument, the People analogize New York's official statement defense to the approach taken by the Model Penal Code (MPC). Section 2.04 of the MPC provides: *388

"Section 2.04. *Ignorance or Mistake.*

* * *

"(3) A belief that conduct does not legally constitute an offense is a defense to a prosecution for that offense based upon such conduct when * * * (b) he acts in reasonable reliance upon an official statement of the law, *afterward determined to be invalid or erroneous,* contained in (i) a statute or other enactment" (emphasis added).

Although the drafters of the New York statute did not adopt the precise language of the Model Penal Code provision with the emphasized clause, it is evident and has long been believed that the Legislature intended the New York statute to be similarly construed. In fact, the legislative history of section 15.20 is replete with references to the influence of the Model Penal Code provision *(see,* Hechtman, Practice Commentaries, McKinney's Cons Laws of NY, Book 39, Penal Law § 15.20, at 36; LaFave and Scott, Substantive Criminal Law § 5.1, n 95; *Drafting a New Penal Law of New York: An Interview with Richard Denzer,* 18 Buffalo L Rev 251, 252 [1968-1969]). The proposition that New York adopted the MPC general approach finds additional support in the comments to section 2.04 *(see,* Model Penal Code § 2.04, comment 3, n 33, at 279 [Official Draft and Revised Comments 1985]). It is not without significance that no one for over 20 years of this statute's existence has made a point of arguing or noting or holding that the difference in wording has the broad and dramatically sweeping interpretation which is now proposed. Such a turnabout would surely not have been accidentally produced or allowed. New York's drafters may even have concluded that the extra clause in the MPC was mere surplusage in view of the clear exceptionability of the mistake authorization in the first instance. Moreover, adding specified conditions by judicial construction, as the dissenters

would have to do to make the mistake exception applicable in circumstances such as these, would be the sheerest form of judicial legislation.

It was early recognized that the "official statement" mistake of law defense was a statutory protection against prosecution based on reliance of a statute that did *in fact* authorize certain conduct. "It seems obvious that society must rely on some statement of the law, and that conduct which *is in fact* 'authorized' * * * should not be subsequently condemned. The threat of punishment under these circumstances can have no deterrent effect unless the actor doubts the validity of the ***389** official pronouncement--*a questioning of authority that is itself undesirable"* (Note, *Proposed Penal Law of New York,* 64 Colum L Rev 1469, 1486 [emphasis added]). While providing a narrow escape hatch, the idea was simultaneously to encourage the public to read and rely on official statements of the law, not to have individuals conveniently and personally question the validity and interpretation of the law and act on that basis. If later the statute was invalidated, one who mistakenly acted in reliance on the authorizing statute would be relieved of criminal liability. That makes sense and is fair. To go further does not make sense and would create a legal chaos based on individual selectivity.

In the case before us, the underlying statute never *in fact authorized* the defendant's conduct; the defendant only thought that the statutory exemptions permitted his conduct when, in fact, the primary statute clearly forbade his conduct. Moreover, by adjudication of the final court to speak on the subject in this very case, it turned out that even the exemption statute did not permit this defendant to possess the weapon. It would be ironic at best and an odd perversion at worst for this court now to declare that the same defendant is nevertheless free of criminal responsibility.

The "official statement" component in the mistake of law defense in both paragraphs (a) and (d) adds yet another element of support for our interpretation and holding. Defendant tried to establish a defense under Penal Law § 15.20 (2) (d) as a second prong. But the interpretation of the statute relied upon must be "officially made or issued by a public servant, agency or body legally charged or empowered with the responsibility or privilege of administering, enforcing or interpreting such statute or law." We agree with the People that the trial court also properly rejected the defense under Penal Law § 15.20 (2) (d) since none of the interpretations which defendant proffered meets the requirements of the statute. The fact that there are various complementing exceptions to section 15.20, none of which defendant could bring himself under, further emphasizes the correctness of our view which decides this case under particular statutes with appropriate precedential awareness.

It must also be emphasized that, while our construction of Penal Law § 15.20 provides for narrow application of the mistake of law defense, it does not, as the dissenters contend, "rule out *any* defense based on mistake of law." *(See,* dissenting ***390** opn, at 399-400.) To the contrary, mistake of law is a viable exemption in those instances where an individual demonstrates an effort to learn what the law is, relies on the validity of that law and, later, it is determined that there was a *mistake in the law itself.*

The modern availability of this defense is based on the theory that where the government has affirmatively, albeit unintentionally, misled an individual as to what may or may not be legally permissible conduct, the individual should not be punished as a result. This is salutary and enlightened and should be firmly supported in appropriate cases. However, it also follows that where, as here, the government is not responsible for the error (for there is none except in the defendant's own mind), mistake of law should not be available as an excuse *(see,* Jeffries, *Legality, Vagueness and the Construction of Penal Statutes,* 71 Va L Rev 189, 208 [1985]).

We recognize that some legal scholars urge that the mistake of law defense should be available more broadly where a defendant misinterprets a potentially ambiguous statute not previously clarified by judicial decision and reasonably believes in good faith that the acts were legal. Professor Perkins, a leading supporter of this view, has said: "[i]f the meaning of a statute is not clear, and has not been judicially determined, one who has acted 'in good faith' should not be held guilty of crime if his conduct would have been proper had the statute meant what he 'reasonably believed' it to mean, even if the court should decide later that the proper construction is otherwise." (Perkins, *Ignorance and Mistake in Criminal Law,* 88 U Pa L Rev 35, 45.) In support of this conclusion Professor Perkins cites two cases: *State v Cutter* (36 NJL 125) and *Burns v State*

(123 Tex Crim 611, 61 SW2d 512). In both these cases mistake of law was viewed as a valid defense to offenses where a specific intent (i.e., willfully, knowingly, etc.) was an element of the crime charged. In *Burns*, the court recognized mistake of law as a defense to extortion. The statute defining "extortion" made the "willful" doing of the prohibited act an essential ingredient of the offense. The court, holding that mistake of law is a defense only where the mistake negates the specific intent required for conviction, borrowed language from the *Cutter* case: "In *State v Cutter* * * * the court said: 'The argument goes upon the legal maxim ignorantia legis neminem excusat. But this rule, in its application to the law of crimes, is subject * * * to certain important exceptions. Where the act done is malum in se, or where the law which ***391** has been infringed was settled and plain, the maxim, in its rigor, will be applied; but where the law is not settled, or is obscure, *and where the guilty intention, being a necessary constituent of the particular offence, is dependent on a knowledge of the law, this rule, if enforced, would be misapplied*' " (*Burns v State*, 123 Tex Crim, at 613, 61 SW2d, at 513, *supra* [emphasis added]). Thus, while Professor Perkins states that the defense should be available in cases where the defendant claims mistaken reliance on an ambiguous statute, the cases he cites recognize the defense only where the law was ambiguous *and* the ignorance or mistake of law negated the requisite intent *(see also, People v Weiss*, 276 NY 384, *supra)*. In this case, the forbidden act of possessing a weapon is clear and unambiguous, and only by the interplay of a double exemption does defendant seek to escape criminal responsibility, i.e., the peace officer statute and the mistake statute.

We conclude that the better and correctly construed view is that the defense should not be recognized, except where specific intent is an element of the offense or where the misrelied-upon law has later been properly adjudicated as wrong. Any broader view fosters lawlessness. It has been said in support of our preferred view in relation to other available procedural protections: "A statute * * * which is so indefinite that it 'either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law' and is unconstitutional. If the court feels that a statute is sufficiently definite to meet this test, it is hard to see why a defense of mistake of law is needed. Such a statute could hardly mislead the defendant into believing that his acts were not criminal, if they do in fact come under its ban * * * [I]f the defense of mistake of law based on indefiniteness is raised, the court is * * * going to require proof * * * that the act was sufficiently definite to guide the conduct of reasonable men. Thus, the need for such a defense is largely supplied by the constitutional guarantee" (Hall and Seligman, *Mistake of Law and Mens Rea*, 8 U Chi L Rev 641, 667 [1941]).

Strong public policy reasons underlie the legislative mandate and intent which we perceive in rejecting defendant's construction of New York's mistake of law defense statute. If defendant's argument were accepted, the exception would swallow the rule. Mistakes about the law would be encouraged, rather than respect for and adherence to law. There ***392** would be an infinite number of mistake of law defenses which could be devised from a good-faith, perhaps reasonable but mistaken, interpretation of criminal statutes, many of which are concededly complex. Even more troublesome are the opportunities for wrongminded individuals to contrive in bad faith solely to get an exculpatory notion before the jury. These are not in terrorem arguments disrespectful of appropriate adjudicative procedures; rather, they are the realistic and practical consequences were the dissenters' views to prevail. Our holding comports with a statutory scheme which was not designed to allow false and diversionary stratagems to be provided for many more cases than the statutes contemplated. This would not serve the ends of justice but rather would serve game playing and evasion from properly imposed criminal responsibility.

Accordingly, the order of the Appellate Division should be affirmed.

Chief Judge Wachtler and Judges Simons and Titone concur with Judge Bellacosa; Judge Hancock, Jr., dissents and votes to reverse in a separate opinion in which Judges Kaye and Alexander concur.

Order affirmed. ***406**

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Boreali v. Dr. David Axelrod, State Health Comm'r

(Ct. nullified earliest regulatory smoking ban)
71 N Y 2nd 1, at 16 – Dissenting Opinion [6-1] [1987]

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71 N.Y.2d 1, 517 N.E.2d 1350, 523 N.Y.S.2d 464, 56 USLW 2319, 108 Lab.Cas. P 55,856, 2 IER Cases 1213, 13 O.S.H. Cas. (BNA) 1498, 1988 O.S.H.D. (CCH) P 28,132

Fred Boreali et al., Respondents,
v.
David M. Axelrod, as Commissioner of the New York State Department of Health, et al., Appellants.

Court of Appeals of New York
275
Argued October 13, 1987;
decided November 25, 1987

CITE TITLE AS: Boreali v Axelrod

SUMMARY

Appeal from an order of the Appellate Division of the Supreme Court in the Third Judicial Department, entered July 29, 1987, which, with two Justices dissenting, affirmed an order and judgment of the Supreme Court (Harold J. Hughes, J.), entered in Schoharie County, (1) denying a motion by defendants for summary judgment, (2) granting a motion by plaintiffs for summary judgment, and (3) declaring that the rules set forth at 10 NYCRR part 25 are null and void.

Boreali v Axelrod, 130 AD2d 107, affirmed.

Bellacosa, J.

(Dissenting).

I would reverse and uphold the Public Health Council (PHC) regulation, adopted to preserve and improve the public health, prohibiting smoking indoors in some public places and in designated portions of workplaces (10 NYCRR 25.2). This comprehensive plan, based on a thoroughly documented record and a carefully deliberated public procedure, was promulgated to protect innocent bystanders from involuntary exposure to the environmental smoke of others.

The majority accepts the Legislature's delegation of broad authority to the PHC to make regulations concerning a wide range of issues affecting the public health *(see, Matter of Levine v Whalen,* 39 NY2d 510, 515). They recognize that the legislative delegation may be granted in the most generous terms *(Chiropractic Assn. v Hilleboe,* 12 NY2d 109, 120), that the regulation is in harmony with the statute *(State Div. of Human Rights [Valdemarsen] v Genesee Hosp.,* 50 NY2d 113, 118; *Matter of Jones v Berman,* 37 NY2d 42, 53), and that this court has held the particular delegation under Public Health Law § 225 (4), (5) (a) to be valid *(Chiropractic Assn. v Hilleboe, supra).* They even acknowledge that the Legislature did not preempt the field of public smoking or evince an intent to constrict the PHC mandate by enacting its own 1975 narrow smoking ban in Public Health Law article 13-E.

Yet, the majority, wrongly I respectfully submit, concludes that the separation of powers doctrine has been transgressed by the Legislature and by the PHC and, on that basis alone, they uphold the judicial invalidation of the smoking ban regulation.

The statutory authority for protecting the public health was delegated by the Legislature to the PHC 75 years ago in the broadest possible mandate and it has not been withdrawn or narrowed. Indeed, it has been exercised regularly with this ***17** court's express approbation *(Matter of Levine v Whalen,* 39 NY2d 510, 517, *supra; Chiropractic Assn. v Hilleboe,* 12 NY2d 109, 120, *supra).* That power includes adoption and amendment to the Sanitary Code dealing with the root source of

authority here--"matters affecting the security of life or health or the preservation and improvement of public health " (Public Health Law § 225 [4], [5] [a]). This court, in a definitive ruling, has held that mission, that delegation and its broad implementation, to be constitutionally proper *(Chiropractic Assn. v Hilleboe, supra,* at 120 [under State Constitution the Legislature properly delegated power to the PHC in Public Health Law § 225]).

This antismoking regulation is a fortiori valid compared to the regulation in *Chiropractic Assn. v Hilleboe (supra),* which was a restriction on the freedom and access to chiropractic X-ray treatments, protecting patients from their own choices. Inasmuch as the Public Health Council could do that with our approbation, we search in vain for reasons in the majority's decision that the same statutory source of authority cannot protect the public health of innocent, involuntary *third-party victims* from others with this limited regulation.

"[I]t is not necessary that the Legislature supply administrative officials with rigid formulas in fields where flexibility in the adaptation of the legislative policy to infinitely variable conditions constitute the very essence of the programs. Rather, the standards prescribed by the Legislature are to be read in light of the conditions in which they are to be applied" *(Matter of Nicholas v Kahn,* 47 NY2d 24, 31).

The Legislature declared its intent that there be a PHC in this State and empowered it to adopt a Sanitary Code for the preservation and improvement of the public health. The Legislature also wisely refrained from enacting a rigid formula for the exercise of the PHC's critical agenda of concerns because that calls for expert attention. That legislative forbearance represents both a sound administrative law principle and, at the threshold, a constitutional one as well *(Matter of Levine v Whalen,* 39 NY2d 510, 515, *supra; Chiropractic Assn. v Hilleboe,* 12 NY2d 109, 120, *supra).* The Legislature could not have foreseen in 1913 the specific need for PHC regulations in areas of human blood collection, care and storage; X-ray film usage; pesticide labels; drinking water contamination; or a myriad of other public health topics *(see,* New York State Sanitary Code, 10 NYCRR parts 1-25). It was prescient and ***18** sound governance as well to grant flexibility to the objective expert entity so it could in these exceptional instances prescribe demonstrably needed administrative regulation for the public health, free from the sometimes paralyzing polemics associated with the legislative process. Just as many of the other specified categories in the State Sanitary Code have properly been regulated by the PHC, so, too, does the subject of public indoor smoking and its impact on the health and well-being of innocent third-party victims comfortably fall within that identical, broad legislative embrace.

While the court admits the difficulty under the high separation of powers standard of articulating the basis for drawing, and even finding, some line limiting the PHC's conceded exercise of authority, it nevertheless goes ahead and does so. Its line is no line, but rather an arbitrary judgment call of its own. It is this judicial branch intrusion which constitutes the truly egregious separation of powers breach into the exercise of prerogatives of the Legislature (Public Health Law § 225 [4], [5] [a] [enabling legislation]) and of the executive (10 NYCRR 25.2 [implementing regulation]).

It is painfully ironic that the PHC, as the legislatively designated body of experts for a vast litany of public health concerns *(see, Chiropractic Assn. v Hilleboe,* 12 NY2d 109, 119-120, *supra),* is declared for the first time and against a long line of precedents to lack expertise in this instance. The majority assertion in this regard collapses under the weight of the medically proven fact that environmental tobacco smoke, especially indoors, is hazardous and even deadly to the health of thousands of innocent bystander nonsmokers *(see,* Health Consequences of Involuntary Smoking, A Report of the Surgeon General [Dec. 1986]; Friedman, *Prevalence and Correlates of Passive Smoking,* 73 Am J of Pub Health, No. 4 [1983]; Repace, *Problems of Passive Smoking,* Bull of NY Acad of Med, at 936-946 [Dec. 1981]). The context and the record upon which the PHC exercised, carefully and narrowly, its conceded authority and its medical and scientific expertise on an overwhelming record are directly relevant and compel reversal. The legal denigration of the PHC and its work is a grave mistake.

Along the way to its decision, the majority somewhat hesitantly deals with a legislative history aspect of the case. It concludes that the law passed by the Legislature and on the books for 75 years (Public Health Law § 225 [4], [5] [a]) is ***19** nullified or neutralized by the inability of the Legislature to broaden its existing narrow ban (Public Health Law § 1399-o). The functional consequence of the negatively implied repeal of the broader authorization, Public Health Law § 225 (4), (5) (a), imputed by the majority to these recent failed legislative efforts, will be welcomed by opponents of all kinds of existing laws from now on, because the majority's rule dramatically changes the use of legislative history and of the principles of ordinary statutory construction. This will come back to haunt us as much as the apologetic side step of directly controlling recent authority *(41 Kew Gardens Rd. Assocs. v Tyburski,* 70 NY2d 325, 335).

No decision of this court and no relevant administrative law principle have been found where general rule-making power was nullified by a court because exceptions to the rule were also promulgated by the regulating entity in response to ancillary social, economic or even policy factors. The majority argument in this respect seems to assert that the PHC was too reasonable and too forthright, and that what it perhaps should have done was create an absolute ban on indoor smoking

expressly and pristinely premised on public health concerns. Life and government are not so neatly categorized. Surely, if the greater power exists, the lesser, as responsibly exercised here, should not be forbidden! In any event, the regulatory provisions at issue contain a severability provision (10 NYCRR 25.7) which would permit the invalidation of objectionable exceptions without overturning the validity of the adopted limited ban on indoor smoking.

Finally, there should be great concern about another and broader precedential regression lurking behind the diaphanous analysis of the majority's holding. Modern administrative and regulatory law principles are profoundly implicated by the majority's expression of and reliance on the anachronistic nondelegation theory embodied in a concurring opinion of Chief Justice Rehnquist *(Industrial Union Dept. v American Petroleum Inst.,* 448 US 607, 671 [Rehnquist, J., concurring]). The majority's invocation of the nondelegation doctrine sounds a discordant note which can summon no good in future administrative law disputes. This doctrine was last used to invalidate an act of Congress in 1935 in the infamous *Schechter Corp.* case (295 US 495; *see also, Industrial Union Dept. v American Petroleum Inst., supra,* at 717, n 30 [Marshall, J., dissenting]), and arises from a line of Supreme Court decisions responsible for a historical upheaval in the Supreme ***20** Court and in the main subsequently overruled anyway *(Industrial Union Dept. v American Petroleum Inst., supra,* at 674 [Rehnquist, J., concurring]).

The cloud deposited by the instant case on modern administrative and regulatory law is bad enough in the legal sense. But nothing could be more tragic than the harm and hazard inflicted involuntarily on many thousands of innocent third persons, nonsmokers, whose public health was entrusted to the expert protection of the PHC. Its effort is crushed without analytical or precedential justification. That is the human dimension of this case which the court cannot avoid, however awkwardly it tries, by its dry doctrinal discussion. The case represents, simply, a substitution of judicial preference for the expert authorized action of an agency which is a "creature[ ] of the Legislature * * * possessed only of those powers expressly or impliedly delegated by that body" *(Matter of Nicholas v Kahn,* 47 NY2d 24, 31, *supra; Matter of City of Utica v Water Pollution Control Bd.,* 5 NY2d 164, 168-169).

Neither the Legislature nor the PHC has transgressed the gossamer lines marked by the separation of powers doctrine, either in delegation or in implementation. That doctrine demands respect from all three branches of government, including this one.

Chief Judge Wachtler and Judges Simons, Kaye, Alexander and Hancock, Jr., concur with Judge Titone; Judge Bellacosa dissents and votes to reverse in a separate opinion.

Order affirmed, without costs. ***21**

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M/O Parkview v. N Y C

(Ct. ordered removal of 12 illegal stories built atop an existing 19-story Eastside New York City apartment building)
71 N Y 2nd 274 – Majority Opinion, Unanimous [1988]

New York
Official Reports

71 N.Y.2d 274, 519 N.E.2d 1372, 525 N.Y.S.2d 176

In the Matter of Parkview Associates, Appellant,
v.
City of New York et al., Respondents, and Civitas Citizens, Inc., Intervenor-Respondent.

Court of Appeals of New York
23
Argued January 11, 1988;
decided February 9, 1988

CITE TITLE AS: Matter of Parkview Assoc. v City of New York

SUMMARY

Appeal, by permission of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the First Judicial Department, entered April 2, 1987, which affirmed a judgment of the Supreme Court (William P. McCooe, J.), entered in New York County in a proceeding pursuant to CPLR article 78, dismissing the petition to set aside the partial revocation of a building permit issued to petitioner.

Matter of Parkview Assocs. v City of New York, 129 AD2d 405, affirmed.

OPINION OF THE COURT

Bellacosa, J.

We hold in this case involving the height of a building on Park Avenue in Manhattan, already constructed in excess of the height limitations of applicable zoning provisions, that ***279** estoppel is not available to preclude a governmental entity from discharging its statutory duties or to compel ratification of prior erroneous implementation in the issuance of an invalid building permit. The rare exception to the unavailability of estoppel against governmental entities may not, in any event, be invoked in this case where reasonable diligence by a good-faith inquirer would have disclosed the true facts and the bureaucratic error. We may not address the additional claim that governmental correction of prior administrative action, erroneously overriding applicable zoning provisions, constitutes an unconstitutional taking inasmuch as there is a pending variance application. We thus affirm the Appellate Division's order affirming the denial of relief to plaintiff.

Owner-builder Parkview's property, purchased in 1982, is at the southeast corner of Park Avenue and 96th Street, located 90- to 190-feet east of Park Avenue. A portion of the property is within a Special Park Improvement District (P.I.D.) created by enactment of the Board of Estimate of the City of New York in 1973. The enabling and authorizing resolution limits the height of new buildings in that district to 19 stories or 210 feet, whichever is less. The P.I.D. boundary ran uniformly 150-feet east of Park Avenue until, by resolution of the Board of Estimate on March 3, 1983, the metes and bounds description of the P.I.D. was amended, providing in part for a reduction from 150 to 100 feet between East 88 Street to midway between 95th and 96th Streets. The boundary north of this midblock division, pursuant to the metes and bounds, remained at all times 150 feet. Plaintiff's property was thus unaffected by this 1983 change and has always been governed by the 1973 original enactment.

Zoning Map 6b accompanying the March 1983 resolution depicted the amended boundary with a dotted line which fell within a shaded area constituting the existing P.I.D. A numerical designation of "150", included on earlier versions of the map to show the setback, had been removed and a new designation of "100" was inserted adjacent to the dotted line. This left

no numerical designation along the northern part of the boundary. The "150" designation signaling the retention of the boundary north of the 95th-96th Street midblock line was reinserted on a version of Map 6b published to reflect a subsequent resolution of September 19, 1985.

Parkview's initial new building application, submitted on June 5, 1985, was rejected for failure to show compliance with ***280** the P.I.D. height limitation. Based upon its interpretation of the version of Zoning Map 6b existing in the summer of 1985, Parkview concluded that a 100-foot boundary controlled, and its revised building application, submitted on July 31, 1985, limited the height of the proposed new building to 19 stories between its property line and 100 feet from Park Avenue. The portion of the building setback more than 100 feet from Park Avenue was to rise 31 stories. The application was approved by the Department of Buildings as conforming with all zoning requirements on August 12, 1985 and, after rereview, a building permit was issued on November 21, 1985 by the Borough Superintendent. There is no dispute that at the time the permit was issued the Department erroneously interpreted amended Map 6b as changing the boundary on 96th Street to 100 feet. On July 11, 1986, however, after substantial construction, the Borough Superintendent of the Department of Buildings issued a stop work order for those portions of the building over 19 stories within the full 150 feet of Park Avenue. After review, the Commissioner of Buildings partially revoked the building permit, consistent with the stop work order, on the grounds that the permit, to the extent it authorized a height of 31 stories from 100-feet back instead of 150-feet back, was invalid when issued.

Parkview appealed the Commissioner's decision to the Board of Standards and Appeals (BSA), which denied the appeal and sustained the determination of the Commissioner. In sum, the BSA found that the dotted lines on Zoning Map 6b within the shaded P.I.D., expressly connoting a reduction to 100 from 150 feet of the protected area, excluded the 96th Street frontage of plaintiff from any change; that the original resolution with its metes and bounds description, which was never changed in any event, controlled over the map depicting the boundaries even if the map could be misread; and that the boundary-height limitation applicable to Parkview under the metes and bounds description was and had always been 150-feet east of Park Avenue.

Parkview then turned to the courts, essentially in an article 78 proceeding, seeking to set aside the partial revocation of its building permit. It sought to reinstate the full permit, arguing that the final BSA determination was arbitrary and capricious or affected by error of law because the original permit was properly issued; that its rights pursuant to that permit had vested; that its reliance on the permit caused substantial and irreparable harm requiring that the City be estopped from ***281** revoking the permit; and that the partial revocation deprived Parkview of its property without due process or just compensation.

The IAS Judge dismissed the petition holding that the BSA's determination was reasonable and supported by substantial evidence that the building permit was invalid when issued, vesting no rights, because the building plans did not comport with the metes and bounds description for the P.I.D. as contained in the controlling original legislative enactment of the Board of Estimate. The court also held that estoppel was unavailable as a matter of law. Finally, the constitutional taking argument was dismissed as premature because Parkview had failed to apply for a variance which is a prerequisite to that claim. The Appellate Division affirmed, and this appeal ensued by leave of this court.

Parkview argues that its original permit was issued in conformity with a reasonable interpretation of the zoning map, thus making it valid when issued; that the principles of equitable estoppel preclude the partial revocation of the building permit even if the permit was erroneously issued; and that the City's partial revocation of its permit constitutes a taking in violation of due process of law and without just compensation. The City counters that the decision of the BSA has a rational basis because the permit was invalid when issued; that equitable estoppel is not available to estop a municipality from enforcing its zoning laws when the building permit issued by the municipality violated those zoning laws; and that the petition below failed to state a claim for an unconstitutional taking.

There can be little quarrel with the proposition that the New York City Department of Buildings has no discretion to issue a building permit which fails to conform with applicable provisions of law, and that the Commissioner may revoke a permit which "has been issued in error and conditions are such that a permit should not have been issued" (Administrative Code of City of New York §§ 27-191, 27-197). Since discrepancies between the map and enabling resolution are controlled by the specifics of the resolution (New York City Zoning Resolution §§ 11-22, 12-01), the original permit in this case was invalid inasmuch as it authorized construction within the 150-foot P.I.D. above 19 stories in violation of New York City Zoning Resolution § 92-06 (2 Journal of Proceedings of Board of Estimate of City of NY, at 1708 [Cal No. 6, Apr. ***282** 23, 1973], as amended [Cal No. 8, Mar. 3, 1983]). Therefore, the subsequent BSA action in ratifying the decision of the Commissioner partially revoking Parkview's permit had a sound legal basis. Indeed, there was no discretion reposed in these authorities to do otherwise at that point and on the record before them at that time.

Turning to the next stage of our analysis, we have only recently once again said that "[g]enerally, estoppel may not be

invoked against a municipal agency to prevent it from discharging its statutory duties" *(Scruggs-Leftwich v Rivercross Tenants' Corp.,* 70 NY2d 849, citing *Matter of Daleview Nursing Home v Axelrod,* 62 NY2d 30, 33; *Matter of Hamptons Hosp. & Med. Center v Moore,* 52 NY2d 88, 93; *see also, Matter of E.F.S. Ventures Corp. v Foster,* 71 NY2d 359 [decided herewith]). Moreover, "[e]stoppel is not available against a local government unit for the purpose of ratifying an administrative error" *(Morley v Arricale,* 66 NY2d 665, 667). In particular, "[a] municipality, it is settled, is not estopped from enforcing its zoning laws either by the issuance of a building permit or by laches" *(City of Yonkers v Rentways, Inc.,* 304 NY 499, 505) and "[t]he prior issue to petitioner of a building permit could not 'confer rights in contravention of the zoning laws' " *(Matter of B & G Constr. Corp. v Board of Appeals,* 309 NY 730, 732, citing *City of Buffalo v Roadway Tr. Co.,* 303 NY 453, 463). Insofar as estoppel is not available to preclude a municipality from enforcing the provisions of its zoning laws and the mistaken or erroneous issuance of a permit does not estop a municipality from correcting errors, even where there are harsh results *(Parsa v State of New York,* 64 NY2d 143, 147; *Matter of New York City v City Civ. Serv. Commn.,* 60 NY2d 436, 448-449), the City should not be estopped here from revoking that portion of the building permit which violated the long-standing zoning limits imposed by the applicable P.I.D. resolution. Even if there was municipal error in one map and in the mistaken administrative issuance of the original permit, those factors would be completely outweighed in this case by the doctrine that reasonable diligence would have readily uncovered for a good-faith inquirer the existence of the unequivocal limitations of 150 feet in the original binding metes and bounds description of the enabling legislation, and that this boundary has never been changed by the Board of Estimate. The policy reasons which foreclose estoppel against a governmental entity in all but the rarest cases thus have irrefutable cogency in this case. ***283**

Finally, Parkview's claim that the City's action constitutes a taking without due process of law or just compensation may not be addressed in this action and at this time because Parkview had failed to apply for a variance *(see, Church of St. Paul & St. Andrew v Barwick,* 67 NY2d 510, 519; *see also, Scarsdale Supply Co. v Village of Scarsdale,* 8 NY2d 325, 330; *Levitt v Incorporated Vil. of Sands Point,* 6 NY2d 269, 273). The variance application now pending is, of course, not affected by our decision today.

Accordingly, the order of the Appellate Division should be affirmed, with costs.

Chief Judge Wachtler and Judges Simons, Kaye, Alexander, Titone and Hancock, Jr., concur.

Order affirmed, with costs. ***284**

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People v. Steven D. Roe, a juvenile/adult offender

(Ct. upheld Depraved Indifference Murder conviction in teenagers' Russian Roulette homicide of friend)
74 N Y 2nd 20, at 29 – Dissenting Opinion [6-1] [1989]

New York
Official Reports

74 N.Y.2d 20, 542 N.E.2d 610, 544 N.Y.S.2d 297

The People of the State of New York, Respondent,
v.
Steven D. Roe, a Juvenile Offender, Appellant.

Court of Appeals of New York
84
Argued March 28, 1989;
decided June 6, 1989

CITE TITLE AS: People v Roe

SUMMARY

Appeal, by permission of an Associate Judge of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered May 31, 1988, which affirmed a judgment of the Westchester County Court (Robert P. Best, J.), convicting defendant, after a nonjury trial, of murder in the second degree.

People v Roe, 140 AD2d 724, affirmed.

Bellacosa, J.

(Dissenting).

I vote to reverse this conviction of a 15-year-old person for the highest degree of criminal homicidal responsibility--depraved indifference murder. The evidence adduced, the statutory scheme under which defendant was charged, and the legislative intent behind it do not support the disproportionate level of maximum blameworthiness imposed here. Moreover, this result finalizes the obliteration of the classical demarcation between murder and manslaughter in this State, not only for juvenile offenders but also for all adult accuseds. As former Chief Judge Breitel so trenchantly observed with respect to an analogous statutory scheme and concept: "[T]he appropriate use of affirmative defenses enlarges the ameliorative aspects of a statutory scheme for the punishment of crime, rather than the other way around--*a shift from primitive mechanical classifications based on the bare antisocial act and its consequences, rather than on the nature of the offender and the conditions which produce some degree of excuse for his conduct, the mark of an advanced criminology" (see, People v Patterson,* 39 NY2d 288, 306-307 [Breitel, Ch. J., concurring (emphasis added)], *affd* 432 US 197).

From common-law times to modern penal code days, the tragic incident at the heart of this case has qualified as the paradigmatic manslaughter with recklessness as the culpable mental state or *mens rea.* Indeed, until recently, persons under 16 years of age in this State were legal infants incapable of being convicted of *any* crime as an adult, no less of the prime, most heinous crime punishable under our law--murder. This case represents an enormous penological regression by combining the juvenile offender *exception* with the depraved indifference homicide *exception* and giving birth to this routinized homogeneous murder category.

One of the three definitions of murder in this State is recklessly engaging in conduct which creates a grave risk of death and causing the death of another under circumstances ***30** evincing a depraved indifference to human life (Penal Law § 125.25 [2]). That is the one at issue in this case. Manslaughter, second degree, is defined as recklessly causing the death of another person (Penal Law § 125.15 [1]). This court has held that both of those crimes (the first an "A-I" felony carrying a mandatory sentence of at least 15 years to life [Penal Law § 70.00], and the lesser being a "C" felony qualifying for 4 12 to 15 years [Penal Law § 70.02]) require the same culpable mental state *(People v Register,* 60 NY2d 270, *cert denied* 466 US 953), i.e., acting recklessly when aware of and consciously disregarding a substantial and unjustifiable risk (Penal Law § 15.05 [3]).

But that culpable mental state, taken alone, supports and defines only manslaughter unless elevated to murder by reckless conduct, which additionally creates a grave risk under circumstances evincing a depraved indifference to human life. The catapulting ingredients are gravity and depravity. Other synonyms used to try to understand the essence of the escalating difference include malignant, malicious, callous, cruel, wanton, unremorseful, reprehensible and the like. The semantics alone prove that the analysis necessarily includes some subjective, gradational assessment.

While the tangible content of "depraved indifference to human life" is thus elusive, the wantonness of the conduct augmenting the reckless culpable mental state must also manifest a level of callousness and extreme cruelty as to be "equal in blameworthiness to intentional murder" *(People v Register,* 60 NY2d 270, 275, *cert denied* 466 US 953, *supra).* I allude to some of the same case illustrations in this regard as the majority does, except I emphasize the particular escalating depravity facts that the majority avoids: firing a gun *three times* in a packed barroom, *having boasted in advance an intention to kill someone (id.);* driving a car at high speed on a crowded urban street and *failing to apply the brakes after striking one person (People v Gomez,* 65 NY2d 9); *continuously* beating a young child *over a five-day period (People v Poplis,* 30 NY2d 85).

The depraved indifference category of murder reflects the Legislature's policy refinement that there is a type of reckless homicide that is so horrendous as to qualify, in a legal fiction way, for blameworthiness in the same degree as the taking of another's life intentionally, purposefully and knowingly *(see,* Donnino, Practice Commentaries, McKinney's Cons Laws of NY, Book 39, Penal Law art 125, at 491; 2 LaFave & Scott, Substantive Criminal Law § 7.4). It is treated equally with the ***31** common-law antecedent of premeditated murder with malice aforethought. Early cases reveal that the concept of "depraved mind" murder as an escalating factor emerged from this common-law notion and was applied in cases where, despite evidence that a defendant had no desire to kill, the conduct nonetheless demonstrated a substitutive aggravating "malice in the sense of a wicked disposition" *(see,* Gegan, *A Case of Depraved Mind Murder,* 49 St John's L Rev 417, 423-427). Modern statutes have borrowed and recast the concept "of a wicked disposition" to speak in terms of "extreme indifference to the value of human life". The predecessor of New York's present statute used an "act imminently dangerous to *others"* and was interpreted to apply, consistent with its exceptionability, only in cases where defendant's conduct created a danger to a multitude of persons rather than to just one individual *(see,* 2 Rev Stat of NY, part IV, ch I, tit I, § 5 [1829] [emphasis added]; *Darry v People,* 10 NY 120 [1854]). The language of the statute was expanded in 1967 to apply to persons who engage in "conduct which creates a grave risk of death to another person" and has been construed to apply to an attack directed at a single person *(see,* Penal Law § 125.25 [2]; *People v Poplis,* 30 NY2d 85, *supra).*

The latest significant case, involving far more egregious conduct than is present in the instant case and held to constitute depraved indifference murder, evoked a warning, albeit in dissent, of the "evisceration" of the "distinction" between manslaughter and murder *(People v Register,* 60 NY2d 270, 284 [Jasen, J., dissenting], *supra).* In my view, today's application completes the homogenization.

In this case, a 15-year-old person stands convicted of the tragic and senseless killing of the 13-year-old brother of his best friend. The shooting occurred around three o'clock in defendant's home on a summer afternoon. Thirteen-year-old Darrin Seifert and another youngster, Dennis Bleakley, went to defendant's home where they were invited to defendant's upstairs bedroom. They examined defendant's weapons collection, which included a sawed-off shotgun. After the weapons were returned to their storage places, defendant and his two companions walked down the hallway to defendant's parents' room where defendant removed a 12-gauge shotgun from a gun case. Defendant asked Darrin to retrieve some shotgun shells located on a shelf in defendant's room. Darrin and Dennis went to defendant's room and took five shells. Three were live ammunition and two were "dummies". Returning to ***32** the master bedroom, Darrin handed the shells to defendant, who proceeded to load the shotgun with four shells. Testimony established that defendant knew two of the shells he loaded into the gun were "live" and two were "dummies". There was also conflicting testimony as to whether the defendant understood that the gun worked in such a manner that the first shell inserted into the gun would be the last fired from the gun or vice versa. The two police investigators testified that, shortly after the incident, defendant indicated he thought he had chambered a "dummy" shell and appeared stunned when he learned the gun operated on a "first in--last out" order of fire. Defendant contradicted this testimony when he testified he had not paid attention to the order in which he loaded the shells into the gun. Both theories, in any event, suggest only recklessness, not depravity.

Moreover, after loading the gun and while standing 10 feet away from the other two boys, defendant exclaimed, "Let's play Polish roulette. Who's first?" Defendant raised the shotgun, pointed it at his two companions and pulled the trigger. The gun fired a live shell which hit Darrin's right chest and shoulder area, knocking him to the floor. Defendant dropped the shotgun and ran over to Darrin, screaming, "Don't die. I killed my best friend's brother." He quickly directed Dennis to go downstairs to call an ambulance, which was done. A neighbor, hearing the shot, entered the house and ran upstairs. She observed defendant straddled over Darrin's body and heard him say, "Is he alright? Is he alright? Tell me." When the police arrived shortly thereafter, they observed the defendant pounding his fists against the wall, crying, "I can't believe I shot him. I can't believe I shot my best friend. Help, please, oh my God, help." The ambulance arrived and Darrin was taken to the hospital

where he was pronounced dead on arrival.

The District Attorney presented the evidence to a Grand Jury and sought a depraved indifference murder charge against this defendant as a juvenile offender. The Grand Jury complied and a bench trial ensued after which the Trial Judge, as trier of fact, convicted on that top count. The question is whether defendant's conduct "was of such gravity that it placed the crime upon the same level as the taking of life by premeditated design * * * [and whether] defendant's conduct, though reckless, was equal in blameworthiness to intentional murder" *(People v Register,* 60 NY2d 270, 274-275, *cert denied* 466 US 953, *supra).* ***33**

I disagree that defendant's conduct qualifies for this lofty homicidal standard. He acted recklessly, of that there can be no doubt. He could also have been punished proportionately as an adult criminal, of that, too, there should not be any doubt. But the accusation and the conviction at the highest homicidal level, predicated on callous depravity and complete indifference to human life, are not supportable against this 15 year old on a sufficiency review and are starkly contradicted by the whole of the evidence adduced.

This "crime is classified as murder and the murder penalty should be imposed 'only when the degree of risk *approaches certainty;* that is, at the point where reckless homicide becomes knowing homicide' " *(People v Lilly,* 71 AD2d 393, 398 [Simons, J., dissenting], quoting Gegan, *A Case of Depraved Mind Murder,* 49 St John's L Rev 417, 447 [emphasis added]). Here, defendant's actions cannot be said to have created an almost certain risk of death. The mathematical probabilities, the objective state of mind evidence at and around the critical moment, the ambiguity in the evidence as to the operational order in the firing of the weapon, and all the circumstances surrounding this tragic incident all render the risk uncertain and counterindicate depravity, callousness and indifference of the level fictionally equalling premeditated, intentional murder. That central and essential element of the crime charged was not proved beyond a reasonable doubt and that has been for a very long time a classically reviewable issue in this court *(People v Ledwon,* 153 NY 10).

I, of course, accept the truism, repeatedly cited by the majority as a justification for its conclusion, that the evidence must be viewed in the light most favorable to the People. But I do not worship that generality nor do I believe that it displaces equally pertinent principles and analysis; nor has it overruled other cogent and relevant precedents like *Ledwon (supra).* Besides, if this 15 year old is to live the rest of his life with the scarlet condemnation of "depraved murderer", he is entitled to have the entire relevant evidentiary res gestae examined within the framework of this court's traditional powers.

The testimony of the only other eyewitness, Dennis Bleakley, established that defendant was shaken and distraught immediately upon realizing that he had shot their companion. Defendant also immediately ran to his victim and instructed Dennis to call an ambulance; the neighbor testified that when ***34** she arrived on the scene, seconds after hearing the shot, defendant was kneeling over his friend's body and crying. Similarly, the police officer who arrived on the scene testified that defendant was extremely distraught and overcome with grief. This is not evidence beyond a reasonable doubt of that hardness of heart or that malignancy of attitude qualifying as "depraved indifference" *(see, People v Ledwon,* 153 NY 10, *supra).* Frankly, the evidence proves the opposite.

Nor should evidence of the "objective circumstances surrounding the act of the shooting"--the essential elevating element of the crime--be discarded as "beside the point" and artificially cut off as of the moment of the flash of the weapon (majority opn, at 27). This is a substantial and new evidentiary restriction and one that has been rejected by a leading authority (2 LaFave & Scott, Substantive Criminal Law § 7.4, at 204-205). Indeed, the very section of that text relied upon by the majority is antithetical to the majority's approach and supports the view advanced in this dissent in this regard *(see,* majority opn, at 27, n 7): "[o]n balance, it would seem that, to convict of murder, with its drastic personal consequences, subjective realization should be required", and evidence of a defendant's conduct in stopping and aiding a victim, whom he had struck and fatally injured, was admissible "to 'negative the idea of wickedness of disposition and hardness of heart' required for depraved-heart murder" *(see,* 2 LaFave & Scott, Substantive Criminal Law § 7.4, at 205, citing *Commonwealth v McLaughlin,* 293 Pa 218, 142 A 213 [1928]). Under the majority's cramped approach, one must wonder whether res gestae conduct will be foreclosed in a prosecution attempt to prove a real depravity set of circumstances in some other depraved murder case. More to the point here and for the defense side of cases yet to come, the majority appears also to be significantly preventing the evidentiary development of ameliorating or contradicting factors with respect to depravity. Both sides and the truth-seeking process itself lose with this antiseptic evidentiary embargo.

On an inextricably related issue, the majority also summarily rejects the defendant's objection to the prosecutor's use of prejudicial prior conduct evidence. To establish defendant's depravity, the People introduced evidence that defendant had previously pointed an unloaded firearm at others, that he had handled a variety of guns and demonstrated to his friends how to load and unload these guns. They even introduced defendant's magazines concerning guns and the posters that had ***35** hung in his bedroom. Evidence of this conduct, of this penchant, of this hobby, and of these prior "bad acts" never should

have been admitted because the probative value was nonexistent or so overwhelmingly prejudicial that the tenuous probativeness was substantially outweighed *(People v Hudy,* 73 NY2d 40, 54-56; *People v Ventimiglia,* 52 NY2d 350; *People v Molineux,* 168 NY 264). The Trial Judge nonetheless took the evidence over objection, stating that it bore on defendant's familiarity with guns and tended to establish defendant's depraved mind--and he was the sole fact finder. As to the first issue--defendant's familiarity with guns--the evidence totally failed to show that defendant knew the order of fire of the weapon used that afternoon--the only relevant issue in this regard in the case. As to the second issue--establishing this 15-year-old's depraved mind--the evidence of defendant's prior acts as related to the charged event is not relevant to show defendant's state of mind on the afternoon in question and was inappropriately devastating in its impact *(see, United States v Affehei,* 869 F2d 670 [2d Cir]). If the truth be stated, we know that this evidence was admitted for only one purpose: the prosecutor's determination to show that this 15 year old was obsessed with firearms rather than with other things which preoccupy such adolescents. This is precisely why admitting this highly prejudicial evidence constitutes reversible error *(People v Alling,* 118 AD2d 960, 963-964 [dissenting opn], *revd on dissenting opn* 69 NY2d 637).

By condoning all this error and thus catapulting the defendant's admittedly reckless criminal act to one "evincing depraved indifference to human life", the court functionally and finally discards and disregards the legislatively drawn distinction between manslaughter and murder *(see, People v Register,* 60 NY2d 270, 284 [dissenting opn], *supra;* Gegan, *A Case of Depraved Mind Murder,* 49 St John's L Rev 417, 447; *see also, People v Marcy,* 628 P2d 69, 78-81 [Colo]). Prosecutors will find the temptation legally and strategically irresistible, and overcharging traditional reckless manslaughter conduct as the more serious murderous conduct will become standard operating procedure in view of the authorized template given for that course of action. Some very disproportionate miscarriages of justice--this case is one of them-- will certainly ensue from this prosecutorial leverage in elevating reckless manslaughter to murder. It is difficult to imagine, after this case, any intentional murder situation not being presented to the Grand Jury with a District Attorney's request for a depraved indifference ***36** murder count as well. Thus, the exception designed as a special fictional and functional equivalent to intentional murder becomes an automatic alternative and additional top count accusation, carrying significant prejudicial baggage in its terminology alone. That devastating advantage, among others, given to the prosecution provides an unjust double opportunity for a top count murder conviction and an almost certain fallback for conviction on the lesser included crime of manslaughter.

The majority also postulates a functional per se principle for this type case that it is always--it says "generally" but provides no indication of qualifying exceptions and I can think of none--up to the trier of fact only to determine whether defendant's actions were of such gravity as to qualify for depraved indifference murder (majority opn, at 25). This remarkable abdication of traditional demurrer and legitimate appellate review functions to unfettered prosecutorial hegemony has very grave consequences and implications for the future. If all prosecutors have to do to secure a depraved indifference murder count from their generally cooperative Grand Juries is to present the meager evidence available here against a juvenile offender, there is not much left for the defense or the trial court to do. Under CPL 210.20 (1) (b), the entire case becomes invulnerable to dismissal because the lesser manslaughter, second degree, with simple recklessness will surely lie and the court in such circumstances is absolutely forbidden from dismissing the higher count, even if not made out by the evidence. The inspect and reduce reform long sought as a fair and balanced judicial remedy for such situations generally, which would ameliorate this outrageous strategic advantage in cases like this, has year after year failed because of prosecutorial opposition *(see,* Assembly Bill 5110 [1989]; Assembly Bill 4459 [1987-1988]; Assembly Bill 4337 [1986]; *see also,* 1988 Rep of Advisory Comm on Criminal Law & Procedure, reprinted in 1988 McKinney's Session Laws of NY, at 2369, 2430; Determinate Sentencing Report and Recommendation, NYS Comm on Sentencing Guidelines, at 97 [1985]). To this long-standing advantage, there is now added the unique fact-insulating characterization accorded to the essential aggravating element in these cases with the result that the prosecution's discretionary authority in this respect is decreed absolute and immune from appropriate review.

As if all that were not disquieting enough, under the particular facts of this case, the conviction of this 15-year-old ***37** defendant for depraved indifference murder becomes even more unsettling because, prior to 1978, persons under the age of 16 were infants, legally presumed to be without capacity to commit any crime as an adult. Children under the age of 16, proven to have committed an act which if committed by an adult would be a crime, were up to then adjudicated juvenile delinquents in Family Court *(see,* Family Ct Act art 3). In 1978, the Governor and Legislature, reacting to a particularly heinous criminal act by someone who would qualify only as a juvenile delinquent, carved out some narrow high level adult prosecution exceptions to the traditional infancy defense. After that date, persons aged 13 through 15 could be criminally responsible as adults for intentional and depraved indifference murder. Additionally, under the same statute, 14 and 15 year olds could be held criminally responsible for some other enumerated felonies and for felony murder only if one of the underlying intent felonies were among those enumerated in the special statute *(see,* Penal Law § 30.00 [2]; McQuillan, *Felony Murder and The Juvenile Offender,* NYLJ, Aug. 25, 1978, at 1, col 2). Notably, every crime, save one, authorized for prosecution against these 13 to 15 year olds requires intention as the culpable mental state. That one exception is depraved indifference murder, which carries the lesser culpable mental state of recklessness.

The majority avoids these objective realities and the inextricably intertwined statute, which could not be more self-evidently relevant to this adolescent defendant, even in the title of this criminal proceeding, by attributing to me a *sua sponte* injection of the issue into the case. They even imply that I question the wisdom of the Legislature's policy choice in enacting the juvenile offender law, which I surely do not. I question the injustice against this defendant in the application of that exceptional authorization for this depraved indifference case, within the framework of this court's traditional review role *(People v Gruttola,* 43 NY2d 116, 122-123; *People v Ledwon,* 153 NY 10, *supra).* The notion that our review power should be so "scientific" and "mechanical" should be repulsed *(see,* Brennan, *Reason, Passion, and "The Progress of the Law",* 42 Rec AB City NY 948, 951-952 [1987]).

The boomerang of Penal Law § 30.00 (2) on this adolescent defendant catches him in a remarkable dual exception--a kind of double bind--creating an opposite anomaly from that which precipitated the juvenile offender legislation--the escape of then-juvenile delinquent Willie Bosket from the ***38** clutches of the adult criminal law *(see,* L 1978, ch 481; NY Times, July 20, 1978, at B2, col 6; NY Times, Nov. 17, 1979, at 27, col 1). Defendant Steven Roe, aged 15, standing alongside an adult-aged criminal over 16, is, in the practical play out, more disadvantaged than an accused adult by quirks of legislative drafting and of prosecutorial charging choices *(see, e.g.,* CPL 300.50, 310.85; Penal Law § 30.00 [2]; § 125.25 [1] [a]; *but see,* ALI Model Penal Code §§ 210.2, 210.3 [1] [b]; Donnino, Practice Commentaries, McKinney's Cons Laws of NY, Book 39, Penal Law art 125, at 492; *People v Patterson,* 39 NY2d 288, 306-307 [Breitel, Ch. J., concurring], *affd* 432 US 197, *supra).* This harsh reality perverts the principle of proportionality in our criminal jurisprudence and exerts the worst kind of regressive inversion on the equal protection of our laws applied as against a 15-year-old defendant charged, tried, convicted and punished as a full adult for the highest crime possible.

Finally, to uphold this defendant's conviction on the uppermost and most heinous level of criminal homicidal responsibility cheapens the gravity with which we treat far more serious murders, e.g., cold-blooded contract killings and the like. In the eyes of the law all the slayers are now made alike, when the perpetrators themselves know and our best instincts and intelligence tell us, too, that they are very different. Justice is disfigured by the punishment of offenders so homogeneously and, yet, so disproportionately.

Chief Judge Wachtler and Judges Simons, Kaye, Alexander and Titone concur with Judge Hancock, Jr.; Judge Bellacosa dissents and votes to reverse in a separate opinion.

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Miguel Braschi v. Stahl Assoc. Co.

(Ct. allowed gay surviving partner to
succeed to joint tenancy apartment)
74 N Y 2nd 201, at 214 – Concurring Opinion
(4th plurality vote in 3-1-2 ruling) [1989]

New York
Official Reports

74 N.Y.2d 201, 543 N.E.2d 49, 544 N.Y.S.2d 784, 58 USLW 2049

Miguel Braschi, Appellant,
v.
Stahl Associates Company, Respondent.

Court of Appeals of New York
108
Argued April 26, 1989;
decided July 6, 1989

CITE TITLE AS: Braschi v Stahl Assoc. Co.

SUMMARY

Appeal, by permission of the Appellate Division of the Supreme Court in the First Judicial Department, from an order of that court, entered August 4, 1988, which (1) reversed, on the law, an order of the Supreme Court (Harold Baer, Jr., J.), entered in New York County, granting a motion by plaintiff for a preliminary injunction and enjoining defendant from evicting plaintiff from the apartment at which he currently resides, and (2) denied plaintiff's motion. The following question was certified by the Appellate Division: "Was the order of this Court, which reversed the order of the Supreme Court, properly made?"

Braschi v Stahl Assocs. Co., 143 AD2d 44, reversed.

Bellacosa, J.

(Concurring).

My vote to reverse and remit rests on a narrower view of what must be decided in this case than the plurality and dissenting opinions deem necessary.

The issue is solely whether petitioner qualifies as a member of a "family", as that generic and broadly embracive word is used in the anti-eviction regulation of the rent-control apparatus. The particular anti-eviction public policy enactment is fulfilled by affording the remedial protection to this petitioner on the facts advanced on this record at this preliminary injunction stage. The competing public policy of eventually restoring rent-controlled apartments to decontrol, to stabilization and even to arm's length market relationships is eclipsed in this instance, in my view, by the more pertinently expressed and clearly applicable anti-eviction policy.

Courts, in circumstances as are presented here where legislative intent is completely indecipherable (Division of Housing and Community Renewal, the agency charged with administering the policy, is equally silent in this case and on this issue), are not empowered or expected to expand or to constrict the meaning of the legislatively chosen word "family," which could have been and still can be qualified or defined by the duly constituted enacting body in satisfying its separate branch responsibility and prerogative. Construing a regulation does not allow substitution of judicial views or preferences for those of the enacting body when the latter either fails or is unable or deliberately refuses to specify criteria or definitional limits for its selected umbrella word, "family", especially where the societal, governmental, policy and fiscal implications are so sweeping (Breitel, *The Lawmakers,* 65 Colum L Rev 749, 767-771; *see also, Boreali v Axelrod,* 71 NY2d 1, 11-12). For then, "the judicial function expands beyond the ***215** molecular movements, in Holmes' figure, into the molar" (Breitel, *op. cit.,* at 770).

The plurality opinion favors the petitioner's side by invoking the nomenclature of "nuclear"/"normal"/"genuine" family

versus the "traditional "/"legally recognizable" family selected by the dissenting opinion in favor of the landlord. I eschew both polar camps because I see no valid reason for deciding so broadly; indeed, there are cogent reasons not to yaw towards either end of the spectrum.

The application of the governing word and statute to reach a decision in this case can be accomplished on a narrow and legitimate jurisprudential track. The enacting body has selected an unqualified word for a socially remedial statute, intended as a protection against one of the harshest decrees known to the law-- eviction from one's home. Traditionally, in such circumstances, generous construction is favored. Petitioner has made his shared home in the affected apartment for 10 years. The only other occupant of that rent-controlled apartment over that same extended period of time was the tenant-in-law who has now died, precipitating this battle for the apartment. The best guidance available to the regulatory agency for correctly applying the rule in such circumstances is that it would be irrational not to include this petitioner and it is a more reasonable reflection of the intention behind the regulation to protect a person such as petitioner as within the regulation's class of " family ". In that respect, he qualifies as a tenant in fact for purposes of the interlocking provisions and policies of the rent-control law. Therefore, under CPLR 6301, there would unquestionably be irreparable harm by not upholding the preliminary relief Supreme Court has decreed; the likelihood of success seems quite good since four Judges of this court, albeit by different rationales, agree at least that petitioner fits under the beneficial umbrella of the regulation; and the balance of equities would appear to favor petitioner.

The reasons for my position in this case are as plain as the inappropriate criticism of the dissent that I have engaged in ipse dixit decision making. It should not be that difficult to appreciate my view that no more need be decided or said in this case under the traditional discipline of the judicial process. Interstitial adjudication, when a court cannot institutionally fashion a majoritarian rule of law either because it is fragmented or because it is not omnipotent, is quite respectable jurisprudence. We just do not know the answers or implications ***216** for an exponential number of varied fact situations, so we should do what courts are in the business of doing--deciding cases as best they fallibly can. Applying the unvarnished regulatory word, "family", as written, to the facts so far presented falls within a well-respected and long-accepted judicial method.

Judges Kaye and Alexander concur with Judge Titone; Judge Bellacosa concurs in a separate opinion; Judge Simons dissents and votes to affirm in another opinion in which Judge Hancock, Jr., concurs; Chief Judge Wachtler taking no part.

Order reversed, with costs, and case remitted to the Appellate Division, First Department, for consideration of undetermined questions. Certified question answered in the negative.

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M/O Seelig v. Koehler, N Y C Corr. Comm'r.

(Ct. upheld random drug testing of correction department employees)

76 N Y 2nd 87 – Majority Opinion [4-3] [1990]

New York
Official Reports

76 N.Y.2d 87, 556 N.E.2d 125, 556 N.Y.S.2d 832, 58 USLW 2667, 5 IER Cases 481

In the Matter of Phillip Seelig, as President of the Correction Officers Benevolent Association of the City of New York, Inc., et al., Appellants,

v.

Richard J. Koehler, as Correction Commissioner of the City of New York, et al., Respondents.

Court of Appeals of New York
106
Argued March 28, 1990;
decided May 8, 1990

CITE TITLE AS: Matter of Seelig v Koehler

SUMMARY

Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department, entered October 12, 1989, which, with two Justices dissenting, (1) reversed, on the law, a judgment of the Supreme Court (Karla Moskowitz, J.; opn 140 Misc 2d 783), entered in New York County in a proceeding pursuant to CPLR article 78, granting the petition, and enjoining respondents from implementing a proposed random drug-testing program for all uniformed correction officers, and (2) dismissed the petition.

Matter of Seelig v Koehler, 151 AD2d 53, affirmed.

OPINION OF THE COURT

Bellacosa, J.

The New York City Commissioner of Correction promulgated a random urinalysis drug-testing program for all uniformed officers because, "[i]n spite of an aggressive drug prevention educational program and testing procedures, including an aggressive reasonable suspicion testing program, the Department has documented a serious drug abuse problem among a significant number of its members." (Record on app, at 30 [Commissioner's Directive, Nov. 17, 1987].) The union representing the guards and its president brought this article 78 proceeding to block the implementation of the program on Fourth Amendment grounds. State Supreme Court granted the petition and enjoined the testing. The Appellate Division reversed and dismissed the proceeding, with two Justices dissenting. Petitioners appealed as of right, and we granted a stay of implementation of the program pending the outcome of this appeal. We now affirm and uphold the random drug-testing program of the New York City Correction Department.

THE CONTEXT

In 1987, this court grappled with the constitutional implications of random drug testing of probationary school teachers and held that urinalysis drug testing could proceed only on the reasonable suspicion predicate *(Matter of Patchogue-Medford Congress of Teachers v Board of Educ.*, 70 NY2d 57). We disapproved random searches there and observed that they "are

closely scrutinized, and *generally only permitted when the privacy interests implicated are minimal, the government's interest is substantial, and safeguards are provided to insure* ***90** *that the individual's reasonable expectation of privacy is not subjected to unregulated discretion" (id.,* at 70 [emphasis added]). The following year, this balancing analysis was applied to a particular subset of public employees--the Organized Crime Control Bureau (OCCB) of the New York City Police Department--in *Matter of Caruso v Ward* (72 NY2d 432). The court concluded--in the presence of "factors * * * which take this case out of *Patchogue"*--that random drug testing was not unconstitutional *(id.,* at 439). Special emphasis was given to the diminished level of Fourth Amendment expectations of those employees.

In this case also, each aspect of the *Patchogue-Caruso* exception test is met. We agree with and note especially this cogent summary in Justice Sullivan's majority opinion below: "We find, in light of the Department's compelling interest in deterring and detecting drug use among correction officers, whose diminished privacy expectations are outweighed by that interest, and its promulgation of detailed regulations which, with respect to such drug testing, are sufficient to prevent unbridled administrative discretion and to preserve privacy to the maximum extent feasible, that the Commissioner's plan is not constitutionally infirm." *(Matter of Seelig v Koehler,* 151 AD2d 53, 57.)

Our holding today, despite the hyperbolic attributions of the dissenting opinion, does no more than conclude that the particular combination of crucial circumstances comprising the paramilitary workplace milieu of jail guards, their severely diminished privacy expectations under a sedulous set of testing procedures, in the face of the significant State interest, satisfy the analytic and constitutional underpinnings of *Patchogue* and *Caruso*--a concededly rigorous set of standards. Key factors, peculiar to this case, which we conclude are sufficient to warrant the substantial intrusion of random testing searches, include:

The employment is in a unique, high-risk, hazardous setting;

The guards have voluntarily agreed to submit to a previously enacted series of urinalyses, both random and suspicion-based;

The guards are already subject to a host of intrusive searches of person and property with no suspicion predicate;

The Commissioner has demonstrated drug use in his ranks and an inability to stop it with currently available procedures; ***91**

A guard's usage increases substantially the inherent dangerousness of illicit drugs, putting at risk the lives of inmates and fellow officers;

A drug-compromised guard establishes a two-way security breach--drugs and weapons are more easily gotten into jail and prisoners can more easily be gotten out;

The challenged testing procedures guard the privacy and dignity of the subjects as carefully as possible;

The accuracy and integrity of the test results are meticulously circumscribed;

A significant appeals process is granted to those who test positive.

Nevertheless, these City of New York jail guards make the argument that they may not be tested for drugs unless the City can show individualized reasonable suspicion. Their claim rests on State and Federal constitutional guarantees against unreasonable search and seizure which apply to urinalysis drug testing (NY Const, art I, §12; US Const 4th Amend; *Matter of Caruso v Ward,* 72 NY2d 432, *supra; Matter of Patchogue-Medford Congress of Teachers v Board of Educ.,* 70 NY2d 57, *supra; Treasury Employees v Von Raab,* 489 US 656; *Skinner v Railway Labor Executives' Assn.,* 489 US 602).

THE PRIVACY INTEREST

Applicants pursue employment as jail guards with the understanding and acceptance of invasions of personal privacy unknown and unacceptable in the civilian world. We note another particularly apt portion of the majority opinion below: "Not all governmental employees enjoy the same level of expectation of privacy. The privacy expectations of any particular group is markedly diminished by such factors as the employees' voluntary pursuit of a position they know to be pervasively regulated for reasons of safety and the employees' acceptance of severe intrusions upon their privacy. *(National Treasury Employees Union v Von Raab,* 489 US [656] *supra; Skinner v Railway Labor Executives' Assn.,* 489 US [602], *supra; Matter of Caruso v Ward, supra,* 72 NY2d, at 440.) Correction officers are traditionally among the most heavily regulated groups of governmental employees and also among those who accept the greatest intrusions upon their privacy. A number of courts have held that correction ***92** officers, because of the confined environment in which they work, the strict security measures governing their conduct, and the other distinctive features of their employment, have diminished expectations of privacy with regard to security-related employer intrusions. *(See, e.g., Poole v Stephens,* 688 F Supp 149, 155; *Policemen's Benevolent Assn. v Township of Washington,* 672 F Supp 779, 793, *revd on other grounds* 850 F2d 133, *cert denied* 490 US [1004], 109 S Ct 1637.)" *(Matter of Seelig v Koehler,* 151 AD2d, *supra,* at 62.)

Before achieving tenure, Department of Correction employees currently undergo five urinalyses--one each at the beginning and end of an 18-month probation period, and three random tests during probation. In these pretenure urinalyses, a supervisor directly observes the production of the specimen. In the protocol at issue, the specimen is collected behind a closed door in a private stall. Notably, the invalidated procedure in *Patchogue* and the validated one in *Caruso* involved direct observation. Petitioners, however, concede the necessity of the more intrusive pretenure program and they do not challenge its constitutionality *(see,* record on app, at 22 [petition, ¶ 18]; *see also, Matter of McKenzie v Jackson,* 75 NY2d 995 [decided today]). We note, too, that the OCCB officers also underwent at least three pretenure drug tests, a significant factor leading to our conclusion that "the substantial privacy intrusions to which [they] already have subjected themselves[ ] reduce[ ] their privacy interest to a minimal or insubstantial level such that the admittedly crucial State interest justifies the random testing." *(Matter of Caruso v Ward,* 72 NY2d, *supra,* at 439.) The "unique" circumstances of the OCCB officers in *Caruso* do not diminish the *ratio decidendi* of that case or the exception principle from *Patchogue* on which *Caruso* built its holding. Of course, the facts in this case are different, as is so with all subsequent cases in which a precedent--the holding--is applied in the traditional common-law process. Thus, the unique fact-specific application here is no less a narrow exception in the *Patchogue-Caruso* line and represents no "abandoning" of the appropriate constitutional analysis *(see,* dissenting opn, at 97). Also, the number or categories of particular public employees' groups is not alone dispositive. Rather, the identification and weighing of all the unique and particular facts of each case governs.

The extremely diminished privacy expectations of the jail guards in this case are initially no less than that of the OCCB members. We added this admonition in *Caruso:* "our decision ***93** in no way impinges on their 4th Amendment rights to be secure against unreasonable searches and seizures of [OCCB officers'] persons, homes, cars, lockers or other personal effects under traditional probable cause standards" *(Matter of Caruso v Ward, supra,* at 442 [citation omitted]). In those respects, the entire jail guard force has yielded even more privacy protections than the OCCB cadre. For example, the Rules and Regulations of the New York City Department of Correction provide that an officer is subject to search at any time, and force is authorized if the officer is not cooperative (rule 5.20.090). Any car driven by a correction officer in or out of jail facilities is subject to search, as is any package for which the officer has been given permission to carry into or out of a jail (rule 5.20.050). Correction officers' lockers are regularly searched (rule 5.20.090). It can be confidently stated, therefore, that these jail guards retain the barest minimal privacy expectation, not because they should be afforded any lesser status or constitutional protection and not because they are being treated as "prisoners," but because it is inherent in their freely chosen work and work conditions. We do not doubt that the majority of these guards are certain to be law abiding, drug free and commendably committed to their tough public jobs. Nevertheless, they suffer a reduced order of constitutional circumspection proportionate to their accepted level of humble privacy expectations.

THE STATE INTEREST

In *Matter of Caruso v Ward* (72 NY2d 432, 441, *supra),* we observed that "[t]he terror-filled world [OCCB members] are working in requires the sternest precautionary safeguards to weed out drug abusers from their own ranks". Yet they work outside in the streets and communities. Jail guards, on the other hand, daily toil among incarcerated individuals, many of whom will pay any price and do any deed to escape or to ameliorate their confinement. A prison is a "unique place fraught with serious security dangers" *(Bell v Wolfish,* 441 US 520, 559), and its operation " 'is at best an extraordinarily difficult undertaking' " *(People ex rel. Vega v Smith,* 66 NY2d 130, 141, quoting *Wolff v McDonnell,* 418 US 539, 566). The prevention, detection and resolution of the myriad daily crises in this netherworld demand the acutest sensory awareness, undulled by the use of illicit drugs *(see, Matter of Figueroa v Bronstein,* 38 NY2d 533, 535). The public employer and society ***94** are unquestionably entitled to the guard's undeviating concentration and split-second good judgment and self-control.

The crucial nature of this State interest is not some hyperbolic or abstract proposition. The Commissioner made the case for random drug testing of the employees on empirical data, on intuitive professional judgment and experience, and only after other methods failed to stem the tide. Despite the Department's regimen of education and reasonable suspicion testing, in a recent 32-month period, drug-related disciplinary charges were brought against 149 tenured guards. In 1986 and 1987, 2.9% of probationary guards tested drug positive, despite being warned about the tests *(see,* record on app, at 136-137 [affidavit of Correction Dept Chief of Operations Thomas Murray]). Downplaying the implications of the dreadful data cannot dull the gripping reality. With all the Commissioner's existing tools in operation, many jail guards *were caught* in drug-related incidents. These data also stand in sharp contrast to the only 10 OCCB members facing drug-related disciplinary charges over a four-year period in *Matter of Caruso (see,* 72 NY2d, *supra,* at 442) and the lack of any evidence of any drug use problem among potential test subjects in *Matter of Patchogue-Medford Congress of Teachers v Board of Educ.* (70 NY2d 57, *supra)* and *Treasury Employees v Von Raab* (489 US, *supra,* at 672-673).

The Supreme Court's rationale upholding the constitutionality of suspicionless drug testing of customs agents in *Von Raab (id.)* offers another instructive perspective. It focused significantly on two components of the agents' duties pertinent here as well: their responsibility for interdicting drugs and the carrying of firearms. New York City jails are populated by substantial numbers of the State's criminal drug users; half the inmates are drug addicts and 90% are drug users or abusers. Guards represent a critical barrier between inmates and suppliers on the outside; drug-compromised guards breach that barrier and that makes them and this case very different from most others.

Petitioners-appellants, nevertheless, suggest that random drug testing is not needed for them in any event since they "generally do not carry firearms while on duty and the number who do is absolutely at a minimum" (appellant's brief, at 22). This suggestion seems disingenuous, since Department policy forbids guards to carry firearms because they operate in places *too dangerous for guns.* Guards are outnumbered ***95** by the inmates and are denied weapons because the Department knows that many prisoners, already illegally armed with makeshift devices, would thus have the potential to acquire real weapons taken from the guards in their midst *(see,* record on app, at 133 [affidavit of Chief of Operations of NY City Dept of Correction]). The primary "weapon" of the guard is alert, clear-headed, measured responsiveness to a daily, unrelentingly tense, caged coexistence.

These jailers are on call 24 hours a day and, "[b]ecause successful performance of their duties depends uniquely on their judgment and dexterity, these employees cannot reasonably expect to keep from [their supervisors] personal information that bears directly on their fitness." *(Treasury Employees v Von Raab,* 489 US, *supra,* at 672, citing *Matter of Caruso v Ward,* 72 NY2d, *supra,* at 441.) Indeed, OCCB officers "regularly" interact with the drug world inhabitants out in the hard streets; jail guards "constantly" interact with the most dangerous of society's concentrated mass in the confines of their walled symbiotic universe. We conclude that jail officials must be allowed to use proportionate and constitutional means to prevent, or at least to lessen, the volatile infiltration of drugs into the jails in and on the bodies of the guards themselves.

THE PROCEDURAL SAFEGUARDS

We now assess the adequacy of the program's proposed protocols, and whether the tested employees are subjected to "unregulated discretion" *(Matter of Caruso v Ward,* 72 NY2d, *supra,* at 438; *Matter of Patchogue-Medford Congress of Teachers v Board of Educ.,* 70 NY2d, *supra,* at 70). A computer randomly selects 50 officers (out of a force of 7,200) every two weeks. A tenured officer may be discharged for refusing to comply with test procedures, but only after a hearing. The employee being tested may be accompanied by a union representative or attorney. State-of-the-art techniques--substantially the same as those approved by the Supreme Court in *Von Raab (Treasury Employees v Von Raab,* 489 US 656 *supra)*--are to be used in collecting the specimen, assuring its integrity, preserving it for challenge and for testing and retestings. If the sample tests positive, it is retested by a more sophisticated method to ensure reliability. If the result is unchanged, the employee who supplied the sample may choose a different State-certified laboratory to test the sample yet ***96** again. As noted earlier, the specimen is produced in a private, closed stall, unlike the directly observed procedures elsewhere countenanced. The protocols overall allow for very little discretion and certainly not that which could be called "unregulated discretion". Finally, they assiduously protect the residual privacy expectations of the guards.

CONCLUSION

By choosing to work in the paramilitary milieu of the City Correction Department, guards voluntarily sacrifice certain cherished freedoms. The search procedure we authorize today, after satisfaction of our rigorous standards, is an exceptional reasonable addition, albeit a significant one, to a long list of other searches, also significant in their places, times and contexts, to which these uniformed guards have already submitted themselves. Our holding portends no avalanche of such searches or any diminishment of our vigilance in the protection of constitutional safeguards.

Accordingly, the order of the Appellate Division should be affirmed, with costs.

Judges Simons, Alexander and Hancock, Jr., concur with Judge Bellacosa; Chief Judge Wachtler dissents and votes to reverse in a separate opinion in which Judges Kaye and Titone concur.

Order affirmed, with costs. ***102**

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M/O Citizens for Energy Policy v. Gov. Mario Cuomo

(Ct. upheld Governor's closing of Shoreham L. I. Nuclear Plant)

78 N Y 2nd 398 – Majority Opinion [4-3] [1991]

New York
Official Reports

78 N.Y.2d 398, 582 N.E.2d 568, 576 N.Y.S.2d 185, Util. L. Rep. P 26,151

In the Matter of Citizens For An Orderly Energy Policy, Inc., et al., Appellants,
v.
Mario M. Cuomo, as Governor of the State of New York, et al., Respondents, and Public Service Commission of the State of New York, Intervenor-Respondent. (Proceeding No. 1.)
In the Matter of J. Kenneth Dollard et al., Appellants, and United States of America, Intervenor-Appellant,
v.
Long Island Power Authority et al., Respondents. (Proceeding No. 2.)
In the Matter of Nassau Suffolk Contractor's Association, Inc., et al., Appellants,
v.
Public Service Commission of the State of New York et al., Respondents. (Proceeding No. 3.)

Court of Appeals of New York
182, 183, 184
Argued September 11, 1991;
Decided October 22, 1991

CITE TITLE AS: Matter of Citizens For An Orderly Energy Policy v Cuomo

SUMMARY

Appeal, in proceeding No. 1, by permission of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Third Judicial Department, entered July 31, 1990, which affirmed a judgment of the Supreme Court (Lawrence E. Kahn, J.; opn 144 Misc 2d 281), entered in Albany County in a proceeding pursuant to CPLR article 78, dismissing the petition to annul (1) a "Settlement Agreement" (the Agreement) executed by Governor Mario M. Cuomo and the Long Island Lighting Company (LILCO) to transfer the Shoreham Nuclear Plant from LILCO to the Long Island Power Authority (LIPA) for closure and decommissioning, (2) a determination by the Board of Trustees of LIPA to approve the Agreement, and (3) a determination by the Board of Trustees of the Power Authority of the State of New York (PASNY) to approve the Agreement.

Appeal, in proceeding No. 2, by permission of the Court of Appeals, from a judgment of the Appellate Division of the Supreme Court in the Third Judicial Department, entered July 31, 1990, which, in a proceeding pursuant to CPLR article 78 (transferred to the Appellate Division by order of the Supreme Court, entered in Albany County), confirmed the determinations of respondents LIPA, PASNY, LILCO and Governor Mario M. Cuomo executing and/or approving the "Settlement Agreement" to transfer the Shoreham Nuclear Plant from LILCO to LIPA, and dismissed the petition.

Appeal, in proceeding No. 3, from a judgment of the Appellate ***399** Division of the Supreme Court in the Third Judicial Department, entered July 31, 1990, which, in a proceeding pursuant to CPLR article 78 (transferred to the Appellate Division by order of the Supreme Court, entered in Albany County), confirmed a determination of the Public Service Commission approving the "Settlement Agreement" providing, *inter alia,* for the transfer of respondent LILCO's Shoreham Nuclear Plant to LIPA, and dismissed the petition.

Matter of Citizens For An Orderly Energy Policy v Cuomo, 159 AD2d 141, affirmed.

Matter of Dollard v Long Is. Power Auth., 159 AD2d 141, affirmed.

Matter of Nassau Suffolk Contr.'s Assn. v Public Serv. Commn., 163 AD2d 700, affirmed.

OPINION OF THE COURT

Bellacosa, J.

The fundamental fulcrum of this case is the validity of the February 1989 "Settlement Agreement", providing essentially for the Long Island Power Authority (LIPA) to acquire the Long Island Lighting Company's (LILCO) Shoreham Nuclear Plant and to close that plant. We affirm the lower courts' determinations unanimously upholding the Agreement against a host of challenges.

I. SHOREHAM

LILCO's nuclear reactor power plant, sited on Long Island Sound in the Shoreham community of the Town of Brookhaven, Suffolk County, was conceived in 1965 as a 540 megawatt nuclear operation to be built at a cost of $124 million. LILCO's original objective was to provide better and reasonable power service to over three million people and industries in its huge ***407** suburban service area. The existing plant, enlarged to 809 megawatts, was substantially completed in 1984 at a mushroomed cost of $5.5 billion, with carrying costs of approximately $30 million a month. Persistent and complex problems plagued this titanic project for almost three decades. Among the problems were varied concerns of this nature: regulatory, licensing, legal, multijudicial, financing, safety, labor/management, consumer, national/State/local political, and providing a reasonable/adequate power supply. Two major events provide historical context as well: the 1979 accident at the Three Mile Island Nuclear Power Station in Pennsylvania and the 1986 accident at Chernobyl in the Soviet Union.

II. LIPA ACT--POLICY

To try to solve the chain of impasses and crises, the Governor and the Legislature negotiated and produced the LIPA Act (the Act) in 1986 (L 1986, ch 517). The legislative findings specifically state that LILCO's decisions to commence and continue construction of Shoreham were "imprudent" and created "significant rate increases" which have resulted in "excessive" electricity costs to LILCO's service area customers (Public Authorities Law § 1020-a). The Legislature questioned whether Shoreham would ever operate or be capable of providing "sufficient, reliable and economic electric service" if it were to operate (Public Authorities Law § 1020- a; *see,* § 1020-h [1] [g]). The Legislature declared in the Act that this crisis created "a situation [of State concern] threatening the economy, health and safety ... in the service area" (Public Authorities Law § 1020-a).

III. THE LIPA ACT

The Act created LIPA, a not-for-profit public corporation, to implement the Legislature's multiple objectives and policies (Public Authorities Law § 1020-c [1]). It conferred broad authority and power on LIPA to fulfill the primary statutory objectives: closing Shoreham, replacing LILCO as the provider of electric and gas power on Long Island, reducing power costs, or all of these (Public Authorities Law §§ 1020-f, 1020-g, 1020-h). The Act authorized LIPA to acquire "all or any part" of LILCO's securities or assets-- including, of course, Shoreham--to further the legislative findings "as [LIPA] in its sole discretion may determine" providing that prior to *"any such acquisition"* LIPA determines that higher utility rates will not ***408** result (Public Authorities Law § 1020-h [2] [emphasis added]). LIPA is authorized to acquire LILCO's securities or assets through negotiated instrument, tender offer or eminent domain (Public Authorities Law § 1020-h). The Act mandated that LIPA close and decommission Shoreham "forthwith" upon acquisition and consider possible alternative uses (Public Authorities Law § 1020-h [9]). It expressly prohibited LIPA from operating a nuclear power facility (Public Authorities Law § 1020- t), and gave LIPA the power "to determine the location, type, size, construction, lease, purchase, ownership, acquisition, use and operation of any generating, transmission or other related facility" (Public Authorities Law § 1020-g [c]).

Under the Act, LIPA is authorized to make and execute agreements and contracts "necessary or convenient in the exercise of [its] powers and functions" (Public Authorities Law § 1020-f [h]) and all State agencies are authorized "to enter into and do all things necessary to perform any such agreement" (Public Authorities Law § 1020-f [h]).

IV. THE 1989 SETTLEMENT AGREEMENT

After an unsuccessful effort in 1988 to reach agreement resolving the Shoreham crisis, and after an unsuccessful tender offer by LIPA to acquire LILCO *(see,* Public Authorities Law § 1020-h [3]), LILCO and the Governor signed the 1989 Settlement Agreement at issue in this case. The Agreement provided that LILCO would transfer the Shoreham plant to LIPA for $1 and LILCO would pay for all costs associated with Shoreham, pursuant to an "asset transfer agreement" incorporated in the Agreement. The Agreement provided that LIPA would contract with the Power Authority of the State of New York (PASNY) for the technical expertise necessary to close Shoreham. This was in furtherance of the legislative objective of closing Shoreham "forthwith" (Public Authorities Law §§ 1020-a, 1020-h [9]). The Agreement reflected the intent that LILCO be returned to an investment-grade financial condition as an investor-owned electric and gas company, and provided for LIPA to advise LILCO in developing a comprehensive least-cost power supply. PASNY agreed to construct additional power- generating facilities for LILCO if requested. The Agreement noted the Public Service Commission's (PSC) approval of a temporary LILCO rate increase for that rate year and expressed the understanding that LILCO's subsequent rate increases would be minimal. It provided for settlement of ***409** related litigation, including LILCO's appeal to the Second Circuit Court of Appeals from a declaration that the Act was constitutional *(Long Is. Light. Co. v Cuomo,* 666 F Supp 370, *appeal dismissed and judgment vacated* 888 F2d 230). LILCO retained the right to seek reinstatement of its Federal court appeal in the event LIPA exercised its statutory authority to acquire LILCO--still a viable, statutory authorization not precluded by the Agreement.

The 1989 Agreement was buttressed by an independent study, commissioned by LIPA, which demonstrated that LILCO's rates, freed of the Shoreham albatross, would be cheaper than LILCO's rates with Shoreham, thus satisfying the *only* condition legislatively imposed on LIPA's authority to acquire "all or any part of" LILCO's assets *(see,* Public Authorities Law § 1020-h [2]). The Agreement was subsequently evaluated and approved as required by the PSC, LIPA, PASNY and LILCO.

Petitioners, representing individuals, business groups and interest groups, commenced three separate CPLR article 78 proceedings challenging the execution and approval of this Settlement Agreement on various grounds.

We conclude that the essential rationale of the Per Curiam opinion at the Appellate Division (159 AD2d 141) dealing with LIPA's authority and SEQRA is sound. Its core conclusion bears emphasis: "[o]ne would be hard pressed to find language more clearly conveying legislative intent to give the implementing agency the broadest flexibility in administering the statute, *including the discretion not to proceed with a full LILCO takeover"* (159 AD2d, at 156 [emphasis added]). We also affirm and agree with the result and reasoning of the second determination brought up for our review and reflected in the Per Curiam opinion at 163 AD2d 700.

The Citizens for an Orderly Energy Policy and the Dollard petitioners contend that the Settlement Agreement contravenes the LIPA Act, subverts its legislative policy, violates the constitutional principle of the separation of powers, and leaps beyond the scope of statutory authority of the respondent Governor and executive agencies. Specifically, petitioners argue--and the dissenters agree--that LIPA is required to acquire LILCO itself before it may acquire and close Shoreham. They claim that respondents exceeded their statutory authority by making a Settlement Agreement which provides for Shoreham's closure independent of LIPA's replacement of ***410** LILCO so that Long Island's power needs would be supplied only by a public power source.

([1]) These arguments, presented at considerable length and with complexity and sophistication, may be simplified for this part of our analysis. They proceed from the erroneous supposition that the exclusive or paramount objective of the LIPA Act was the acquisition and displacement of LILCO itself as a privately owned investor company supplying electric and gas utility services to Long Island. We conclude that the statute nowhere limits the Executive Branch and its agencies in this critical respect. Instead, the respondents acted within their respective constitutional and statutory authority and effected a properly delegated discretionary policy and purpose articulated and intended by the LIPA Act, i.e., the closure and decommissioning of Shoreham by LIPA.

V. STATUTORY AUTHORIZATION FOR CLOSING SHOREHAM

The Executive Branch and its agencies may not "go beyond stated legislative policy and prescribe a remedial device not

embraced by the policy" in contravention of the separation of powers doctrine *(Matter of Broidrick v Lindsay,* 39 NY2d 641, 645-646). However, only executive acts inconsistent with or arrogative of the Legislature's prerogatives violate the separation doctrine *(Clark v Cuomo,* 66 NY2d 185, 189; *Matter of Nicholas v Kahn,* 47 NY2d 24, 30; *Rapp v Carey,* 44 NY2d 157, 163; *Matter of Broidrick v Lindsay, supra,* at 645-646). A check-and- balance in the distribution of powers is that the Legislative Branch may not delegate away its fundamental lawmaking powers or policymaking choices. The Legislature may, however, declare its policy in general terms by statute, endow administrative agencies with the power and flexibility to fill in details and interstices and to make subsidiary policy choices consistent with the enabling legislation *(Boreali v Axelrod,* 71 NY2d 1, 10; *Matter of Nicholas v Kahn, supra,* at 31; *Matter of Bates v Toia,* 45 NY2d 460, 464).

The Legislature is not required in its enactments to supply agencies with rigid marching orders, especially in a field as complex as nuclear power regulation, which is "simply incapable of statutory completion" and "where flexibility in the adaptation of the legislative policy to infinitely variable conditions constitute[s] the very essence [of the Act]" *(Matter of Nicholas v Kahn,* 47 NY2d 24, 31, *supra).* The intricate nuances of the policy determinations required under the LIPA ***411** Act deserve some respect from the Court. The specialized entity, LIPA, was created by the Legislature to concentrate on and resolve these matters within a reasonably defined and delegated range of expertise *(see, Matter of Memorial Hosp. v Axelrod,* 68 NY2d 958, 960; *Matter of Great Lakes-Dunbar- Rochester v State Tax Commn.,* 65 NY2d 339, 343). The wisdom and prudence of the Legislature's flexible approach are not ours to question. Nor may the Court weigh the fiscal quid pro quos of the Settlement Agreement. Our role is simply to construe the enactment, its validity and its implementation.

There can be little doubt that the Act authorizes LIPA to acquire and close Shoreham. It allows LIPA to acquire "all or *any part* of the securities or *assets* of LILCO, as the authority in its *sole discretion* may determine" (Public Authorities Law § 1020-h [2] [emphasis added]; *see also,* § 1020-f [d]; § 1020-g [c]; § 1020-h [6] [a]). The Legislature wanted Shoreham closed and decommissioned, and it expressly declared its legislative policy that LIPA's acquisition, closure and decommissioning of Shoreham would accomplish an objective of the Act (Public Authorities Law §§ 1020-a, 1020-h [9]; § 1020- t; *cf., Matter of Campagna v Shaffer,* 73 NY2d 237, 243; *Boreali v Axelrod,* 71 NY2d 1, 6, 11-16, *supra; Under 21, Catholic Home Bur. for Dependent Children v City of New York,* 65 NY2d 344, 356; *Subcontractors Trade Assn. v Koch,* 62 NY2d 422, 429-430; *Matter of Broidrick v Lindsay,* 39 NY2d 641, 646-647, *supra).*

In fact, closure of Shoreham was one of the overriding engines driving the emergency legislative initiative and package. The language of the Act and its legislative history cogently portray the Act's objectives: LIPA's acquisition and closure of Shoreham, or LIPA's takeover and replacement of LILCO as a utility provider, or both, dependent only on control of rates *(see,* Public Authorities Law §§ 1020-a, 1020-h). The objectives were not expressed as mandatory or paramount or indispensably linked or preconditioned upon each other. Thus, respondents cannot be said to have arrogated by administrative or executive fiat that which was not contemplated or delegated by the Legislature *(Matter of Campagna v Shaffer,* 73 NY2d 237, 242, *supra),* and did not "effect [their own] vision of societal policy choices" *(id.,* at 242) or act on a "clean slate", thereby invading the nondelegable legislative policymaking function *(Boreali v Axelrod,* 71 NY2d 1, 13, *supra).* To be sure, this Settlement Agreement did not, by any stretch of the facts, result from executive fiat; rather, it was the product of a constitutional and statutorily authorized resolution of the ***412** Shoreham crisis by LIPA, LILCO and the Governor and executive agencies *(contrast, Youngstown Co. v Sawyer,* 343 US 579 [a totally inapposite case, cited by the dissenters at 428-429, whose essential facts are the seizure of the country's steel mills unilaterally by President Truman to deal with a strike during the Korean War]).

Appellants and the dissenters would have the Court construe the comprehensive statute (Public Authorities Law § 1020-h [9]) in a strained and inflexible fashion, producing absurd results. Their legislatively unintended all-or-nothing approach would reinstate the Shoreham crisis, producing a plain contradiction of a critical objective of the statute.

The Act conferred broad discretion on LIPA, delegated to it "all of the powers necessary or convenient" to implement its multipronged, complicated purposes (Public Authorities Law § 1020-f), and provided for liberal construction of its terms to effectuate its purposes (Public Authorities Law § 1020-ff). Appellants' and the dissenters' interpretation, relying on an inference by negative implication that the Public Authorities Law withholds authority from LIPA to close Shoreham, unless it completely takes over LILCO, is simply wrong. The pertinent subdivisions, the strained cross- incorporation by reference of general preamble language, and the Act overall do not impose or create such a requirement. Further, the negative inference approach is a disfavored interpretive tool, especially in the face of a broad delegation of appropriate discretion and authority designed to effect the stated legislative goals of closure, found throughout the whole Act read as an integrated, complex, emergency package of legislation *(see, Matter of City of New York v State of New York Commn. on Cable Tel.,* 47 NY2d 89, 92; *see also, Clark v Cuomo,* 66 NY2d 185, *supra).* Indeed, none of the legislative history on which the dissenters rely supports their judicial incorporation into the Act of a conditional restriction that LIPA was without authority to acquire Shoreham in a negotiated agreement unless it simultaneously engaged in a full scale buyout and replacement of LILCO.

The only condition attached to LIPA's decision to acquire any or all of the assets or stock of LILCO is LIPA's determination that such acquisition would result in rates to LILCO's customers not higher than LILCO would have charged had there been no such acquisition (Public Authorities Law § 1020-h [2], [4], [10]). Once that threshold is satisfied, LIPA is ***413** empowered--but not required--to make any such acquisition. No provision can be found anywhere in the Act which expressly or by reasonable implication requires that LIPA must exert its full acquisition authority contemporaneously with the acquisition and decommissioning of Shoreham itself, i.e., "making LIPA's authority to acquire any part of the LILCO property conditional on LIPA's replacing LILCO" (dissenting opn, at 418; *see also,* 419, 420, 424-425, 427-428). No matter how many times or different ways such an unfounded interpretation is repeated, the fact remains that the Act simply does not "condition" LIPA's acquisition of Shoreham on its acquisition also of all of LILCO's assets and replacement of privately owned LILCO with a public utility provider. One would, in any event, expect a critical precondition feature of this kind to be expressed or readily ascertainable if it were ever intended. It is not, and that is not surprising, for that could have paralyzed LIPA from bringing about a plainly intended goal: the closing of Shoreham.

Appellants claim that the Agreement, because it provided for the continued operation of LILCO, conflicts with the legislative goal to put LILCO out of business by a takeover and substitution with a public power supplier. While the Legislature indicated in the Act that it contemplated--based on information and conditions at the time of enactment--that replacement of LILCO with a publicly owned power authority would be the "best" or "most appropriate" method of remedying the host of emergency problems addressed by the Act (especially closing Shoreham) *(see,* Public Authorities Law §§ 1020-a, 1020-h [1] [a], [n]), the Legislature reposed in LIPA the flexible authority to make the ultimate choice among statutory alternatives. LIPA was authorized to acquire all or any part of LILCO's stock and assets (Public Authorities Law § 1020-h), but the Act does not mandate or direct LIPA to do so or to replace LILCO at any given time or as a precondition to achieving other key legislative objectives.

Acquisition of all of privately owned LILCO's assets by eminent domain or otherwise would cost billions of taxpayer dollars (hardly a "bail out" [dissenting opn, at 418]); this is a factor the Legislature recognized in affording LIPA broad authority with respect to whether such a total acquisition was feasible, or necessary, or might contribute to higher rather than lower rates because of the financing costs alone of such a monumental public acquisition of a privately owned utility (Bill Jacket, L 1986, ch 517, Budget Report on Bills, at 7; *id.,* ***414** Report of Comptroller, at 19). We emphasize that the recurring and unavoidable theme reflected in the legislative history is that the intended *sine qua non* objective of the Act was to give LIPA the authority to save ratepayers money by controlling and reducing utility costs (Bill Jacket, Assembly Mem, at 14; *id.,* Budget Report, at 6; *id.,* Executive Approval Mem, at 12; *id.,* Executive Mem, at 15). It was not to *force* LIPA to replace LILCO as the service area utility provider in order to achieve the legislative objective of closure of Shoreham and elimination of Shoreham's impact on utility rates.

Indeed, the Governor, in approving the LIPA Act legislation, emphasized that the core objective of the Act was to produce ratepayer savings, which he recognized might not necessarily be achieved by a complete conversion to public power through LIPA's replacement of LILCO (Governor's Approval Mem, 1986 McKinney's Session Laws of NY, at 3178).

Further, under the terms of the Agreement, LIPA did not permanently forego the exercise at some time of its delegated power to acquire and supplant LILCO should it decide in its "sole discretion" that doing so would accomplish the Act's objective of controlling utility costs to LILCO customers *(see,* Public Authorities Law § 1020-h [2]). The Agreement is *not* structured to expressly prohibit acquisition by LIPA of any part of LILCO other than Shoreham, as the Agreement in no way precludes LIPA from exercising its full range of statutory choices under the LIPA Act depending on the time and circumstances, including market conditions and the State's fiscal situation. Rather, the Agreement plainly accomplished an urgent objective of the Act: the prevention of further rate increases attributable to the Shoreham enterprise.

We emphasize that our decision in this respect focuses solely on the statutory interpretation concerning the delegation, implementation and distribution of governmental public utility power as it pertains to Shoreham. We imply no views--which would be irrelevant and inappropriate in any event--about the wisdom of nuclear power, public power, or punishment of private power companies for failed and costly enterprises. We conclude only that a rational choice was made by the entities charged with the implementing authority--legitimate "means"--based on delegated power and on the record before us to achieve a legislative goal--the legitimate "end" of Shoreham (dissenting opn, at 428). ***415**

VI. SEQRA

The Dollard petitioners and the intervenor United States Department of Energy argue that the Settlement Agreement violates

SEQRA. Specifically, they contend that the Governor and administrative agencies had to produce Environmental Impact Statements (EIS) before making or approving this Agreement with LILCO to transfer Shoreham to LIPA for closure and decommissioning. They add that PASNY also had to do a SEQRA review before it agreed to aid LIPA in decommissioning Shoreham by building baseload generating plants for LILCO in the future, if LILCO requested. We agree with the Appellate Division that, as to each aspect of this SEQRA argument, the Settlement Agreement was "either statutorily exempt from SEQRA, or so tentative and premature as not yet to trigger SEQRA review" (159 AD2d 141, 159).

Primary guidance is found in the LIPA Act, which declares that LIPA's acquisition of LILCO's assets or stock is not State "action" subject to SEQRA, and that SEQRA "shall not be applicable in any respect to such acquisition or any action of [LIPA] to effect such acquisition." (Public Authorities Law § 1020-s [2].) Nothing in this respect could be plainer.

(2) Appellants and the dissenters, with entirely inapposite authorities, nevertheless urge that the decision to decommission triggered an immediate full-scale SEQRA prerequisite to the Settlement Agreement itself. "[O]fficial acts of a ministerial nature, involving no exercise of discretion", are expressly exempt from SEQRA (ECL 8-0105 [5] [ii]). A "ministerial act" is an action performed "in a prescribed manner imposed by law *without the exercise of any judgment or discretion as to the propriety of the act*" (6 NYCRR 617.2 [x] [emphasis added]). Actions of the State Legislature are also exempt (6 NYCRR 617.2 [q] [5]). When it passed the LIPA Act, the Legislature--inescapably aware of the inherent environmental consequences of Shoreham's shutdown-- necessarily judged for itself the propriety of closure and decommissioning and mandated such action (Public Authorities Law §§ 1020-a, 1020-h [9]). LIPA's decision to fulfill the legislative objective to close and decommission Shoreham was not an action subject to SEQRA because LIPA had no choice in this respect; its acquisition of Shoreham triggered a legislatively mandated, ministerial consequence, i.e., to shut it down forthwith.

Appellants argue that decommissioning was not mandatory on these facts and, thus, is not entitled to the ministerial ***416** exemption provision as that highly specialized legal word of art is employed in the SEQRA field. They essentially argue that under Public Authorities Law § 1020-h (9), LIPA's closure and decommissioning of Shoreham were mandatory only if LIPA acquired controlling shares of LILCO or *all* of LILCO's assets--but not if it just acquired Shoreham. This interpretation is not supported by legislation or logic. First, whether or not LIPA acquired, in addition to Shoreham, the rest of LILCO's stock or remaining assets has no greater or lesser bearing on the potential for environmental consequences arising out of LIPA's acquisition of only the Shoreham asset. Thus, it is not rational to differentiate between the two scenarios. The statute does not do so, and to do so by statutory construction leads to an unacceptable anomaly. The lesser circumstance could not rationally be subject to more severe restrictions than the greater.

Second, the Legislature allowed LIPA to acquire Shoreham only, expressed that decommissioning was a central objective of the Act, precluded LIPA from running Shoreham, and certainly understood and intended that *if* LIPA acquired Shoreham it must "forthwith" close and decommission it. "Forthwith" in this circumstance would surely be an oxymoronic usage if the Legislature were deemed to have compelled the SEQRA process in this circumstance only, because that would freeze the shutdown and decommissioning process.

Viewed in another light, appellants' restrictive interpretation would compel this syllogism: if LIPA determined that acquisition of LILCO itself would not effect the Act's objectives but that acquisition of Shoreham only would, LIPA *must* nevertheless choose the total takeover route to avoid SEQRA review of the lesser, common objective. Such a trap makes no sense and could not have been intended.

We emphasize that what was "ministerial" here was LIPA's nondiscretionary action in complying with the *Legislature's mandate* that Shoreham be decommissioned. It was not up to LIPA to produce an EIS to evaluate the propriety of the legislative policy choice of decommissioning because, in this case, mandating SEQRA review would have the effect of overriding the Legislature's express exemption (6 NYCRR 617.2 [q] [5]).

(3) Finally, we agree with the Appellate Division determination that PASNY's agreement to aid LIPA in decommissioning and constructing alternative generating facilities for LILCO, if ***417** requested, are proposed actions which had not reached the point at which SEQRA review is required at the time the Agreement was made (159 AD2d 141, 160, *supra; see, Matter of Programming & Sys. v New York State Urban Dev. Corp.*, 61 NY2d 738, 739; *Matter of Tri-County Taxpayers Assn. v Town Bd.*, 55 NY2d 41, 46-47). No decommissioning plan had been proposed or selected; no plans to build generating plants to replace Shoreham had been proposed or formulated; and no decision even to build such plants had been made. The *subsequent* selection of a specific decommissioning method has already received full environmental review, culminating in a Final Generic Environmental Impact Statement in 1990, which has not been challenged by appellants. PASNY's construction of facilities--if ever undertaken--will be subject to independent SEQRA review when a specific project plan is actually formulated and proposed.

All other arguments, including those addressed to whether the PSC satisfied the requirements of the State Administrative Procedure Act, have been reviewed and require no further discussion, as they are without merit or affect on the dispositive analysis or result, or have been addressed in the Per Curiam opinions of the Appellate Division with which we agree.

Accordingly, in *Matter of Citizens,* the order of the Appellate Division should be affirmed, with costs. In *Matter of Dollard* and in *Matter of Nassau Suffolk Contr. 's Assn.,* the judgments should be affirmed, with costs.

Chief Judge Wachtler and Judges Simons and Kaye concur with Judge Bellacosa; Judge Hancock, Jr., dissents and votes to reverse in a separate opinion in which Judges Alexander and Titone concur. ***432**

In *Matter of Citizens For An Orderly Energy Policy v Cuomo:* Order affirmed, with costs.

In *Matter of Dollard v Long Is. Power Auth.:* Judgment affirmed, with costs.

In *Matter of Nassau Suffolk Contr. 's Assn. v Public Serv. Commn.:* Judgment affirmed, with costs. ***433**

~ 8 ~

Wildenstein Co. v. Hal Wallis Foundation

(Ct. certified to Fed Appeals Ct. that N. Y.'s modern Rule vs Perpetuities [Feudal] does not apply to commercial transaction [Gaughin & Monet paintings])
79 N Y 2nd 641 – Majority Opinion [6-1] [1992]

New York
Official Reports

79 N.Y.2d 641, 595 N.E.2d 828, 584 N.Y.S.2d 753, 60 USLW 2805

Wildenstein & Co., Inc., Plaintiff,
v.
Brent Wallis, Individually, as President of the Hal B. Wallis Foundation, as Trustee of the Hal B. Wallis Trust, and as Executor of Hal B. Wallis, Deceased, et al., Defendants.

Court of Appeals of New York
104
Argued April 29, 1992;
Decided June 9, 1992

CITE TITLE AS: Wildenstein & Co. v Wallis

SUMMARY

Proceeding, pursuant to NY Constitution, article VI, § 3 (b) (9) and Rules of the Court of Appeals § 500.17 (22 NYCRR 500.17), to review four questions certified to the New York State Court of Appeals by order of the United States Court of Appeals for the Second Circuit. The following questions were certified by the United States Court of Appeals and accepted by the New York State Court of Appeals pursuant to section 500.17: "(1) Does the New York Rule Against Perpetuities apply to preemptive rights and future consignment interests in personal property? (2) Does the New York common law rule against unreasonable restraints on alienation invalidate preemptive rights and future consignment interests in personal property? (3) If either the Rule Against Perpetuities or the common law rule against unreasonable restraints on alienation invalidates the preemptive rights and future consignment interests at issue here, can the beneficiary of those rights and interests assert a claim for unjust enrichment stemming from the loss of such rights and interests? (4) If either the Rule Against Perpetuities or the common law rule against unreasonable restraints on alienation invalidates the preemptive rights and future consignment interests at issue here, can the beneficiary of those rights and interests nevertheless state a claim for fraudulent inducement and fraud arising from the transaction that gave it such rights and interests?"

OPINION OF THE COURT

Bellacosa, J.

Wildenstein & Co., a dealer in fine art, seeks relief under a settlement agreement between itself and Hal Wallis, now deceased, pursuant to which Wildenstein returned to Wallis in 1982 two valuable paintings, Monet's "Houses of Parliament" and Gauguin's "The Siesta--A Brittany Landscape". In exchange, the agreement gave Wildenstein preemptive and exclusive consignment rights with respect to 15 original paintings by renowned artists in Wallis's collection. Wildenstein's lawsuit, begun in the United States District Court for the Southern District of New York, named the Estate of Hal B. Wallis, the Hal B. Wallis Trust, the Hal B. Wallis Foundation and Brent Wallis as defendants. The defendants resisted Wildenstein's claims by invoking the Rule against Perpetuities (EPTL 9-1.1) and the common-law rule against unreasonable restraints on alienation of property.

This lawsuit comes to us from the United States Court of Appeals for the Second Circuit, which certified four questions arising out of an appeal in that court from the District Court's dismissal of the Wildenstein complaint:

"(1) Does the New York Rule Against Perpetuities apply to preemptive rights and future consignment interests in personal property?

"(2) Does the New York common law rule against unreasonable restraints on alienation invalidate preemptive rights and future consignment interests in personal property?

"(3) If either the Rule Against Perpetuities or the ***645** common law rule against unreasonable restraints on alienation invalidates the preemptive rights and future consignment interests at issue here, can the beneficiary of those rights assert a claim for unjust enrichment stemming from the loss of such rights and interests?

"(4) If either the Rule Against Perpetuities or the common law rule against unreasonable restraints on alienation invalidates the preemptive rights and future consignment interests at issue here, can the beneficiary of those rights and interests nevertheless state a claim for fraudulent inducement and fraud arising from the transaction that gave it such rights and interests?" (949 F2d 632, 636.)

On January 16, 1992, we accepted the certified questions *(see,* NY Const, art VI, §3 [b] [9]; 22 NYCRR 500.17).

The first two questions are not academic abstractions and must be construed in the context of the real case in controversy in order to provide meaningful and appropriate answers. We must determine whether the New York statutory Rule against Perpetuities applies to invalidate Wildenstein's preemptive and consignment rights, or whether the common-law rule against unreasonable restraints on alienation is transgressed. We conclude in the negative as to those two questions and, therefore, need not address the third and fourth questions relating to alternative relief.

I.

Hal Wallis, a California-based film producer whose credits included "Casablanca", avidly collected Impressionist and Modern works of art. In late 1980, Wallis's wife, Martha Hyer Wallis, apparently gave, without his knowledge, paintings from the collection, including "Houses of Parliament" and "The Siesta--A Brittany Landscape", to several individuals in exchange for an anticipated loan to her of approximately $1 million. In January 1981, two of these individuals went to Wildenstein's New York City offices offering to sell the Monet and the Gauguin. They produced a power of attorney and other documents purporting to grant them authority to sell the paintings for Mrs. Wallis. Wildenstein purchased the two paintings for $650,000.

Hal Wallis learned that Wildenstein had his Monet and ***646** Gauguin in August 1981. Through his attorney, he sought to retrieve the paintings, informing Wildenstein that the paintings had been sold without his permission. On April 20, 1982, following lengthy negotiations, Wildenstein and Wallis reached a formal settlement agreement pursuant to which Wildenstein returned the two paintings to Wallis in exchange for $665,000, representing the $650,000 Wildenstein paid for them plus $15,000 for expenses. The settlement agreement provides that Wildenstein would have a right of first refusal to purchase and an exclusive right of consignment to auction 15 named paintings in the Wallis collection. The first refusal right, sometimes also referred to as a preemptive right, requires Hal or Martha Wallis to give Wildenstein at least 30 days prior notice of the terms of any proposed sale of a painting covered by the settlement agreement, and provides that Wildenstein shall have the option to purchase such painting within 20 days on the same terms as the triggering purchase offer. The exclusive right of consignment requires that, in the event the Wallises decide to sell any painting at auction, the painting shall be consigned exclusively to Wildenstein for six months. The agreement recites the parties' intent that "Wildenstein shall have the first opportunity to purchase or sell all paintings listed". The terms of the settlement agreement are applicable to the "executors, successors and assigns" of the Wallises and Wildenstein. However, the agreement specifically excludes any painting given to a charitable organization exempt from tax under Internal Revenue Code § 501 (c) (3) (26 USC § 501 [c] [3]).

Hal Wallis died in October 1986. Pursuant to the terms of the Hal B. Wallis Trust as amended in 1985, most of the paintings in the Wallis collection were distributed to the Hal B. Wallis Foundation, a tax-exempt charitable organization, which was to arrange to have the paintings displayed at the Los Angeles County Museum of Art. Under the terms of the Wallis Trust, Renoir's "Jeune Fille au Chapeau a Coquelicots", one of the paintings covered by the settlement agreement, passed to Hal Wallis's son, defendant Brent Wallis, subject to his guarantee not to sell the painting. In December 1986, Brent Wallis nevertheless sold the Renoir for $750,000.

In early 1989, Wildenstein learned that the Hal B. Wallis Foundation intended to sell other paintings listed in the settlement agreement at an auction to be held on May 10, 1989 at Christie's in New York. On May 9, 1989, Wildenstein sued Brent Wallis, the Wallis Trust, the Wallis Foundation ***647** and the Wallis Estate in the United States District Court. The complaint

was dismissed by the District Court, which granted summary judgment to the Wallis defendants (756 F Supp 158).

The District Court declined to decide whether Wildenstein's rights under the settlement agreement are immune from the New York Rule against Perpetuities under *Metropolitan Transp. Auth. v Bruken Realty Corp.* (67 NY2d 156). Instead, that court rested its decision on the common-law rule against unreasonable restraints on the alienation of property. It rejected Wildenstein's claims under the settlement agreement, stating: "these private restrictions on the transferability of the Wallis paintings did not further any countervailing public interest in the purchase and sale of works of fine art or otherwise facilitate such transactions" (756 F Supp 158, 164-165, *supra).*

II.

At the outset of our analysis, it is important to place the Wildenstein/Wallis agreement and the respective benefits and obligations of those contracting parties in perspective. Wildenstein is a commercial art dealer and Wallis was an avid art collector. They settled a dispute over valuable art works of world-wide renown. That settlement boomeranged into this controversy that dissolves under a remarkable old doctrine--the Rule against Perpetuities. That the principles of the 1682 *Duke of Norfolk's Case* (3 Ch Cas 1) should emerge to dominate this modern commercial transaction is a royal irony that does not serve the common-law policy designed to block long-term retention over property by long-gone ancestors.

The Rule against Perpetuities and the common-law rule against unreasonable restraints on alienation both limit the ability of owners to control future dispositions of their property. The New York Rule against Perpetuities, codified at EPTL 9-1.1, provides that (1) any present or future estate is void if it suspends the absolute power of alienation for a period beyond lives in being at the creation of the estate plus 21 years (EPTL 9-1.1 [a] [2]), and (2) any estate in property is invalid unless it must vest, if at all, within the same period (EPTL 9-1.1 [b]). The statutory rule against remote vesting (EPTL 9-1.1 [b]) is thus a rigid formula that invalidates any interest that may not vest within the prescribed time period *(see,* Turano, Practice Commentaries, McKinney's Cons Laws of NY, Book 17B, EPTL 9-1.1, at 480; Morris and Leach, The ***648** Rule Against Perpetuities, at 12 [2d ed 1962]). Because of its capricious consequences, the modern view of the rule has evoked its characterization as a "Reign of Terror" (Leach, *Perpetuities in Perspective: Ending the Rule's Reign of Terror,* 65 Harv L Rev 721, 721-723 [1952]).

Somewhat in tandem, the common-law rule against unreasonable restraints on the alienation of property, which invalidates unduly restrictive controls on future transfers, erects a somewhat more flexible standard, requiring a case- by-case analysis that measures reasonableness of the restraint by its price, duration and purpose *(Metropolitan Transp. Auth. v Bruken Realty Corp.,* 67 NY2d 156, 161-162, *supra; Allen v Biltmore Tissue Corp.,* 2 NY2d 534). Despite their differences, however, both the statutory and common-law rules strive to strike a balance between society's interest in the free alienability of property and the rights of owners to direct future transfers.

A.

We turn to the first question certified: whether the rule against remote vesting applies to Wildenstein's rights under the settlement agreement.

The Rule against Perpetuities, though founded in a real property context, became generally applicable to interests in both real and personal property *(see, Sherman v Richmond Hose Co. No. 2,* 230 NY 462, 471). We have also held the rule applicable to options in real estate transactions *(Buffalo Seminary v McCarthy,* 58 NY2d 867, *affg for reasons stated in parts I and II of opn below* 86 AD2d 435 [Hancock, Jr., J.]). In certain contexts, preemptive rights may also be subject to the Rule against Perpetuities *(see, Morrison v Piper,* 77 NY2d 165, 170; *Metropolitan Transp. Auth. v Bruken Realty Corp.,* 67 NY2d 156, 164-166, *supra).*

The instant settlement agreement grants Wildenstein two types of rights-- preemptive rights, should the Wallises decide to privately sell any of the covered paintings, and exclusive consignment rights, should the Wallises decide to sell by auction. Preemptive rights differ significantly from options in that the holder of an option has the power to induce a transaction, while the holder of a preemptive right may purchase only if an owner decides to sell *(see, Metropolitan Transp. Auth. v Bruken Realty Corp., supra,* at 163; *see also, LIN Broadcasting Corp. v Metromedia, Inc.,* 74 NY2d 54, 60). ***649** While we have not addressed the applicability of the Rule against Perpetuities to future consignment rights, the parties have offered no

distinction to justify treating such rights differently from preemptive rights. These two kinds of rights constitute future contingent interests in 15 paintings which can be triggered only by the Wallises' decision to sell, privately or by auction.

To resolve the applicability of the Rule against Perpetuities with respect to Wildenstein's rights, we must examine the history and purposes of the rule in the relevant context of this Court's recent decisions in *Metropolitan Transp. Auth. v Bruken Realty Corp.* (67 NY2d 156, *supra)* and *Morrison v Piper* (77 NY2d 165, *supra).* The rule against remote vesting originated in the late 17th century to address donative transfers of land among family members. By curbing attempts by the landed gentry to control future generations' ownership of their real property, the rule protected the public's interest in the development of land and prevented undue concentrations of wealth and power *(see,* 5A Powell, Real Property ¶ 759 [1], at 71- 2--71-4; Leach, *Perpetuities in Perspective: Ending the Rule's Reign of Terror,* 65 Harv L Rev 721, 725-726). Although the limits imposed by the rule upon the power to control future ownership of property stem from a policy against the withdrawal of property from commerce, the rule against remote vesting struck a balance in allowing property owners to provide for family members they personally knew and those within the first generation after that class *(see,* 6 American Law of Property § 24.16, at 51 [1952]; *see also,* Dukeminier, *A Modern Guide to Perpetuities,* 74 Cal L Rev 1867, 1869-1870).

The Rule against Perpetuities thus began as a flexible balancing principle. Commentators became troubled as the rule acquired rigid encrustations over the centuries because it did not sufficiently lend itself in a modern setting to taking reasonable account of competing interests and evolving policies *(see,* Morris and Leach, The Rule Against Perpetuities, at 12-13 [2d ed 1962]; Dukeminier, *A Modern Guide to Perpetuities, op. cit.,* at 1869-1870). Professor Leach found the extension of the rule to modern commercial transactions, such as option agreements, a "step of doubtful wisdom" which, he suggested, ought to be the outer limits of its application to commercial contractual responsibilities *(see,* Leach, *Perpetuities in Perspective: Ending the Rule's Reign of Terror,* 65 Harv L Rev 721, 736-737; *see also,* Leach, ***650** *Perpetuities: New Absurdity, Judicial and Statutory Correctives,* 73 Harv L Rev 1318, 1321-1322; Leach, *Perpetuities in a Nutshell,* 51 Harv L Rev 638, 660). Application of the rule to invalidate rights such as rights of first refusal has been found to defeat the legitimate expectations of the holder of the rights to the advantage of the other party who expressly agreed to the limitations *(see, Weber v Texas Co.,* 83 F2d 807, 808- 809, *cert denied* 299 US 561; Note, *Survey, Developments in Maryland Law, 1987-1988: Property,* 48 Md L Rev 749, 783-784). Thus, courts have recognized that the important commercial interests served by upholding preemptive rights, which only minimally affect alienability, outweigh the purpose underlying the rule against remote vesting *(see, Metropolitan Transp. Auth. v Bruken Realty Corp.,* 67 NY2d 156, *supra; see also, Anderson v 50 E. 72nd St. Condominium,* 119 AD2d 73, 78, *appeal dismissed* 69 NY2d 743; *Weber v Texas Co.,* 83 F2d 807, *supra; Cambridge Co. v East Slope Inv. Corp.,* 700 P2d 537 [Colo]; *Shiver v Benton,* 251 Ga 284, 304 SE2d 903; *Robroy Land Co. v Prather,* 95 Wash 2d 66, 622 P2d 367; *Hartnett v Jones,* 629 P2d 1357 [Wyo]).

In *Metropolitan Transp. Auth. v Bruken Realty Corp.* (67 NY2d 156, *supra),* this Court acknowledged the contradiction of ancient purpose and modern application. We held the Rule against Perpetuities inapplicable to preemptive rights in commercial and governmental transactions, emphasizing that application of the rule "would invalidate an agreement which promoted the use and development of the property" *(Metropolitan Transp. Auth. v Bruken Realty Corp., supra,* at 166, 168). In *Morrison v Piper* (77 NY2d 165, *supra),* we addressed the applicability of the rule to preemptive rights in a noncommercial, family transaction involving residential property. We declined to extend the modern realism of *Bruken* to interests arising out of that family-land transaction, which had all the traditional touchstones envisioned by the original rule and purpose. Even so, we found an interpretative path, as the statute prescribes, to avoid invalidation of the transfer wherever possible *(id.,* at 171-174). Thus, our *Morrison* decision should not be read to limit or otherwise affect the scope of the *Bruken* holding and exception concerning the Rule against Perpetuities in contemporary commercial settings.

In light of the history and purposes underlying the rule and the commercial and precedential context in which the Wildenstein/Wallis agreement arose, we conclude that the rule against remote vesting does not apply to these preemptive and exclusive consignment rights. The parties' agreement, although factually in the borderland between the transactions ***651** considered in *Bruken* and *Morrison,* is plainly closer to that in *Bruken* and qualifies for the commercial escape route from the rule expounded as part of *Bruken's* rationale.

In exchange for helping Wallis regain a valued part of his collection, Wildenstein was assured that in the event of a sale of one or more of the paintings, it might still realize the profit or commission it hoped to earn when it originally acquired the Monet and the Gauguin. That the agreement also covered 13 other paintings does not alter our analysis, particularly because Wildenstein's rights are triggered only by a decision to sell the paintings. Because Wildenstein must meet a third party's offer if it elects to exercise its preemptive right, that right allows the Wallises, and their executors, successors or assigns, to realize the highest possible price should they decide to sell any of the paintings subject to the agreement. The agreement leaves the Wallises, and their executors, successors and assigns, free to maintain the paintings in the private collection or transfer them to a tax-exempt charitable organization--factual and interpretative matters not within the questions certified to us nor upon which we may rule or express any views.

([1]) Inasmuch as Wildenstein's preemptive and exclusive consignment rights serve significant commercial interests by facilitating broader marketing of world-renowned art treasures while posing, at the most, only a minimal limitation on the alienability of the works, we conclude that they are not subject to the Rule against Perpetuities. Accordingly, the first certified question, as thus construed and applied, should be answered in the negative.

B.

Turning next to the second question certified, we address the validity of Wildenstein's rights under the common-law rule against unreasonable restraints on alienation. We conclude that this doctrine does not invalidate Wildenstein's rights under the agreement.

The reasonableness of Wildenstein's preemptive first refusal rights and exclusive consignment rights depends upon their duration, price and purpose *(see, Metropolitan Transp. Auth. v Bruken Realty Corp.*, 67 NY2d 156, 167, *supra; Allen v Biltmore Tissue Corp.*, 2 NY2d 534, 542, *supra)*. The rule condemns "not a *restriction* on transfer, a provision merely postponing sale during the option period, but an effective ***652** *prohibition* against transferability itself" *(Allen v Biltmore Tissue Corp., supra,* at 542 [emphasis in original]). Thus, the reasonableness of Wildenstein's rights is determined by considering the 30-day period during which it could exercise its preemptive rights and the six-month period of its exclusive consignment right, not the remotely potential perpetual quality of those rights. We have upheld 90-day periods for exercising preemptive rights to purchase land *(Metropolitan Transp. Auth. v Bruken Realty Corp., supra)* and corporate stock *(Allen v Biltmore Tissue Corp., supra)*. We note that the record contains an uncontradicted affidavit of an art gallery expert attesting to the widespread use of preemptive and exclusive consignment rights in the art world, and the unusually short duration of the six-month exclusive consignment rights in the Wildenstein/Wallis agreement.

([2]) The terms of Wildenstein's first refusal right require it to meet the offer of a third party. Preemptive rights conditioned upon payment equal to a third party's offer are generally reasonable; under this method of price determination, the owner suffers no legally cognizable loss *(see, Metropolitan Transp. Auth. v Bruken Realty Corp., supra,* at 167-168; 3 Simes and Smith, Future Interests § 1154, at 62-63 [2d ed]). The settlement agreement provides that should the Wallises wish to sell any of the paintings at auction, they may propose a price for the paintings. If the parties ultimately cannot agree as to a reasonable price, the agreement requires that the price be set by a major international auction house representative. This method of price setting, with input by Wildenstein, the Wallises and an independent third party, seems sensible and balanced. It ill behooves a court to substitute its sense of unreasonableness for the parties' arm's length agreement in the circumstances of a settlement of an essentially commercial dispute like the one in this case. Thus, given the reasonableness of the price, duration and purpose of Wildenstein's first refusal and exclusive consignment rights, they should not be declared invalid under the common-law rule prohibiting unreasonable restrictions on the alienation of property.

Accordingly, the first and second questions certified, as construed and applied, should be answered in the negative and the third and fourth questions certified, concerning the alternative remedies that might be available in the event Wildenstein's rights were deemed invalid under either of the ***653** first two certified questions, should be not answered as unnecessary.

Chief Judge Wachtler and Judges Simons, Kaye and Titone concur with Judge Bellacosa; Judge Hancock, Jr., concurs in result in a separate opinion.

Following certification of questions by the United States Court of Appeals for the Second Circuit and acceptance of the ***655** questions by this Court pursuant to section 500.17 of the Rules of Practice of the New York State Court of Appeals (22 NYCRR 500.17), and after hearing argument by counsel for the parties and consideration of the briefs and the record submitted, certified question number one answered in the negative, certified question number two answered in the negative, and certified questions number three and four not answered as unnecessary. ***656**

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Town Super. Edgar King v. Gov. Mario Cuomo

(Ct. disallowed a work-around of how to "make a law" by the book)

81 N Y 2nd 247 – Majority Opinion [5-2] [1993]

New York
Official Reports

81 N.Y.2d 247, 613 N.E.2d 950, 597 N.Y.S.2d 918

In the Matter of Edgar A. King, as Supervisor of the Town of Northumberland, et al., Appellants,
v.
Mario M. Cuomo, as Governor of the State of New York, et al., Respondents.

Court of Appeals of New York
78
Argued March 23, 1993;
Decided May 6, 1993

CITE TITLE AS: Matter of King v Cuomo

SUMMARY

Appeal, on constitutional grounds, from an order of the Appellate Division of the Supreme Court in the Third Judicial Department, entered June 4, 1992, which modified, on the law, and, as modified, affirmed a judgment of the Supreme Court (Robert C. Williams, J.), entered in Albany County, granting a motion by defendants-respondents to dismiss the complaint/petition in a combined declaratory judgment action and CPLR article 78 proceeding challenging the constitutionality of the bicameral recall procedure used by the Legislature to reacquire Assembly Bill No. 9592-A of 1990 from the Governor's desk. The modification consisted of reversing so much of the judgment as dismissed the complaint/petition, and declaring that the recall procedure utilized by the Legislature with reference to Assembly Bill No. 9592-A of 1990 was constitutional.

Matter of King v Cuomo, sub nom. Matter of Seymour v Cuomo, 180 AD2d 215, reversed.

OPINION OF THE COURT

Bellacosa, J.

The bicameral "recall" practice used by the Legislature to reacquire Assembly Bill No. 9592-A of 1990 from the Governor's desk is not authorized by article IV, § 7 of the New York State Constitution. The Constitution prescribes the respective powers of the Executive and the Legislative Branches as to how a passed bill becomes a law or is rejected. The order of the Appellate Division, therefore, should be reversed and the challenged procedure should be declared unconstitutional, but only prospectively.

Assembly Bill No. 9592-A, entitled "AN ACT to amend the agriculture and markets law, in relation to the siting of solid waste management-resource recovery facilities within agricultural districts," was passed by the Assembly and the Senate on June 28, 1990 and June 29, 1990, respectively. It was formally sent to the Governor on July 19, 1990. The next day, according to the official journals of the Legislature, the Assembly adopted a resolution, with which the Senate concurred, requesting that the Governor return the bill to the Legislature. The Executive Chamber accommodated the request on the same day.

Appellants brought their combined CPLR article 78 and declaratory judgment action seeking a ruling (1) that the method used by the Legislature to retrieve the passed bill is unconstitutional; and (2) that the passed bill, in effect, automatically became law because the Governor failed to act on it within 10 days of its delivery to his desk on July 19, 1990. Supreme Court dismissed the action and the Appellate Division modified to declare the recall practice constitutional. Appellants are before this Court by an appeal taken as of right on a substantial constitutional issue.*251

I.

Preliminarily, the State defendants argue that the Judicial Branch may not review the constitutionality of this recall practice, as it would be an intrusion on the inviolate roles of the separate law-making Branches. We conclude that the courts do not trespass "into the wholly internal affairs of the Legislature" *(Heimbach v State of New York,* 59 NY2d 891, 893, *appeal dismissed* 464 US 956) when they review and enforce a clear and unambiguous constitutional regimen of this nature. In *Heimbach v State of New York (supra),* by sharp contrast, the internal procedural issue involved how the Clerk of the Senate recorded and certified a roll call of votes *(compare, Matter of Board of Educ. v City of New York,* 41 NY2d 535, 538). Our precedents are firm that the "courts will always be available to resolve disputes concerning the scope of that authority which is granted by the Constitution to the other two branches of the government" *(Saxton v Carey,* 44 NY2d 545, 551; *New York State Bankers Assn. v Wetzler,* 81 NY2d 98, 102; *see also, Myers v United States,* 272 US 52, 116; *Matter of New York State Inspection, Sec. & Law Enforcement Empls. v Cuomo,* 64 NY2d 233, 239). That is precisely what is being done here *(see, Wolfe v McCaull,* 76 Va 876, 880 [1882] [constitutionality of recall procedure is a justiciable issue]).

The internal rules of the Assembly and the Senate, which reflect and even purport to create the recall practice, are entitled to respect. However, those rules cannot immunize or withdraw the subsisting question of constitutional law-making power from judicial review. Since the authority of the Legislature is "wholly derived from and dependent upon the Constitution" *(Matter of Sherrill v O'Brien,* 188 NY 185, 199), the discrete rules of the two houses do not constitute organic law and may not substitute for or substantially alter the plain and precise terms of that primary source of governing authority. The rule-making authority of article III, § 9 prescribes that "[e]ach house shall determine the rules of *its own proceedings"* (emphasis added). Contrary to the assertion of the dissent, that authorization cannot justify rules which extend beyond the Legislature's "own proceedings" and are inextricably intertwined with *proceedings* pending entirely before the Executive. These rules substantially affect Executive *proceedings* after the Legislature's proceedings, with respect to a passed bill, have formally ended by transmittal of the passed bill to the Governor's desk.

The challenged recall practice significantly unbalances the ***252** law-making options of the Legislature and the Executive beyond those set forth in the Constitution. By modifying the nondelegable obligations and options reposed in the Executive, the practice compromises the central law-making rubrics by adding an expedient and uncharted bypass. The Legislature must be guided and governed in this particular function by the Constitution, not by a self-generated additive *(see, People ex rel. Bolton v Albertson,* 55 NY 50, 55).

II.

Article IV, § 7 of the State Constitution prescribes how a bill becomes a law and explicitly allocates the distribution of authority and powers between the Executive and Legislative Branches. The key provision grants law-making authority from the People as follows:

"[e]very bill which shall have passed the senate and assembly shall, before it becomes a law, be presented to the governor; *if he approve, he shall sign it;* but *if not, he shall return it with his objections* to the house in which it shall have originated ... *[i]f any bill shall not be returned by the governor within ten days* (Sundays excepted) after it shall have been presented to him, *the same shall be a law in like manner as if he had signed it"* (emphasis added).

The description of the process is a model of civic simplicity: (1) Approval; (2) Rejection by Veto; or (3) Approval by Inaction. The Constitution thus expressly creates three routes by which a passed bill may become a law by gubernatorial action or inaction or be rejected by veto.

The putative authority of the Legislature to recall a passed bill once it has been formally transmitted to the Governor "is not found in the constitution" *(People v Devlin,* 33 NY 269, 277). We conclude, therefore, that the practice is not allowed under the Constitution. To permit the Legislature to use its general rule-making powers, pertaining to in-house procedures, to create this substantive authority is untenable. As this Court stated in *Devlin* "[w]hen both houses have ... finally passed a bill, and sent it to the governor, *they have exhausted their powers* upon it" *(id.,* at 277 [emphasis added]). That expression and principle apply with equal force here, even though in *Devlin* the recall was attempted by only one ***253** house rather than both *(see, Wolfe v McCaull,* 76 Va 876, 883, *supra).*

When language of a constitutional provision is plain and unambiguous, full effect should be given to "the intention of the framers ... as indicated by the language employed" and approved by the People *(Settle v Van Evrea,* 49 NY 280, 281 [1872]; *see also, People v Rathbone,* 145 NY 434, 438). In a related governance contest, this Court found "no justification ... for

departing from *the literal language of the constitutional provision" (Anderson v Regan,* 53 NY2d 356, 362 [emphasis added]). As we stated in *Settle v Van Evrea:*

"[I]t would be dangerous in the extreme to extend the operation and effect of a written Constitution by construction beyond the fair scope of its terms, merely because a restricted and more literal interpretation might be inconvenient or impolitic, or because a case may be supposed to be, to some extent, within the reasons which led to the introduction of some particular provision plain and precise in its terms.

"That would be *pro tanto* to establish a new Constitution and do for the people what they have not done for themselves" (49 NY 280, 281, *supra).*

Thus, the State's argument that the recall method, in practical effect and accommodation, merely fosters the underlying purpose of article IV, § 7 is unavailing *(see, New York State Bankers Assn. v Wetzler,* 81 NY2d 98, 104, *supra).*

If the guiding principle of statutory interpretation is to give effect to the plain language *(Ball v Allstate Ins. Co.,* 81 NY2d 22, 25; *Debevoise & Plimpton v New York State Dept. of Taxation & Fin.,* 80 NY2d 657, 661; McKinney's Cons Laws of NY, Book 1, Statutes § 94), "[e]specially should this be so in the interpretation of a written Constitution, an instrument framed deliberately and with care, and adopted by the people as the organic law of the State" *(Settle v Van Evrea,* 49 NY, at 281, *supra).* These guiding principles do not allow for interstitial and interpretative gloss by the courts or by the other Branches themselves that substantially alters the specified law-making regimen. Courts do not have the leeway to construe their way around a self-evident constitutional provision by validating an inconsistent "practice and usage of those charged with implementing the laws" *(Anderson v Regan,* 53 NY2d 356, 362, *supra; see also,* ***254** *People ex rel. Burby v Howland,* 155 NY 270, 282; *People ex rel. Crowell v Lawrence,* 36 Barb 177, *affd* 41 NY 137; *People ex rel. Bolton v Albertson,* 55 NY 50, 55, *supra).*

The New York Legislature's long-standing recall practice has little more than time and expediency to sustain it. However, the end cannot justify the means, and the Legislature, even with the Executive's acquiescence, cannot place itself outside the express mandate of the Constitution. We do not believe that supplementation of the Constitution in this fashion is a manifestation of the will of the People. Rather, it may be seen as a substitution of the People's will expressed directly in the Constitution.

The Governor has been referred to as the "controlling element" of the legislative system (4 Lincoln, The Constitutional History of New York, at 494 [1906]). The recall practice unbalances the constitutional law-making equation, which expressly shifts power solely to the Executive upon passage of a bill by both houses and its transmittal to the Executive. By the ultra vires recall method, the Legislature significantly suspends and interrupts the mandated regimen and modifies the distribution of authority and the complementing roles of the two law-making Branches. It thus undermines the constitutionally proclaimed, deliberative process upon which all people are on notice and may rely. Realistically and practically, it varies the roles set forth with such careful and plain precision in the constitutional charter. The limbo status to which a passed bill is thus consigned withdraws from or allows evasion of the assigned power granted only to the Executive to approve or veto a passed bill or to allow it to go into effect after 10 days of inaction.

Though some practical and theoretical support may be mustered for this expedient custom *(see, e.g.,* 4 Lincoln, *op. cit.,* at 501), we cannot endorse it. Courteous and cooperative actions and relations between the two law-making Branches are surely desirable and helpful, but those policy and governance arguments do not address the issue to be decided. Moreover, we cannot take that aspirational route to justify this unauthorized methodology.

The inappropriateness of this enterprise, an "extraconstitutional method for resolving differences between the legislature and the governor," also outweighs the claimed convenience (Zimmerman, The Government and Politics of New York State, at 152). For example, "[t]his procedure 'creates a negotiating ***255** situation in which, under the threat of a full veto, the legislature may recall a bill and make changes in it desired by the governor, thus allowing him to exercise *de facto* amendatory power' "(Fisher and Devins, *How Successfully Can the States' Item Veto be Transferred to the President?,* 75 Geo LJ 159, 182, quoting Benjamin, *The Diffusion of the Governor's Veto Power,* 55 State Govt 99, 104 [1982]).

Additionally, the recall practice "affords interest groups another opportunity to amend or kill certain bills" (Zimmerman, *op. cit.,* at 152), shielded from the public scrutiny which accompanies the initial consideration and passage of a bill. This "does not promote public confidence in the legislature as an institution" because "it is difficult for citizens to determine the location in the legislative process of a bill that may be of great importance to them" *(id.,* at 145, 152). Since only "insiders" are likely to know or be able to discover the private arrangements between the Legislature and Executive when the recall method is employed, open government would suffer a significant setback if the courts were to countenance this long-standing practice.

In sum, the practice undermines the integrity of the law-making process as well as the underlying rationale for the demarcation of authority and power in this process. Requiring that the Legislature adhere to this constitutional mandate is not some hypertechnical insistence of form over substance, but rather ensures that the central law-making function remains reliable, consistent and exposed to civic scrutiny and involvement.

We are satisfied also that legitimate correction of mere technical oversights or errors in passed bills may be accomplished by chapter amendments, through messages of necessity and other available mechanisms. It is no justification for an extraconstitutional practice that it is well intended and efficient, for the day may come when it is not so altruistically exercised.

Appellants are entitled, therefore, to a judicial declaration that the recall practice is not constitutionally authorized.

III.

The particular remedy and relief appropriate to this case is a critically distinct issue. Appellants seek an order compelling the Secretary of State to execute a certificate that Assembly Bill No. 9592-A became law on or about July 30, 1990. ***256** Though the recall practice is not constitutionally authorized, neither is the mandamus relief warranted.

Despite the removal of the subject bill from the Governor's desk, logic and sound public policy do not compel or persuade us to treat the bill in this case as having been on the Executive's desk for the requisite 10 days, within the meaning of article IV, § 7. Also, the bill in question lapsed when the 1990 session of the Legislature ended, and resuscitation by judicial decree in the fashion requested would be a disproportionate remedy and would " 'wreak more havoc in society than society's interest in stability will tolerate' " *(Gager v White,* 53 NY2d 475, 483, *cert denied sub nom. Guertin Co. v Cachat,* 454 US 1086; *see also, Hurd v City of Buffalo,* 41 AD2d 402, *affd* 34 NY2d 628). Prospective application of a new constitutional rule is not uncommon where it would have a "broad, unsettling effect" *(Matter of McCann v Scaduto,* 71 NY2d 164, 178; *see also, Foss v City of Rochester,* 65 NY2d 247, 260; *City of Rochester v Chiarella,* 65 NY2d 92, 96; *Gurnee v Aetna Life & Cas. Co.,* 55 NY2d 184, 192- 193, *cert denied* 459 US 837; *Hurd v City of Buffalo,* 41 AD2d 402, *supra; New York Pub. Interest Research Group v Steingut,* 40 NY2d 250, 261). It is well established that "the courts should not act 'so as to cause disorder and confusion in public affairs even though there may be a strict legal right' " *(Matter of Hellerstein v Assessor of Town of Islip,* 37 NY2d 1, 13-14, quoting *Matter of Andresen v Rice,* 277 NY 271, 282 [declaring unconstitutional one of the oldest statutes and practices in the history of New York dating back to 1788]).

The recall practice has been in operation for over a century *(see,* 4 Lincoln, *op. cit.,* at 499-501). Between 1932 and 1980 a total of 2,131 bills were recalled; while most bills are recalled only once, in 1939, 1963, 1966, 1968 and 1976 a single bill was recalled three times and in 1977 three bills were recalled three times *(see,* Zimmerman, *op. cit.,* at 149-151; *see also,* Fisher and Devins, *How Successfully Can the States' Item Veto be Transferred to the President?,* 75 Geo LJ 159, 182). Often a bill that has been recalled is never resubmitted to the Governor *(see,* Zimmerman, *op. cit.,* at 150-151 [700 of the 2,131 bills recalled never resubmitted]). It is impossible to calculate how many, and which, bills would be affected by a ritualistic approach to the relief related to our declaration that the recall practice is not constitutionally authorized. In addition, despite the mitigation from the short four-month Statute of Limitations (CPLR 217), a retroactive ruling, or even a ruling ***257** with resuscitative effect, in the instant case would cause profoundly uncertain effects in particular and unwarranted "disorder and confusion" *(Matter of Hellerstein v Assessor of Town of Islip,* 37 NY2d, at 14, *supra).*

Accordingly, the order of the Appellate Division should be reversed, with costs, and the bicameral recall practice should be declared unconstitutional prospectively from this date forward.

Chief Judge Kaye and Judges Simons and Titone concur with Judge Bellacosa; Judge Smith dissents in part in a separate opinion in which Judge Hancock, Jr., concurs.

Order reversed, with costs, and judgment granted in accordance with the opinion herein.***263**

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People v. Angela Thompson

(Ct. imposed mandatory draconian life
sentence under Rockefeller Drug Laws)
83 N Y 2d 477, at 488 – Dissenting Opinion [4-2] [1994]

New York
Official Reports

83 N.Y.2d 477, 633 N.E.2d 1074, 611 N.Y.S.2d 470

The People of the State of New York, Appellant,
v.
Angela C. Thompson, Respondent.

Court of Appeals of New York
36
Argued February 10, 1994;
Decided March 30, 1994

CITE TITLE AS: People v Thompson

SUMMARY

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the First Judicial Department, from so much of an order of that Court, entered April 27, 1993, as affirmed a sentence of the Supreme Court (Juanita Bing Newton, J.), imposed in New York County following defendant's conviction of criminal sale of a controlled substance in the first degree after a jury trial, sentencing her to a prison term of 8 years to life.

People v Thompson, 190 AD2d 162, reversed.

Bellacosa, J.

(Dissenting). Judge Ciparick and I respectfully dissent and vote to affirm the order of the Appellate Division which upheld the sentence imposed on defendant by the trial court. By reversing the sentence, the Court of Appeals today compels the resentence of defendant to a mandatory minimum of 15 years to life imprisonment. The Court rules that this more severe sentence is required to effectuate the will of the Legislature, expressed more than 20 years ago as part of the frustratingly decried, yet intractably operative, Rockefeller Drug Sentencing Laws.

We agree with the courts below that this new fate visited upon Angela Thompson--a near doubling of her minimum sentence from 8 years to 15 years--is not jurisprudentially required. Indeed, when this Court facially upheld the constitutionality of this draconian sentencing scheme, it expressed the qualification that wise adjudication on an as-applied basis should deal with cases that crossed the line of cruel and unusual punishment, denominated generically at that time as rare exceptions *(see, People v Broadie [and seven other discrete cases],* 37 NY2d 100, 119, *cert denied* 423 US 950; *see also, People v Jones,* 39 NY2d 694, 698 [Breitel, Ch. J., dissenting]; US Const 8th Amend; NY Const, art I, §5).

The only issue before the Court, on the People's appeal in this case, is whether sentencing this woman to less than the mandatory term of 15 years to life imprisonment is warranted. We conclude that the circumstances of this case support the prior courts' rulings that the lesser period of incarceration is warranted because the mandatory sentence inflicts a grossly disproportionate penalty on defendant. This case falls within *Broadie's* "rare case" exception, examined, ***489** understood and applied in the brighter light of contemporary standards, based on 20 years of experience and empirical data *(see,* Appendix). Our conclusion in no way condones or minimizes the volitional, personal responsibility of defendant for serious criminal conduct which, upon conviction, brought her, by the judgment of the sentencing court, a minimum of eight years actual imprisonment.

I.

Each side in this case has argued vigorously and has added gloss, characterizations and inferences with respect to the facts. The essential and controlling features of this case, however, are essentially uncontroverted. Angela Thompson, a 17-year-old woman, was arrested in 1988 after making a single sale of cocaine to an undercover police officer at her uncle's residence.

The presentence report shows that defendant grew up in a variety of places and under several different custodial arrangements. Her uncle, Norman Little, was running a major drug-selling operation in Harlem, and at some point he employed her in his illicit enterprise. Eventually, the uncle turned out to be Angela Thompson's codefendant, though the police acknowledged that he was the principal target of their investigation and prosecution. In an effort to arrest the uncle and shut down this major drug operation, the police made four separate undercover drug purchases on four different days. Defendant had made one sale to an undercover officer of 214 vials of crack cocaine with a street value of $2,000. During the course of the sale, defendant's uncle entered the room and stood between defendant and the undercover police officer for a short time. The weight was 2.13 grams over the two-ounce (56 grams) limit to qualify as a class A-I felony sale. A grain, which is the smallest unit in the system of weights used in the United States, weighs .0648 of a gram. The additional 33 grains in this case weighed 2.13 grams, which is less than one tenth of an ounce.

Following her arrest, defendant was charged with an A-I felony. The People offered her a plea bargain carrying a sentence of three years to life and, just before trial, four years to life, but she rejected both offers. She was on $1,000 bail until the trial and showed up for every court date. Having put the People to their proof at trial, she was convicted of the A-I felony.***490**

Justice Bing Newton, the Trial Justice, heard all the evidence and saw all the necessary participants. She sentenced defendant to eight years to life and trenchantly commented:

"Notwithstanding the Legislative desire to create mandatory minimum sentencing guidelines for the State of New York, I think it's still the law of this country that the punishment must fit the crime. ... The question is whether or not the defendant is the type of person, by the facts presented in this case, such that, Constitutionally, this would be inappropriate, to serve 15 years to life. I know the defendant committed this crime when she was 17 years of age. ... I will note that while defendant was found in the location at the time the search warrant was executed, that this indicates a single transgression of the law. ... Her uncle, Norman Little, obviously is the person who put her in this position. ... *The problem with these [Broadie] guidelines are that they are not compelling and clear. So, the Court does not have a lot of guidance.* ... I conclude that the defendant, to be sentenced to 15 years to life, would be getting an unconstitutional sentence. ... I make this determination ... applying the Constitutional standards that are outlined in *[Broadie]* to this case, *and therefore, [I] leav[e] it to the Appellate Court to ... give guidance as to when it is appropriate to apply the [Broadie] case" (People v Thompson,* Sup Ct, NY County, Dec. 11, 1989, Bing Newton, J., indictment No. 03994-89, Sentencing Minutes [emphasis added]).

On her appeal to the Appellate Division, defendant encountered the People's cross appeal claiming that her sentence was illegal and too low on the minimum side. The prosecution's strategy, however legally unassailable, is entitled to be viewed somewhat skeptically in view of the context of the lesser pretrial offers, the sentence it consented to for the uncle, and the initial failure to appeal the "illegality" of the sentence until defendant pursued her judgment appeal rights. Indeed, the prosecutor in oral argument of this case before this Court, with no basis in the record, declared that there is a "small group of judges applying their own *black-robed predilections* on this issue," including, apparently, the Trial Justice and Associate Justices constituting the majority at the Appellate ***491** Division in this case. This disrespectful characterization should be rejected categorically because all the Justices and Judges in this case, and presumptively in all others, act out of a conscientious oath-driven duty to render justice ideally and in the given case to all sides equally.

The Appellate Division, in any event, rejected the People's effort to ratchet defendant's sentence up to 15 years to life, though it also ruled against her on her appeal. Justice Asch, for the Appellate Division majority, interpreted the record and arguments, adding this comment with respect to the sentence on this defendant, by then 22 years of age:

"A system of justice which mandates a 15-year prison sentence, as a minimum, on a 17-year-old girl, who was not cared for by parents and *under the domination of her uncle* ... also mandates a lifetime of crime and imposes on the community, upon her release, a woman who may be incapable of anything but criminal activity. If we do not attempt to rehabilitate such young people, we condemn ourselves as well" (190 AD2d 162, 167 [Asch, J.] [emphasis added]).

The prior courts rightly considered Angela Thompson's character and personal circumstances. We are convinced that they had the best vantage point to draw inferences, characterizations and interpretations from the record, a rather ordinary and traditional deference in such matters.

Notably, defendant's uncle was arrested on 12 counts, including four separate sales on different dates. The People consented

to his plea of guilty to one count of criminal sale of controlled substance in the first degree, with a sentence of 15 years to life. Defendant Thompson and at least one other similarly situated young woman (against whom charges were dismissed) were only coincidentally present at the time of the execution of the search warrant and caught in the net spread to catch Norman Little. Defendant's conviction constitutes her entire criminal record and no other criminal activity appears in her presentence report data. On the other hand, despite his three prior felony and seven prior misdemeanor convictions, the uncle received the identical sentence now superimposed on Angela Thompson. These juxtaposed sentences are substantively and analytically no different from the kind of disproportionate sentencing condemned by former Chief Judge Breitel in his passionate dissenting opinion in ***492** *People v Jones* (39 NY2d 694, 698, *supra* [four *pounds* of heroin]; *see,* Brennan, *Reason, Passion, and "The Progress of the Law"* [Cardozo Memorial Lecture, delivered before the Association of the Bar of the City of New York], 10 Cardozo L Rev 3, 12 [1988]). Indeed, defense counsel argued, without contradiction, another aspect of disproportionality at the sentencing of Angela Thompson:

"There was also, during this arrest, the arrest of a third female, who could have been charged with an A-I felony, a young lady, I believe similar in age to the defendant. She had made or assisted in the sale, A-I weight, to Officer Dante Grey. And during the hearings it came out, I believe, her nickname was Shorty. But, my memory could be wrong, that the District Attorney's Office decided not to prosecute her because they were afraid at that time that if they had arrested her, Mr. Little would know who the undercover officer was at that time, and this was early on in the proceedings. Now, granted, that's a very legitimate concern, and I fully understand why the People would make that type of decision, to protect their undercover, which is, of course, a concern to everybody. But it shows how another young individual, just like Miss Thompson, doing the exact same act, because of discretion decisions by the District Attorney's Office, is not standing here today, before the Court, facing these consequences. That she's not being sentenced, she hasn't even been charged. It's alleged she did the same thing that Miss Thompson did on one occasion. The undercover testified, I believe, truthfully at trial. He never saw Angela Thompson on any other date during this investigation, before arrests were made, other than that one date that the sale was made. This was over a six week period of time, he's back and forth to that location. It shows the type of involvement Miss Thompson had, if we accept the jury's verdict, which, of course, Miss Thompson does not, but I have to face as her attorney. That type of disparity where individuals are not prosecuted for legitimate reasons, and because of the fear it might have that they might give information to someone else who has been arrested, and the type ***493** of disparity where Mr. Little receives the same sentence that this defendant faces today, although he chose to plead guilty and she chose to go to trial, maintaining her innocence, shows why this particular case is not a case where 15 to life should be given to the defendant." *(People v Thompson,* Sup Ct, NY County, Dec. 11, 1989, Bing Newton, J., indictment No. 03994-89, Sentencing Minutes.)

The final outcome of this case requires no characterization, as it speaks starkly for itself. Angela Thompson must now be informed, five years after the original sentence and after having served nearly two thirds of her original minimum sentence, that a new fateful day of reckoning has arrived, as the Court of Appeals today effectuates the near doubling of her minimum sentence.

II.

The mandatory minimum sentence of 15 years with the prospect of incarceration for life represents one of the most severe penalties prescribed under New York State law. It reflects society's and the Legislature's high level of condemnation for the most reprehensible crimes and the most serious offenders, e.g., murder in the first and second degrees (Penal Law §§ 125.27, 125.25), kidnapping in the first degree (Penal Law § 135.25), and arson in the first degree (Penal Law § 150.20).

As noted, Angela Thompson's sale was slightly over the required two-ounce weight to qualify as an A-I crime *(compare, People v Ryan,* 82 NY2d 497 [932.8 grams of mushrooms containing approximately 5,303 milligrams of controlled substance psilocybin]). The weight in this case was bumped up to A-I level by specific importuning from the undercover buyer-officer. The additional one tenth of an ounce, by the ruling of this Court today, thus adds up to seven more minimum years of imprisonment beyond that prescribed by the trial-sentencing Justice. Indeed, had those 2.13 grams not been tacked on, defendant would have been accountable for an A-II sale, whose mandatory minimum sentence is only three years (Penal Law § 70.00 [3] [a] [ii]).

By tendering this dissenting view, we intend no disrespect for the Legislature's prerogatives in prescribing the types of criminal conduct and allocating appropriate punishment levels. ***494** This Court has acknowledged, after all, the Legislature's power to severely limit the discretion that courts may exercise in sentencing decisions *(see, People v Broadie,* 37 NY2d, at 123, *supra;* Penal Law § 70.00). Correspondingly, however, respect must be accorded the principle that "the Constitution of this state confers power upon the courts to declare void legislative acts prescribing punishments for crime, in fact cruel and unusual" *(People ex rel. Kemmler v Durston,* 119 NY 569, 577 [the first electrocution death sentence held not cruel and unusual because it was "immediate" and "painless", two propositions that are surely debatable in the wake of slightly over

100 years of experience and empirical data about electrocutions], *affd sub nom. In re Kemmler,* 136 US 436; *People v Broadie, supra,* at 119; *see,* NY Const, art I, §5). While courts will grant appropriate deference to the Legislature regarding its presumptively constitutional sentencing promulgations, and to the Executive in the person and office of local prosecutors for implementing those sentences, no penalty should be entirely off limits to appropriate judicial responsibility. Rather, courts are obliged to scrutinize the sentences that they impose or review against applicable constitutional principles.

Historical analysis reveals that the constitutional prohibition against cruel and unusual punishment found under the State Constitution was primarily directed at sadistic and purely degrading cruelty, including all forms of torture, barbarity or inhumane treatment *(see, People v Broadie,* 37 NY2d, at 124, *supra;* Mulligan, *Cruel and Unusual Punishments: The Proportionality Rule,* 47 Fordham L Rev 639, 640-645 [1979]; *see also, Matter of Bayard,* 25 Hun 546, 549; Ordinance of 1638, in O'Callaghan, Laws and Ordinances of New Netherland, 1638-1674, at 10, 12 [crimes should be punished "according to the circumstance of the case"]). Courts as far back as colonial New York considered on sentencing the "baseness of the offense, the behavior and the age and standing of the defendant" *(see,* Goebel and Naughton, Law Enforcement in Colonial New York, at 682, 702). Moreover, the evolving nature of the protection against cruel and inhuman punishment under the United States and New York State Constitutions includes examination of proportionality under contemporary standards *(see, e.g., Harmelin v Michigan,* 501 US 957 [650 grams of cocaine]; *Solem v Helm,* 463 US 277; *Robinson v California,* 370 US 660; *Weems v United States,* 217 US 349; *People v Broadie,* 37 NY2d 100, *supra;* ***495** *People v Davis,* 33 NY2d 221, *cert denied* 416 US 973; Berger, *Justice Brennan vs. The Constitution,* 29 BC L Rev 787, 787, n 4 [1988] [citing Address by Justice Brennan, Georgetown University, Washington, D.C., *printed in* The Great Debate: Interpreting Our Written Constitution, at 11 (Federalist Society 1986)]).

This is the first case since deciding *People v Broadie* (37 NY2d 100, *supra)* in which this Court, instead of leaving undisturbed the sentences below, substitutes the more severe, legislatively mandated minimum sentence in lieu of the sentence imposed by the prior courts in their effort to arrive at a constitutional, proportioned and appropriate sentence *(see, People v McCleese,* 71 NY2d 839; *People v Ortiz,* 64 NY2d 997; *People v Donovan,* 59 NY2d 834, *affg* 89 AD2d 968; *People v Jones,* 39 NY2d 694, *supra; compare and contrast, People v Martinez,* 191 AD2d 306 [sentence of 4 1/2 to 9 years for criminal sale of a controlled substance in the third degree reduced to 2 to 4 years]; *People v Skeffery,* 188 AD2d 438 [mandatory sentence of 15 years to life for criminal possession of a controlled substance in the first degree reduced to 5 years to life]; *People v Andrews,* 176 AD2d 530, *lv denied* 79 NY2d 918 [mandatory minimum sentence of 15 years to life for A-I drug felony reduced to five years to life to avoid being "cruel and unusual"]; *People v Ramirez,* NYLJ, Oct. 1, 1993, at 22, col 3 [17-year-old defendant given sentence of probation following conviction of criminal sale of controlled substance in the second degree]; *People v Royster,* 117 Misc 2d 112 [defendant sentenced to five years probation after pleading guilty to one count of criminal sale of a controlled substance in the third degree]).

In the instant case, the Court, by overturning the opposite views of both prior courts, effectively renders a first instance judgment that an Eighth Amendment transgression and the *Broadie* rare case exception are not present. The reversal of a lesser sentence binds defendant to the legislative yoke of the Rockefeller drug "solution" of the 70's. In practical terms, it allows, ironically, no judicial sentencing discretion or departure from absolute mandates in the particular framework of this case and especially in the face of some enlightenment in the 90's concerning the penological consequences of wholesale mandatory sentencings.

This area of the law also still lacks sufficient criteria by which the parties, the Bench and the Bar would be guided in ***496** how or when to appropriately request or invoke this court-decreed protection. The trial court expressed on the record the particular difficulty of sentencing under *Broadie's* continued lack of specificity. If any realistic value is to be salvaged from the otherwise illusory promise of *Broadie,* that guidance should be forthcoming so as to justify the decision in this case and to test future ones.

In suggesting some factors as a start for the Court to build and articulate a useful and quite appropriate test in a real case setting, we by no means intend that any one or all of these factors should be determinative in a given case. While the Court cannot substitute its role for that of the Legislature and declare a comprehensive code, the Judiciary, in our respectful view, should provide some texture, context and substance beyond an exhortation that rare cases may result in departures from the mandatory sentences.

Some years ago, faced with a similar vacuum of legislative criteria for the exercise of the interests of justice dismissal power, the Judiciary filled the interstice *(People v Clayton,* 41 AD2d 204 [Hopkins, J.]). Spurred by that traditional common-law development *(see also, People v Belge,* 41 NY2d 60, 62), the Legislature eventually codified criteria for nisi prius guidance and appellate review purposes (CPL 210.40). *Broadie's* atrophying rare case exception has apparently stimulated particular legislative attention in a bill that, arguably and as finally enacted, might allow an interests-of-justice consideration of a reduction in just such a case as the instant one *(see,* 1994 NY Assembly Bill A 7693). Angela Thompson's sentence, if this

bill were law, could be only 1 to 3 years. While legislative reform may be on the horizon, however, the courts cannot escape the obligation to decide this case under prevailing, evolving principles which might, as with *Clayton* and *Belge,* rouse appropriate legislative action.

We propose for this case, for future cases and until remedial legislation is a reality, that the analysis of a sentencing and appellate reviewing court under the rare case exception may include (1) objective criteria including, but not limited to: (i) the gravity and nature of the offense, (ii) the relative culpability of the defendant, (iii) the proportionality with other similarly situated or differentiated defendants; and (2) subjective criteria involving the history of the particular defendant. Trial courts can be counted on to competently and responsibly apply and particularize the factors and balance the enumerated objective and subjective criteria.***497**

Interestingly, comparable assessments are duly entrusted for lesser liberty matters under narrow, judicially created review standards for administrative agency disciplinary determinations *(see, Matter of Pell v Board of Educ.,* 34 NY2d 222). If a penalty "shocks the judicial conscience" in that field of law, Judges strike it down. In this different but parallel field, where the most serious liberty interests are at stake, this cruel and unusual mandatory sentence shocked the conscience of the Trial Justice, the Appellate Division, and it shocks at least two Judges at this final level of review. We respect the fact that reasonable minds might disagree on the application of available criteria, and that we and other courts could conclude differently as to whether a particular defendant and case qualifies as a rare case exception. As-applied constitutional adjudication does not, however, justify the failure to articulate and apply contemporary sentencing guidelines which would make our respective and respectable differences on application in this case more understandable.

More specifically, the pertinent factors should include any exceptional special circumstances inhering in the nature of the criminal transaction itself. Since the gravity of drug crimes is keyed to the weight of the drugs sold or possessed, the amount of the drugs in weight and dollars should be part of the exceptional sentencing appraisal. Selling pounds of an illegal drug with a value of hundreds of thousands or even millions of dollars should not be per se homogenized with relatively and significantly smaller transactions of a few hundred or thousands of dollars. Scale is key and is relevant to the proportionality analysis. There could also be an assessment of the conduct and actions of the law enforcement personnel from the time of the commission of the crime, if they are involved, through the prosecution phases. Consideration should, of course, be given to the number or length of times that a defendant participated in criminal activity and whether a sentence less than the most severe mandatory variety would deprecate the seriousness of the particular crime in general, in relation to other participants charged and uncharged, and in relation to other serious crimes of equal classification rank.

Next, a defendant's relative pecking order, as subservient or dependent, contrasted to those with relatively higher and especially, as here, the highest hierarchical power and control, is pertinent. The degree of sophistication generally and with ***498** respect to the particular criminality, as well as the precipitating agent or cause of the crime, have some bearing on appropriate and proportionate sentencing. An employee-serf-like defendant who has no entrepreneurial role and financial stake, should not be treated at the same level as the kingpins and bosses *(People v Jones,* 39 NY2d 694, 698, supra. [Breitel, Ch. J., dissenting]).

We emphasize that our view does not create or promote a per se drug millhand or courier rare case exception, nor does youth or any particular age alone justify the invocation of the rare case exception. While those features are appropriate to the over-all particular analysis, they do not constitute their own artificial, automatic entitlement to departure from the prescribed mandatory minimum.

In assessing proportionality of the punishment, traditional sentencing concepts such as the character of a defendant, personal history and special circumstances are indispensable. This facet would include the age, school record, employment history and family circumstances. This review is limited to presentencing activities. Any personal or family history, or rehabilitation following sentencing while in prison, cannot be considered on our constitutional inquiry on the direct appeal relating to the judgment of conviction but is reserved for collateral judicial review, correctional department considerations and even clemency applications *(see,* People's motion to strike portions of respondent's brief and Appendix, granted simultaneously with this decision on the People's appeal). Included, too, would be consideration of the proportionality of the sentence between persons more seriously involved in the same offense, like the uncle codefendant here, who received the same or lesser sentence as defendant and other young woman who apparently was not charged at all. Empirical data and analysis may even be developed or discovered from official correctional records and reports to show that these kinds of mandatory sentences fall disproportionately and exploitively on young minority recruits including, as in this case, an African-American teenage woman *(see,* US Dept of Justice, Bureau of Justice Statistics, Sentencing in the Federal Courts: Does Race Matter? The Transition to Sentencing Guidelines, 1986-1990, at 10-14 [Executive Summary] [1993] [wide sentencing disparities based on race discovered in crack cocaine crime category]). Moreover, the wholesale enlistment of numerous youngsters into drug trafficking is not a reason for the Judiciary to preclude the use of the *Broadie* rare case exception. ***499** Rather, it

represents a greater urgency and responsibility to apply it responsibly and appropriately, even if some additional individuals would qualify for relatively more lenient, but also more proportionate, sentencing.

Not to be overlooked either is the fact that appellate review would be available under identifiable and measurable standards as we have suggested *(see, People v Belge,* 41 NY2d 60, *supra).* In the highest judicial tradition, we urge nuanced exceptional sentence exertions justified by on-the-record explication, not some open-ended discretion. No one should forget that public officers in the other two branches of government are not inherently or presumptively wiser and more conscientious than judicial officers--or vice versa--and the other branches have not been invested with unilateral power over the liberty of individuals. To the contrary, the unique responsibility of sentencing is traditionally reposed in neutral Magistrates, not in partisan prosecutors. Ultimately, it is Judges who bear the singular, awesome duty of facing defendants in open court on the day of reckoning to declare the law's sentencing judgment.

III.

In sum, this case focuses on the distribution of the power of sentencing adjudication in a particular category and framework. It implicates and resolves who really exercises that momentous duty, under what circumstances, and with what respectful checks-and-balances.

We decided to dissent because we concluded the Judiciary has more power and responsibility than it is undertaking in this case and in this critical adjudicative area. The exception from the mandatory absolutes of the sentencing scheme was described generally in *People v Broadie* (37 NY2d 100, *supra;* [Breitel, Ch. J.]). While that aspect was a key ingredient to *Broadie's* holding, the originator of the idea ironically saw his equalizing qualification rejected when the Court first considered and ruled, 4 to 3, against invoking the reserved authority; it declined to declare a particular rare case exception in that drug factory millhand case *(People v Jones,* 39 NY2d 694, 698, *supra;* [Breitel, Ch. J., dissenting]). Today, the exhortation should be animated because it is buttressed by empirical data and a record that justifies resolute, differentiated sentencing *(compare, People v Bing,* 76 NY2d 331, 338; *see,* Appendix). The Court should not be deterred by floodgate speculation. Real criteria and appellate review are sufficient guardians against runaway sentencing exercises generally and in individual cases.***500**

What was not cruel and unusual in 1789 (ratification of Constitution) or 1888 (decision in *Kemmler* case with his execution) may well be unconstitutional in 1994. Similarly, what was not rare in the subset of the cruel and unusual punishment concept in 1975 *(Broadie)* and 1976 *(Jones)* may be ripe for such classification today. We believe that constitutional adjudication is a dynamic, evolving process, not a static set of revered relics. The genius of Chief Judge Breitel's exception should be given life today, not be frozen in the time and meaning of 20 years ago (Brennan, *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights,* 61 NYU L Rev 535, 544 [1986]; Berger, *Justice Brennan vs. The Constitution,* 29 BC L Rev 787, 787, n 4 [1988] [citing Address by Justice Brennan, Georgetown University, Washington, D.C., *printed in* The Great Debate: Interpreting Our Written Constitution, at 11 (Federalist Society 1986) ("[Constitutional i]nterpretation must account for the transformative purpose of the text")]).

Prosecutors, as Executive Branch officers, should not enjoy the power to shackle judicial responsibility while they zealously seek to incarcerate masses of criminal drug offenders *(compare, People v Roe,* 74 NY2d 20, 29, 35 [Bellacosa, J., dissenting] ["Some very disproportionate miscarriages of justice--this case is one of them--will certainly ensue from this prosecutorial leverage in elevating reckless manslaughter to murder."]). A balanced judicial role, envisioned as necessary by *Broadie* and exercised by prudent Trial Judges whose sentences would remain subject to the leavening, harmonizing review by the Appellate Divisions on appeal by prosecutors, is necessary. The prior courts in this case made a wise, humane, fair, bold and correct sentencing ruling, justified by the record, by their findings and by a host of the factors we have proposed. We should sustain their effort, not overturn it and stifle future efforts.

We conclude that the hardly lenient sentence of eight minimum years to life originally imposed on Angela Thompson should be upheld by affirming the prior courts as heralds of the arrival of *Broadie's* promise that a rare case exception does indeed exist.

Chief Judge Kaye and Judges Simons and Smith concur with Judge Levine; Judge Bellacosa dissents and votes to affirm in a separate opinion in which Judge Ciparick concurs; Judge Titone taking no part.

Order reversed, etc.***501**

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McCain v. Dinkins, N Y C Mayor, et al.

(Ct. upheld contempt finding against New York City
public officials as part of years of drawn-out homeless litigation)
84 N Y 2d 216 – Majority Opinion, Unanimous [1994]

84 N.Y.2d 216, 639 N.E.2d 1132, 616 N.Y.S.2d 335

Yvonne McCain et al., Respondents-Appellants,

v.

David N. Dinkins, as Mayor of the City of New York, et al., Appellants-Respondents, et al., Defendant.

In the Matter of Maria Lamboy et al., Respondents-Appellants,

v.

Barbara J. Sabol, as Administrator of the Human Resources Administration of the City of New York and as Commissioner of the New York City Department of Social Services, et al., Appellants-Respondents, et al., Defendant.

Karen Slade et al., Respondents-Appellants,

v.

David N. Dinkins, as Mayor of the City of New York, et al., Appellants-Respondents, et al., Defendant.

Court of Appeals of New York
58
Argued March 15, 1994;
Decided May 10, 1994

CITE TITLE AS: McCain v Dinkins

SUMMARY

Cross appeals, by permission of the Appellate Division of the Supreme Court in the First Judicial Department, from an order of that Court, entered July 29, 1993, which, in the three above-entitled actions and proceeding, (1) affirmed an order of the Supreme Court (Helen E. Freedman, J.), entered in New York County, (a) consolidating contempt motions, (b) granting motions to intervene, (c) joining Cesar Perales, Marsha Martin and Norman Steisel as defendants, (d) finding the City of New York to be in civil contempt of prior court orders, and (e) providing for further proceedings on the contempt motions against the individual defendants; and (2) modified, and, as modified, affirmed an order of that court (Helen E. Freedman, J.), entered in New York County, *inter alia,* (a) directing the City to pay fines to homeless families who stayed overnight in an Emergency Assistance Unit (EAU) before being given shelter, and (b) finding four New York City officials in civil contempt and directing them to appear separately at an EAU on one given night and remain at such EAU until all eligible families applying for emergency shelter before 12:00 midnight have been placed. The modification consisted of vacating the sanction against the individual defendants and remanding to the Supreme Court for the imposition of an appropriate sanction. The following question was certified by the Appellate Division: "Were the orders of Supreme Court, as affirmed and modified by this Court properly made?"

McCain v Dinkins, 192 AD2d 217, modified.*217

OPINION OF THE COURT

Bellacosa, J.

As if the seeming insolubility of society's efforts to house the homeless were not a daunting enough problem, a collateral consequence takes center judicial stage arising out of a series of long-standing lawsuits culminating in contempt adjudications against the City of New York and four City officials.

The City and the four appointed City officers are held in contempt of judicial orders for disobeying mandates in the underlying cases. Appellants include the City of New York; the New York City Human Resources Administration (HRA); former First Deputy Mayor Norman Steisel; former Human Resources Administration Commissioner Barbara J. Sabol; former HRA Executive Deputy Commissioner Jeffrey Carples, who is currently Acting Commissioner of the New York City Department of Homeless Services (DHS); and former HRA Deputy Commissioner Kenneth Murphy, who is currently Deputy Commissioner of DHS.***221**

By leave of the Appellate Division on the municipality's and the officials' main appeal, this Court affirms the portion of the Appellate Division order upholding Supreme Court's findings of civil contempt, including the monetary fines payable by the City. The cross appeal by Legal Aid on behalf of the aggrieved homeless persons should also result in an affirmance. We find justified the modification by the Appellate Division striking, as unwarranted here, the sanction that would have incarcerated the four City officials in Emergency Assistance Units (EAUs). However, while the actions of the City's four agents warrant affirmance of their adjudication of contempt, the Appellate Division's remittal for imposing a new sanction as to them serves no remedial purpose in this case where those agents no longer hold office or pertinent offices. Therefore, to that extent only, we modify to strike the remittal. With this denouement of the collateral contempt features of the underlying lawsuits virtually ended, the parties and newly responsible public officials should return their full attention and humane efforts to solving or ameliorating the core, substantive problem itself.

I.

The Appellate Division order acted on two orders of Supreme Court: (1) dated November 13, 1992, which adjudged New York City in civil contempt of judicial orders in specified cases; and (2) dated December 8, 1992 (a) directing New York City to pay fines to homeless families who stayed overnight in City EAU offices before being appropriately sheltered; (b) finding four City officials in contempt; and (c) directing the officials to stay overnight in EAUs.

The contempt adjudications stem from a trilogy of court orders in consolidated matters. The litigations, started in the early 1980's, were brought on behalf of homeless persons in order to induce the City to comply with the New York State Department of Social Services Administrative Directive, 83 ADM-47 of September 1983 (Directive), which states:

"Local districts must have procedures in place to ensure that homeless persons or persons in imminent danger of becoming homeless can apply for emergency housing whenever such emergency housing is needed ...

"Emergency housing must ... be provided immediately if a homeless person is determined eligible ...***222**

"When the individual is determined to be in immediate need and is not determined to be ineligible, an emergency placement shall be made and other needs met." (83 ADM-47 [IV] [A] [1] [a], [b]; [2] [b].)

The Directive established baseline standards of shelter, sanitation and safety by prohibiting the City of New York from holding families with children overnight in welfare offices while awaiting appropriate accommodations. The Directive was incorporated into court decrees after findings of violations by the City of the Directive *(McCain v Koch,* 117 AD2d 198, *revd in part* 70 NY2d 109 [1987], *on remand* 136 AD2d 473; *Matter of Lamboy v Gross,* 126 AD2d 265, *affg* 129 Misc 2d 564; *Slade v Koch,* 135 Misc 2d 283, *mod* 136 Misc 2d 119).

Broadly summarized, the *McCain* order directs the municipality to "[p]rovide lawful emergency housing to all eligible homeless families with children, such emergency housing not to include overnight accommodations at Emergency Assistance

Units or Income Maintenance Centers"; the *Lamboy* order prohibited the same City practice of holding families overnight in welfare offices because it violates the 1983 Administrative Directive, which requires that emergency housing "be provided immediately" to eligible homeless families; and the *Slade* order relates to baseline standards for sheltering pregnant women and infants. The three court orders establish compliance goals.

The voluminous record before us documents that the City and the four cited officials repeatedly failed to measure up to the essential compliance goals of these court orders, with "promises by City defendants to take specific actions to remedy [these] violations hav[ing] repeatedly been broken" (Sup Ct, NY County, Nov. 20, 1992, Freedman, J., index No. 41023/83). These officials tolerated homeless families with children being held overnight in welfare offices. Appellants do not deny that they failed to provide sufficient permanent housing and to fund all the homeless prevention initiatives they committed themselves to before Supreme Court in the November 1990 plan. Instead, they tender legally inexcusable reasons.

Homeless persons begin their quest for emergency shelter by entering an EAU. In theory, they enter an EAU office, fill out forms and, if determined eligible, are immediately placed ***223** in emergency housing *(see,* 83 ADM-47; *Matter of Lamboy v Gross,* 126 AD2d, at 267, *supra).* In practice, the municipality, which is unable to predict or prepare the EAUs for fluctuating demands, has left families with children in the EAUs overnight and in documented instances for several days. EAUs are offices with desks, chairs and tables, and are not designed or suitable to serve as any kind of dwelling space. The consequences of the City's practices include families sleeping on the chairs and on the floor, washing in the sinks of public restrooms, and suffering self-evidently unsanitary and unsafe traumas.

Appellants also do not dispute that homeless citizens were left to spend nights and days in the EAUs. They plead for the Court's understanding of the seemingly insurmountable shortage of housing to meet the problem, the crisis and the emergencies. They note that the supply and the uncontrollable influx of families and the unmatched demand are the dominating societal forces driving the homeless problem and evading plenary solution. They argue that they acted in good faith and to the best of a municipal ability to fulfill the court orders. In support of this claim, appellants recite increased demand and a series of failed strategies. In effect, they throw up their hands and say they did all they humanly or officially could do.

In the early 1980's, HRA found hotel rooms for approximately 800 homeless families. Most stayed just one or two months before moving into permanent housing. By 1983, when the *McCain* action began, there were 2,500 homeless families in hotels and shelters in New York City *(see,* HRA, Progress Report on the Five Year Plan for Housing and Assisting Homeless Families [Feb. 1989]). The number of families seeking emergency housing continued to rise as the 1980's "progressed" and families began staying in shelter systems for longer periods. Five years after *McCain* was instituted, the number of families in emergency housing had burst to over 5,000. The increasing demand was met by the City drafting more and more hotels into its "system". The use of hotels educed sharp criticism, especially for its effects on young mothers, single-parent families, and the children growing up in such settings and conditions.

In the late 1980's, the City acquiesced in fundamental changes in the family shelter system. The City Council enacted Local Law No. 19 in 1988 to require the City to eliminate ***224** the use of welfare hotels by April 1993. In the spring and summer of 1990, the City put almost every low-cost apartment into the program for homeless families and dropped the requirements that families in emergency housing wait first in hotel units before being assigned to apartments. This accelerated placement of homeless families into permanent housing produced dramatic results. By August 1990, the 3,600 families in over 60 hotels in 1987 dropped to only 147 families in three hotels in the entire emergency housing system.

As the elimination of the use of hotels came within grasp, demands for emergency housing surged. Hundreds more families per month rushed to HRA for shelter. HRA had anticipated and planned for 2,732 families for June 30, 1990. The actual number needed turned out to be 3,196 and that number jumped to 4,120 by June of 1991.

Appellants emphasize a particular aspect of their quandary. Instead of the number of homeless families being reduced by accelerating their movement into permanent apartments, the numbers dramatically increased. According to the Mayor's Commission on the Homeless, "[p]lacing thousands of homeless families, many of whom had only recently entered into the shelter system, into permanent housing appears to have contributed to an enormous surge of families entering the system in the latter part of 1990" (Report of NY City Commn on Homeless, at 73 [Feb. 1992]). The municipality and its cited officials claim that families began to see the shelter system as their best chance to acquire adequate dwellings and they, in turn, applied for emergency housing in greater numbers as word spread of the successful program--up to a point. Thus, the City fostered a greater demand and, ironically, a continuation or exacerbation of the crisis. By the end of the summer of 1990, the Department of Housing Preservation and Development ran out of apartments available for HRA to use. The supply of permanent housing apparently was exhausted from that source. The City seemed forced to return to the use of hotels or to keep the clients waiting in EAUs until there is an adequate opening. Neither constitutes an acceptable solution and certainly not compliance with the Directive or the extant "negotiated" judicial decrees. On the very morning of the issuance of contempt citations by Supreme Court Justice Freedman, the plaintiffs demonstrated ongoing violations with overnight stays of families at the EAUs.***225**

II.

A.

The contempt phase of this litigation saga was renewed in earnest in November 1992. Plaintiffs complained that the City and the four officials failed to live up to the letter and promise of the *Slade, McCain* and *Lamboy* orders. The previous contempt proceedings in 1990, after extensive discussions, led to a negotiated resolution with plaintiffs foregoing relief in return for the official commitment to implement a specific remedial plan. The first exertion in June of 1990 required the City to maintain a supply of lawful emergency and permanent housing units sufficient to meet the needs of all homeless families for emergency housing, and to compensate for shortfalls in the number of emergency housing units by substituting permanent housing. Because implementation came to naught, contempt proceedings were revived and Supreme Court directed the City to submit a new remedial plan. A November 1990 mandated plan emerged and constitutes the template against which the contempt violations at issue here were adjudicated. By November of 1992, Justice Freedman found detailed and repeated violations of the 1990 plan.

Matter of McCormick v Axelrod (59 NY2d 574; 583) and *Heard v Cuomo* (80 NY2d 684) were invoked to frame the issue whether lawful orders were knowingly disobeyed. Both Courts concluded that they had been and imposed contempt findings because "[t]he overnight housing of homeless families at EAUs is intolerable and clearly violates the prior orders of the IAS and this Court in *McCain v Koch* ... and *Matter of Lamboy v Gross"* (192 AD2d 217, 218). The notion of substantial compliance was rejected as "it is no defense that the municipal defendants were attempting to comply or acting in good faith" *(id.,* at 219, citing *Matter of Bonnie H. [Rose H.],* 145 AD2d 830, *lv dismissed* 74 NY2d 650). Found equally unavailing was the City's plight that total compliance in every instance was impossible.

Plaintiffs have sustained their burden for the courts to hold the City of New York and its four cited, appointed officials in contempt pursuant to section 753 (A) (3) of the Judiciary Law. It provides in relevant part:

"A court of record has power to punish, by fine and imprisonment, or either, a neglect or violation of duty, or other misconduct, by which a right or ***226** remedy of a party to a civil action or special proceeding, pending in the court may be defeated, impaired, impeded, or prejudiced, in any of the following cases ...

"3. A party to the action or special proceeding ... for any other disobedience to a lawful mandate of the court."

Civil contempt has as its aim the vindication of a private party to litigation and any sanction imposed upon the contemnor is designed to compensate the injured private party for the loss of or interference with the benefits of the mandate *(Matter of McCormick v Axelrod,* 59 NY2d 574, 583, *supra; State of New York v Unique Ideas,* 44 NY2d 345).

Although the line between the civil and criminal contempt may be difficult to draw in a given case and the same act may be punishable as both a civil and a criminal contempt, the element which escalates a contempt to criminal status is the level of willfulness associated with the conduct *(Matter of McCormick v Axelrod,* 59 NY2d 574, 583, *supra).* In the matters at issue, criminal contempt was not sought and is not in issue *(see, People ex rel. Stearns v Marr,* 181 NY 463, 471).

To sustain a civil contempt, a lawful judicial order expressing an unequivocal mandate must have been in effect and disobeyed *(see, e.g., Pereira v Pereira,* 35 NY2d 301, 308; *Matter of Spector v Allen,* 281 NY 251, 259; *Ketchum v Edwards,* 153 NY 534, 539; *Coan v Coan,* 86 AD2d 640, 641, *appeal dismissed* 56 NY2d 804). Moreover, the party to be held in contempt must have had knowledge of the order, although it is not necessary that the order actually have been served upon the party *(e.g., People ex rel. Stearns v Marr,* 181 NY 463, 470, *supra).* In addition, prejudice to the rights of a party to the litigation must be demonstrated *(see,* Judiciary Law § 753 [A]; *Matter of McCormick v Axelrod,* 59 NY2d 574, *supra).* We are satisfied that the City itself was justifiably held in contempt on this record.

We reject the City's argument that the 1983 Directive (83 ADM-47) that emergency housing be provided immediately could not be met. The record reflects that as many as 100 families were forced to stay in the EAU offices overnight on some days. The feasibility of obedience, however, is not before us at this time, nor are intractable or herculean municipal efforts of a financial or political variety. The case is before us with detailed and affirmed findings of a serious, significant ***227** and persisting failure to comply with judicial decrees framed and particularized in part by reluctant acquiescence and negotiation by the City itself. *Matter of Bonnie H. (Rose H.)* (145 AD2d 830, *lv dismissed* 74 NY2d 650, *supra)* is instructive:

"Judiciary Law § 753 (A) (1) provides that a court may punish for contempt the neglect or violation of a duty, or other misconduct, by disobedience to a lawful mandate of the court or a Judge thereof, as a result of which the right of a party in a civil action or special proceeding is defeated, impeded, impaired or prejudiced *(see, Matter of McCormick v Axelrod, ...).* Respondent's argument that he acted in good faith and in the best interests of the children is of no avail *(see, Matter of Sentry Armored Courier Corp. v New York City Off-Track Betting Corp.,* 75 AD2d 344; *Matter of Williamsville Teachers Assn. v Hatch,* 62 AD2d 1144). It is Family Court which makes the order of disposition of children found to be neglected (Family Ct Act § 115 [a] [i]; § 1013 [a]) and once the order is made, respondent has no discretion but to comply with that order" (145 AD2d 830, 831, *supra).*

Insurmountable proof of municipal noncompliance was assembled and no escape theories are available on this record. Courts are justified and enjoy few alternative options in such circumstances except to exercise their "inherent power to enforce compliance with their lawful orders through civil contempt" *(Shillitani v United States,* 384 US 364, 370). Since we agree that immediately means "immediately" *(see, Matter of Ayers v Coughlin,* 72 NY2d 346) and that overnight stays in the City EAUs are not permissible *(see, McCain v Koch,* 70 NY2d 109, *supra),* we should uphold the Appellate Division's determination that Justice Freedman was ultimately left with no alternative but to find contempt and acted on a cogently documented record. Indeed, on the morning of November 20, 1992, she was faced with the harsh reminder of noncompliance as more than 30 families with children were shown to have slept the previous night on the floors, chairs and tabletops of City EAUs.

B.

The four City officials, however, argue that they should be judged differently from the City. We discern no basis in law ***228** or the record, however, to absolve the individual agents of the City who performed or failed to perform the ordered acts, while holding the abstract principal, the City, responsible and in contempt for the very same failure to comply. The individual defendants were sufficiently aware of the prior orders in *McCain* and *Lamboy,* the prior contempt proceedings, and the

unacceptable and unauthorized circumstances and conditions surrounding the use of the EAUs *(see,* Sup Ct, NY County, Nov. 20, 1992, Freedman, J., at 23). The City and the individual contemnors had adequate and sufficient notice of decrees and the contempt proceedings against them for their individualized responsibility and noncompliance. The very agents invested by the City to administer the homeless shelter system can hardly be heard to complain that they were unaware of the court orders, which they had so directly and actively been attempting to comply with or avoid compliance with for over four years.

Furthermore, the individual officials were specifically responsible for fulfilling the City's municipal obligations to take appropriate steps to comply. Therefore, these individuals were properly held responsible personally for their failure to act for the benefit of their municipal principal--which could act only through them--by taking appropriate steps necessary to comply with the prior court orders *(see, Matter of McCormick v Axelrod,* 59 NY2d, at 583, *supra; Matter of Bonnie H. [Rose H.],* 145 AD2d 830, *supra; Matter of Ward v Buric,* 176 AD2d 571; *compare, Spallone v United States,* 493 US 265, 276). To hold otherwise on this record would create an unwarranted precedential loophole and exception for public officials to escape appropriate public accountability in judicial forums for failure to comply with court orders. The sanction and availability of contempt in such circumstances on a properly presented evidentiary record must be maintained. Governmental entities and their agents should, like any other party, be held to compliance and sanctions for indifference, dereliction or defiance of judicial decrees.

Thus, because we hold that the finding of contempt against the City is well supported on this record, we likewise rule against the responsible agents of the City. By like analysis, we are satisfied that the imposition of remedial fines against the City should suffice as the entire remedy for the conduct of the City and its agents in the circumstances and eventuations of the case.***229**

As to the imposition of civil contempt penalties imposed on the parties, we look to their remedial nature and effect *(State of New York v Unique Ideas,* 44 NY2d 345, *supra).* Supreme Court directed the City to pay fines to families not properly sheltered as required by the court orders during the period September 20, 1991 to November 20, 1992 in accordance with the denoted schedule *(see,* Sup Ct, NY County, Dec. 8, 1992, Freedman, J., at 7 [$50 for the first night, $100 awards per family per additional night]), which imposed fines to be directly paid to the aggrieved homeless families as "indemnification pursuant to Judiciary Law § 773" *(id.,* at 7).

These fines against the City are as remedial as could be developed within the discretionary, equitable powers of the courts under the unusual circumstances of these matters. Thus, we affirm the Supreme Court's imposition of these fine sanctions payable to those homeless families who were forced to spend nights at the EAUs with the confidence that these fines will serve as appropriate recompense for the failure to comply with the mandates of the courts *(Matter of Department of Envtl. Protection v Department of Envtl. Conservation,* 70 NY2d 233, 239).

III.

On the plaintiffs' cross appeal, seeking to reinstate the sanction of overnight "stays" imposed on the individual officials, we agree with the Appellate Division's unanimous modification and we essentially affirm that portion of the order. While "remedial powers of an equity court must be adequate to the task ... they are not unlimited" *(Whitcomb v Chavis,* 403 US 124, 161). Thus, in selecting contempt sanctions, a court is obliged to use the " ' "least possible power adequate to the end proposed" ' " *(Spallone v United States,* 493 US 265, 276, *supra,* quoting *Anderson v Dunn,* 6 Wheat [19 US] 204, 231). We agree with the Appellate Division that, in this case, the unusual circumstances of this municipal government problem of mammoth proportions and complexity do not warrant the imposition on appointed officials of overnight stays in EAUs *(see, N. A. Dev. Co. v Jones,* 99 AD2d 238, 240; *see also, State of New York v Unique Ideas,* 44 NY2d 345, *supra; People ex rel. Stearns v Marr,* 181 NY 463, 471, *supra; Matter of Sentry Armored Courier Corp. v New York City Off-Track Betting Corp.,* 75 AD2d 344, 345). While this severe sanction may be within a court's power to ***230** induce compliance or remedy noncompliance with a court's mandate for particularly egregious conduct or willful inaction *(see, Matter of Department of*

Envtl. Protection v Department of Envtl. Conservation, 70 NY2d 233, *supra),* this case, as against these municipal officials, does not qualify for that sanction.

The remittal to the trial court for imposition of a replacement sanction against the individual defendants is, however, unnecessary and inappropriate in this case. None of the four holds the same office and responsibility in City government and some are entirely gone from the new administration that took office at the beginning of 1994. Thus, imposition of replacement sanctions for the contempts of the former and different appointed officials would serve no judicial or party purpose appropriate to civil contempt sanctions, inasmuch as they acted solely in their official capacities in all events.

IV.

We close then with an echo of the words of the Appellate Division that "it can hardly be disputed that all the parties involved in this contempt proceeding, including defendants [and their successors in office and responsibility], have a vital interest in finding an operative solution to the City's homeless crisis" (192 AD2d 217, 220, *supra).* While political solutions for complex societal problems like homelessness test the foundations of government, the adjudication of contempt is all that this record presents in the judicial process and sphere. We consider the precise issues in this case only and consider them closed and at an end. All other arguments and claims have been considered and are either without merit, without need for further discussion, or subsumed in the rest of this opinion.

Accordingly, the order of the Appellate Division should be modified, without costs, by striking only the provision of the Appellate Division's order directing remittal to Supreme Court and, as so modified, affirmed. Only because of the technical modification, the certified question should be answered in the negative.

Chief Judge Kaye and Judges Simons, Titone, Smith, Levine and Ciparick concur.
Order modified, without costs, in accordance with the opinion herein and, as so modified, affirmed, and certified question answered in the negative.***231**

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M/O Cooperman

(Ct. upheld highest ethical professional standards for attorneys)
83 N Y 2nd 465 – Majority Opinion, Unanimous [1994]

New York
Official Reports

83 N.Y.2d 465, 633 N.E.2d 1069, 611 N.Y.S.2d 465, 62 USLW 2581

In the Matter of Edward M. Cooperman (Admitted as Edward Michael Cooperman), an Attorney, Appellant. Grievance Committee for The Tenth Judicial District, Respondent.

Court of Appeals of New York
25
Argued February 8, 1994;
Decided March 17, 1994

CITE TITLE AS: Matter of Cooperman

SUMMARY

Appeal, by permission of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered January 25, 1993, which (1) granted a motion by petitioner Grievance Committee for the Tenth Judicial District to confirm a Special Referee's report sustaining 15 charges of professional misconduct against respondent Edward M. Cooperman to the extent of confirming charges 2 through 5, 7 through 10 and 12 through 15 relating to respondent's use of special nonrefundable retainer fee agreements and otherwise denying the motion to confirm, (2) suspended respondent from the practice of law for two years, continuing until further order of the Appellate Division, with leave to the respondent to apply for reinstatement after the expiration of the two-year period upon furnishing satisfactory proof that during that period he has actually refrained from practicing or attempting to practice as an attorney and counselor-at-law, he has fully complied with this order and with the terms and provisions of the written rules governing the conduct of disbarred, suspended and resigned attorneys (22 NYCRR 691.10), and he has otherwise properly conducted himself, and (3) ordering respondent, during the period of his suspension, to refrain from practicing law in any form, either as principal or agent, clerk or employee of another, appearing as an attorney or counselor-at-law before any court, Judge, Justice, board, commission or other public authority, giving to another an opinion as to the law or its application, or any advice in relation thereto, and holding himself out in any way as an attorney and counselor-at-law.

Matter of Cooperman, 187 AD2d 56, affirmed.

OPINION OF THE COURT

Bellacosa, J.

The issue in this appeal is whether the appellant attorney violated the Code of Professional Responsibility by repeatedly using special nonrefundable retainer fee agreements with his clients. Essentially, such arrangements are marked by the payment of a nonrefundable fee for specific services, in advance and irrespective of whether any professional services are actually rendered. The local Grievance Committee twice warned the lawyer that he should not use these agreements. After a third complaint and completion of prescribed grievance proceedings, the Appellate Division suspended the lawyer from practice for two years. It held that the particular agreements were per se violative of public policy. We affirm the order of the Appellate Division.

I.

In 1990, the petitioner, Grievance Committee for the Tenth Judicial District, initiated a disciplinary proceeding charging

attorney Cooperman with 15 specifications of professional misconduct. They relate to his use of three special nonrefundable retainer fee agreements.*470

The first five charges derive from a written fee agreement to represent an individual in a criminal matter. It states: "My minimum fee for appearing for you in this matter is Fifteen Thousand ($15,000.00) Dollars. This fee is not refundable for any reason whatsoever once I file a notice of appearance on your behalf". One month after the agreement, the lawyer was discharged by the client and refused to refund any portion of the fee. The client filed a formal complaint which the Grievance Committee forwarded to Cooperman for a response. Cooperman had already received a Letter of Caution not to use nonrefundable retainer agreements, and while this new complaint was pending, Cooperman was issued a second Letter of Caution admonishing him not to accept the kind of fee arrangement at issue here. He rejected the admonition, claiming the fee was nonrefundable.

Charges 6 through 10 refer to a written retainer agreement in connection with a probate proceeding. It states in pertinent part: "For the MINIMAL FEE and NON-REFUNDABLE amount of Five Thousand ($5,000.00) Dollars, I will act as your counsel". The agreement further provided: "This is the minimum fee no matter how much or how little work I do in this investigatory stage ... and will remain the minimum fee and not refundable even if you decide prior to my completion of the investigation that you wish to discontinue the use of my services for any reason whatsoever." The client discharged Cooperman, who refused to provide the client with an itemized bill of services rendered or refund any portion of the fee, citing the unconditional nonrefundable fee agreement.

The last five charges relate to a fee agreement involving another criminal matter. It provides: "The MINIMUM FEE for Mr. Cooperman's representation ... to any extent whatsoever is Ten Thousand ($10,000.00) Dollars. ... The above amount is the MINIMUM FEE and will remain the minimum fee no matter how few court appearances are made .... The minimum fee will remain the same even if Mr. Cooperman is discharged." Two days after execution of the fee agreement, the client discharged Cooperman and demanded a refund. As with the other clients, he demurred.

Cooperman's persistent refusals to refund any portion of the fees sparked at least three separate client complaints to the Grievance Committee. In each case, Cooperman answered the complaint but refused the Grievance Committee's suggestion for fee arbitration. Thereafter, the Grievance Committee sought authorization from the Appellate Division, Second *471 Department, to initiate formal disciplinary proceedings against Cooperman. It tendered an array of arguments that these retainer agreements are unethical because, first, they violate the lawyer's obligation to "refund promptly any part of a fee paid in advance that has not been earned" (Code of Professional Responsibility DR 2-110 [A] [3]). Further, the agreements create "an impermissible chilling effect upon the client's inherent right upon public policy grounds to discharge the attorney at any time with or without cause," in violation of DR 2-110 (B) (4). The petition also alleged that the fees charged by Cooperman were excessive in violation of DR 2-106 (A), and that he wrongfully refused to refund unearned fees in violation of DR 2-110 (A) (3). Finally, it notes that denominating the fee payment as nonrefundable constitutes misrepresentation (DR 1-102 [A] [4]).

After an extensive hearing, the Referee made findings supporting violations on all 15 charges. On appropriate motion, the Appellate Division confirmed the Referee's report with respect to charges 2 through 5, 7 through 10, and 12 through 15. The Court disaffirmed the report as to charges 1, 6 and 11, which alleged that the retainer agreements constituted deceit and misrepresentation. In sustaining the remaining charges, the Court held that these retainer agreements were unethical and unconscionable and "violative of an attorney's obligations under the Code of Professional Responsibility to refund unearned fees upon his or her discharge" (187 AD2d 56, 57). The Court also concluded that Cooperman's fees were excessive. The Court suspended him from the practice of law for a period of two years but did not order restitution.

II.

Whether special nonrefundable retainer fee agreements are against public policy is a question we left open in *Jacobson v Sassower* (66 NY2d 991, 994), a fee dispute case. We agree with the Appellate Division in this disciplinary matter that special nonrefundable retainer fee agreements clash with public policy and transgress provisions of the Code of Professional Responsibility *(see,* DR 2-110 [A] [3]; [B] [4]; 2-106 [A]), essentially because these fee agreements compromise the client's absolute right to terminate the unique fiduciary attorney-client relationship.

The particular analysis begins with a reflection on the nature of the attorney-client relationship. Sir Francis Bacon *472 observed, "[t]he greatest trust between [people] is the trust of giving counsel" (Bacon, *Of Counsel,* in The Essays of Francis

Bacon, at 181 [1846]). This unique fiduciary reliance, stemming from people hiring attorneys to exercise professional judgment on a client's behalf--"giving counsel"--is imbued with ultimate trust and confidence *(see, Rosner v Paley,* 65 NY2d 736, 738; *Greene v Greene,* 56 NY2d 86, 92). The attorney's obligations, therefore, transcend those prevailing in the commercial market place *(compare, Meinhard v Salmon,* 249 NY 458, 463, 464). The duty to deal fairly, honestly and with undivided loyalty superimposes onto the attorney-client relationship a set of special and unique duties, including maintaining confidentiality, avoiding conflicts of interest, operating competently, safeguarding client property and honoring the clients' interests over the lawyer's *(see, Matter of Kelly,* 23 NY2d 368, 375-376; *see also,* Brickman and Cunningham, *Nonrefundable Retainers Revisited,* 72 NC L Rev 1, 6 [1993]). To the public and clients, few features could be more paramount than the fee--the costs of legal services *(see, Jacobson v Sassower,* 66 NY2d 991, 993, *supra).* The Code of Professional Responsibility reflects this central ingredient by specifically mandating, without exception, that an attorney "shall not enter into an agreement for, charge, or collect an illegal or excessive fee" (DR 2-106 [A]), and upon withdrawal from employment "shall refund promptly any part of a fee paid in advance that has not been earned" (DR 2-110 [A] [3]). Accordingly, attorney-client fee agreements are a matter of special concern to the courts and are enforceable and affected by lofty principles different from those applicable to commonplace commercial contracts *(see, Matter of Schanzer,* 7 AD2d 275, *affd* 8 NY2d 972; *Martin v Camp,* 219 NY 170).

Because the attorney-client relationship is recognized as so special and so sensitive in our society, its effectiveness, actually and perceptually, may be irreparably impaired by conduct which undermines the confidence of the particular client or the public in general. In recognition of this indispensable desideratum and as a precaution against the corrosive potentiality from failing to foster trust, public policy recognizes a client's right to terminate the attorney-client relationship *at any time with or without cause (see, Matter of Dunn,* 205 NY 398, 402; *Tenney v Berger,* 93 NY 524; DR 2-110 [B] [4]). This principle was effectively enunciated in *Martin v Camp* (219 NY 170, *supra):* "The contract under which an attorney is employed by a client has peculiar and distinctive features ***473** ... [thus] [n]otwithstanding the fact that the employment of an attorney by a client is governed by the contract which the parties make ... the client with or without cause may terminate the contract at any time" *(id.,* at 172-174; *compare, Denburg v Parker Chapin Flattau & Klimpl,* 82 NY2d 375; *Cohen v Lord, Day & Lord,* 75 NY2d 95 [dealing conversely with economic consequences affecting the unfettered right to hire an attorney]).

The unqualified right to terminate the attorney-client relationship at any time has been assiduously protected by the courts *(see, Demov, Morris, Levin & Shein v Glantz,* 53 NY2d 553; *Andrewes v Haas,* 214 NY 255; *see also, Matter of Krooks,* 257 NY 329, 331; *Matter of Snyder,* 190 NY 66, 69). An attorney, however, is not left without recourse for unfair terminations lacking cause. If a client exercises the right to discharge an attorney after some services are performed but prior to the completion of the services for which the fee was agreed upon, the discharged attorney is entitled to recover compensation from the client measured by the fair and reasonable value of the completed services *(see, Lai Ling Cheng v Modansky Leasing Co.,* 73 NY2d 454; *Teichner v W & J Holsteins,* 64 NY2d 977; *Matter of Montgomery,* 272 NY 323, 326). We have recognized that permitting a discharged attorney "to recover the reasonable value of services rendered in *quantum meruit,* a principle inherently designed to prevent unjust enrichment, strikes the delicate balance between the need to deter clients from taking undue advantage of attorneys, on the one hand, and the public policy favoring the right of a client to terminate the attorney-client relationship without inhibition on the other" *(Demov, Morris, Levin & Shein v Glantz,* 53 NY2d 553, 558, *supra,* citing *Matter of Krooks,* 257 NY 329, 332, *supra).*

Correspondingly and by cogent logic and extension of the governing precepts, we hold that the use of a special nonrefundable retainer fee agreement clashes with public policy because it inappropriately compromises the right to sever the fiduciary services relationship with the lawyer. Special nonrefundable retainer fee agreements diminish the core of the fiduciary relationship by substantially altering and economically chilling the client's unbridled prerogative to walk away from the lawyer. To answer that the client can technically still terminate misses the reality of the economic coercion that pervades such matters. If special nonrefundable retainers are allowed to flourish, clients would be relegated to hostage ***474** status in an unwanted fiduciary relationship--an utter anomaly. Such circumstance would impose a penalty on a client for daring to invoke a hollow right to discharge. The established prerogative which, by operation of law and policy, is deemed not a breach of contract is thus weakened *(see, Matter of Krooks,* 257 NY 329, *supra; Martin v Camp,* 219 NY 170, 174, *supra).* Instead of becoming responsible for fair value of actual services rendered, the firing client would lose the entire "nonrefundable" fee, no matter what legal services, if any, were rendered. This would be a shameful, not honorable, professional denouement. Cooperman even acknowledges that the essential purpose of the nonrefundable retainer was to prevent clients from firing the lawyer, a purpose which, as demonstrated, directly contravenes the Code and this State's settled public policy in this regard.

Nevertheless, Cooperman contends that special nonrefundable retainer fee agreements should not be treated as per se violations unless they are pegged to a "clearly excessive" fee. The argument is unavailing because the reasonableness of a particular nonrefundable fee cannot rescue an agreement that impedes the client's absolute right to walk away from the attorney. The termination right and the right not to be charged excessive fees are not interdependent in this analysis and context. Cooperman's claim, in any event, reflects a misconception of the nature of the legal profession by turning on its head

the axiom that the legal profession "is a learned profession, not a mere money-getting trade" (ABA Formal Opn No. 250).

DR 2-110 (A) and (B) of the Code of Professional Responsibility add further instruction to our analysis and disposition:

"Withdrawal from Employment

"(A) In general. ...

"(3) A lawyer who withdraws from employment shall refund promptly any part of a fee paid in advance that has not been earned.

"(B) Mandatory withdrawal.

"A lawyer representing a client before a tribunal, with its permission if required by its rules, shall withdraw from employment, and a lawyer representing a client in other matters shall withdraw from employment, if: ...

"(4) [The lawyer] is discharged by [the] client."***475**

We believe that if an attorney is prohibited from keeping any part of a prepaid fee that has not been earned because of discharge by the client, it is reasonable to conclude also that an attorney may not negotiate and keep fees such as those at issue here. In each of Cooperman's retainer agreements, the Appellate Division found that the lawyer transgressed professional ethical norms. The fee arrangements expressed an absoluteness which deprived his clients of entitlement to any refund and, thus, conflicted with DR 2-110 (A) (3).

Since we decide the precise issue in this case in a disciplinary context only, we imply no views with respect to the wider array of factors by which attorneys and clients may have fee dispute controversies resolved. Traditional criteria, including the factor of the actual amount of services rendered, will continue to govern those situations *(see,* DR 2-106 [B]). Thus, while the special nonrefundable retainer agreement will be unenforceable and may subject an attorney to professional discipline, quantum meruit payment for services actually rendered will still be available and appropriate.

Notably, too, the record in this case contradicts Cooperman's claim that he acted in "good faith". He urges us to conclude that he "complied with the limited legal precedents at the time." The conduct of attorneys is not measured by how close to the edge of thin ice they skate. The measure of an attorney's conduct is not how much clarity can be squeezed out of the strict letter of the law, but how much honor can be poured into the generous spirit of lawyer-client relationships. The "punctilio of an honor the most sensitive" *(Meinhard v Salmon,* 249 NY, at 464, *supra)* must be the prevailing standard. Therefore, the review is not the reasonableness of the individual attorney's belief, but, rather, whether a "reasonable attorney, familiar with the Code and its ethical strictures, would have notice of what conduct is proscribed" *(Matter of Holtzman,* 78 NY2d 184, 191). Cooperman's level of knowledge, the admonitions to him and the course of conduct he audaciously chose do not measure up to this necessarily high professional template. He even acknowledged at his disciplinary hearing that he knew that "there were problems with the nonrefundability of retainers". Cooperman's case, therefore, constitutes a daring test of ethical principles, not good faith. He failed the test, and those charged with enforcing transcendent professional values, especially the Appellate Divisions, ought to be sustained in their efforts.***476**

Our holding today makes the conduct of trading in special nonrefundable retainer fee agreements subject to appropriate professional discipline. Moreover, we intend no effect or disturbance with respect to other types of appropriate and ethical fee agreements *(see,* Brickman and Cunningham, *Nonrefundable Retainers Revisited,* 72 NC L Rev 1, 6 [1993]). Minimum fee arrangements and general retainers that provide for fees, not laden with the nonrefundability impediment irrespective of any services, will continue to be valid and not subject in and of themselves to professional discipline.

The Court is also mindful of the arguments of some of the *amici curiae* concerned about sweeping sequelae from this case in the form of disciplinary complaints or investigations that may seek to unearth or examine into past conduct and to declare all sorts of unobjectionable, settled fee arrangements unethical. We are confident that the Appellate Divisions, in the highest tradition of their regulatory and adjudicatory roles, will exercise their unique disciplinary responsibility with prudence, so as not to overbroadly brand past individualized attorney fee arrangements as unethical, and will, instead, fairly assess the varieties of these practices, if presented, on an individualized basis. Therefore, we decline to render our ruling prospectively, as requested *(see,* Schaefer, *The Control of "Sunbursts": Techniques of Prospective Overruling,* Cardozo Memorial Lecture, delivered before the Association of the Bar of the City of New York [Apr. 13, 1967], reprinted in 22 Record of Assn of Bar of City of NY 394, 403, 407-408; *Great N. Ry. v Sunburst Co.,* 287 US 358, 364-365).

We have examined appellant's other contentions and conclude that they are without merit.

Accordingly, the order of the Appellate Division should be affirmed, with costs.

Judges Simons, Smith, Levine and Ciparick concur; Chief Judge Kaye and Judge Titone taking no part.

Order affirmed, with costs.*477

~ 13 ~

M/O Jacob & M/O Dana

(Ct. allowed adoption by unmarried lesbian partners)
86 N Y 2nd 651, at 669 – Dissenting Opinion [4-3] [1995]

New York
Official Reports

86 N.Y.2d 651, 660 N.E.2d 397, 636 N.Y.S.2d 716, 64 USLW 2294

In the Matter of Jacob, an Infant. Roseanne M. A. et al., Appellants.
In the Matter of Dana. G. M., Appellant.

Court of Appeals of New York
195, 196
Argued June 5, 1995;
Decided November 2, 1995

CITE TITLE AS: Matter of Jacob

SUMMARY

Appeal, in the first above-entitled proceeding, from an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department, entered December 23, 1994, which, with two Justices dissenting, affirmed an order of the Family Court, Oneida County (James W. Morgan, J.), dismissing a petition for adoption.

Appeal, in the second above-entitled proceeding, by permission of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered April 3, 1995, which affirmed an order of the Family Court, Putnam County (John W. Sweeny, J.), denying a petition for adoption and dismissing the proceeding.

Matter of Jacob, 210 AD2d 876, reversed.

Matter of Dana, 209 AD2d 8, reversed.

Bellacosa, J.

(Dissenting). Judges Simons, Titone and I respectfully dissent and vote to affirm in each case.

These appeals share a statutory construction issue under New York's adoption laws. While the results reached by the majority are intended to have a benevolent effect on the individuals involved in these two cases, the means to those ends transform the legislative adoption charter governing countless other individuals. Additionally, the dispositional methodology transcends institutional limitations on this Court's proper exercise of its authority, fixed by internal discipline and by the external distribution of powers among the branches of government.

The majority minimizes the at-will relationships of the appellants couples who would be combined biological-adoptive parents in each case, but the significant statutory and legally central relevancy is inescapable. Unlike married and single parent households, each couple here cohabits only day-to-day, no matter the depth or length of their voluntary arrangements. Their relationships lack legal permanency and the State has not endowed them with the benefits and enforceable protections that flow from relationships recognized under color of law. Nowhere do statutes, or any case law previously, recognize de facto, functional or second parent adoptions in joint circumstances as presented here.

Specifically, in the respective cases, the availability of adoption is implicated because of the operation-of-law consequences under Domestic Relations Law § 117 based on: (1) the relationship of the biological parent and the putative adoptive child if a *male and female unmarried cohabiting couple,* one of whom is the biological mother of the child, *jointly petitions* to adopt the five-year-old child; and (2) the relationship of the biological parent and her child if the *lesbian partner* of the biological mother *petitions alone* to adopt the five-year-old child. Neither ***670** case presents an issue of ineligibility because of sexual orientation or of discrimination against adoption on that basis, despite the majority's evocations in that regard.

The facts are uncontested and pertinently recited in the Chief Judge's opinion. In *Matter of Jacob,* Family Court, Oneida County, dismissed the petition on the ground that the petitioners are an unmarried couple. No best interests factual or evidentiary evaluations were undertaken. The court held that adoption proceedings are creatures of statute and that Domestic Relations Law § 110 does not authorize adoption by an unmarried couple. The Appellate Division, Fourth Department, affirmed (210 AD2d 876), concluding that the statute did not permit adoption by two unmarried persons together.

In *Matter of Dana,* Family Court, Putnam County, denied the adoption petition. The court held that (1) G. M. did not have standing to adopt pursuant to Domestic Relations Law § 110, since she did "not fall within any of the classifications under Domestic Relations Law Section 110"; and (2) the proposed adoption ran afoul of Domestic Relations Law § 117 (1) (a).

The Appellate Division, Second Department, unanimously affirmed (209 AD2d 8), but contrary to Family Court, it found that G. M. had standing to adopt under Domestic Relations Law § 110 as an "adult unmarried person." The Per Curiam opinion limited the dispositional rationale to the effect of Domestic Relations Law § 117--automatic termination of the biological parent's rights upon adoption by other than a stepparent. The Court, therefore, ruled that Family Court's result was correct for the reason that "[c]learly the intent of the Legislature was to deny a single person the right to adopt another's child while the natural parent, a single person, retains parental rights" *(id.,* at 10).

Although adoption has been practiced since ancient times, the authorization for this unique relationship derives solely from legislation. It has no common-law roots or evolution *(Matter of Seaman,* 78 NY2d 451, 455; *Matter of Robert Paul P.,* 63 NY2d 233, 237; *Matter of Thorne,* 155 NY 140, 143; *see generally,* Presser, *The Historical Background of the American Law of Adoption,* 11 J of Fam L 443 [1971]). Therefore, our Court has approved the proposition that the statutory adoption charter exclusively controls *(Matter of Robert Paul P., supra,* at 238; *Matter of Malpica-Orsini,* 36 NY2d 568, 572, *appeal dismissed sub nom. Orsini v Blasi,* 423 US 1042; *Carpenter v Buffalo Gen. Elec. Co.,* 213 NY 101, 108).***671**

The judicial role is most sensitive, but no case has ever recognized a judicially created right of adoption. This restraint is especially pertinent when the Legislature has expressly enacted a plenary, detailed legislative plan *(see, Matter of Malpica-Orsini, supra,* at 570; *Matter of Eaton,* 305 NY 162, 165). The majority acknowledges New York's unique legislative developments and the several major cases in which adoptions have been disallowed *(see, e.g., Matter of Robert Paul P., supra)* that together document these juridically limiting principles, yet the majority's ruling and result paradoxically turn away from those consistent guideposts.

Pointedly, this Court's unqualified utterance is that " ' "[t]he Legislature has *supreme control of the subject" ' " (Matter of Robert Paul P., supra,* at 237 [emphasis added]; *see also, Matter of Malpica-Orsini, supra).* A transcendent societal goal in the field of domestic relations is to stabilize family relationships, particularly parent-child bonds. That State interest promotes permanency planning and provides protection for an adopted child's legally secure familial placement. Therefore, statutory authorizations should not be substantively transformed under the guise of interpretation, and all facets of the adoption statutes should be harmonized *(see, Matter of Costello v Geiser,* 85 NY2d 103, 109; *Heard v Cuomo,* 80 NY2d 684, 689; *Matter of Long v Adirondack Park Agency,* 76 NY2d 416, 420, 422-423).

Notably, too, for contextual understanding of these cases, New York State has long refused to recognize common-law marriages *(see,* Domestic Relations Law § 11). It also does not recognize or authorize gay or lesbian marriages, though efforts to secure such legislation have been pursued *(see,* 1995 Assembly Bill A-648; 1994 Assembly Bill A-10508).

I.

Domestic Relations Law § 110, entitled "Who May Adopt," provides at its outset that *"[a]n adult unmarried person or an adult husband and his adult wife together* may adopt another person" (emphasis added). Married aspirants are directed to apply "together", i.e., jointly, as spouses, except under circumstances not applicable in these cases.

In *Dana,* appellant G. M. asserts that she may petition as "[a]n adult unmarried person," without regard to the legal consequences of other related provisions of the adoption charter. She petitioned individually and qualifies under ***672** section 110, irrespective of her sexual orientation. The *Dana* case, therefore, is not a case involving the right of homosexuals to adopt, nor, self-evidently, is the *Jacob* case. Satisfying the standing component does not, however, complete the analysis or overcome section 117's operation-of-law impact on both cases.

Appellants Stephen T. K. and Roseanne M. A. urge that the term "adult unmarried person" should also permit them to adopt "together" as an unmarried couple. They bypass the statute's plain words by claiming that nothing in the statutory language of Domestic Relations Law § 110 precludes their adoption effort. Preclusion or prohibition, however, are not the point. Petitioners' burden, ignored by the majority, is to identify a source of statutory authorization.

Petitioners came to court in the *Jacob* case to adopt "together," as two unmarried adults. The court must deal with them as they presented themselves and must also obey the statute that on its face allows a joint petition by "married" spouses "together." The statute unambiguously declares that "[a]n adult unmarried person *or* an adult husband and his wife *together* may adopt another person" (Domestic Relations Law § 110 [emphasis added]; Scheinkman, Practice Commentaries, McKinney's Cons Laws of NY, Book 14, Domestic Relations Law § 110, at 398, 402, 404). Words of such precise import and limitation are not merely talismanic and may not be rendered superfluous, as the majority has done here. The Legislature's chosen words must be given their substantive, intended meaning, and interpretation is no substitute for its failure to be more explicit or flexible.

The statutory language and its history instructively reveal no legislative intent or hint to extend the right and responsibility of adoption to cohabiting unmarried adults *(see,* Scheinkman, Supplementary Practice Commentaries, McKinney's Cons Laws of NY, Book 14, Domestic Relations Law § 110, 1995 Cum Ann Pocket Part, at 85). The opposite obtains, notably in the *Jacob* case, in the direct contraindication of Domestic Relations Law § 11 expressing the State's long-standing public policy refusal to recognize at-will common-law relationships as marriages. Confusion is thus sown by the holdings today by blurring plain meaning words and clear lines between relationships that are legally recognized and those that are not. Under the newly fashioned theory rooted in ambiguity, any number of people who choose to live together--even ***673** those who may not cohabit--could be allowed to adopt a child together. The result in these cases and *reductio ad absurdum* illustrations flowing from appellants' theorem--that singular may mean plural and vice versa under a general axiom of statutory construction inapplicable in the face of specificity--are far beyond any discernible legislative intent of New York lawmakers. Marriages and single parent households are not, after all, mere social conventions generally or with respect to adoption circumstances; they enjoy legal recognition and special protections for empirically proper social reasons and public policies.

The legislative history of adoption laws over the last century also reveals a dynamic process with an evolving set of limitations. The original version enacted in 1873 provided: "Any minor child may be adopted *by any adult"* (L 1873, ch 830 [emphasis added]). In 1896, the Legislature cut back by stating that "[a]n adult unmarried person, or an adult husband or wife, or an adult husband and his adult wife together, may adopt a minor" (L 1896, ch 272, § 60; *see also,* L 1915, ch 352; L 1917, ch 149). This language was further restricted, in 1920, when the Legislature omitted from the statute the language "or an adult husband or wife" *(see,* L 1920, ch 433). Since enactment of the 1920 amendment, the statute has provided that "[a]n adult unmarried person or an adult husband and his adult wife *together* may adopt" (Domestic Relations Law § 110 [emphasis added]). The words chosen by the Legislature demonstrate its conclusion that a stable familial entity is provided by either a one-parent family or a two-parent family when the concentric interrelationships enjoy a legal bond. The statute demonstrates that the Legislature, by express will and words, concluded that households that lack legally recognized bonds suffer a relatively greater risk to the

stability needed for adopted children and families, because individuals can walk out of these relationships with impunity and unknown legal consequences.

Next, the Legislature specified the exceptions in section 110 permitting a married individual to petition for adoption without consent of the other spouse *(see,* Domestic Relations Law § 110; McKinney's Cons Laws of NY, Book 1, Statutes § 240 *[expressio unius est exclusio alterius*--where a statute mentions certain exceptions and omits others, the Legislature intends that the omitted items should be excluded]; *Matter of Alonzo M. v New York City Dept. of Probation,* 72 NY2d 662, 665; ***674** *Patrolmen's Benevolent Assn. v City of New York,* 41 NY2d 205, 208-209). The failure of the Legislature to provide for the circumstances of these two cases examined in the light of successive particularized legislative amendatory actions, is yet another cogent refutation of the uniquely judicial authorization of adoption, unfurled today under the twin banners of statutory interpretation and ambiguity.

Lastly in this connection, we derive a diametrically different lesson from *Matter of Alison D. v Virginia M.* (77 NY2d 651), decided in 1991. The majority for that case held that a lesbian partner is not a "parent" under Domestic Relations Law § 70 (a). The Court expressly rejected an expansionist judicial definition of "de facto parent" or "functional" family *(id.,* at 656) and declined to enlarge legislatively limited delineations *(id.,* at 657). Yet, today's majority, only four years later, revives and applies that rejected de facto methodology using another nonstatutory, undelineated term, "second parent adoption" *(compare, Simpson v Loehmann,* 21 NY2d 305, 314 [Breitel, J., concurring] ["Only a major reappraisal by the court, rather than the accident of a change in its composition, would justify the overruling of" precedent]). The majority now grants legal recognition to what it refers to as functional parents in both cases, the couples comprised of two individuals bound together solely by personally elective affiliation, not by marriage as the statute prescribes. This turnabout should be contrasted again with what the Court in *Alison D.* actually did: it took a statute at its precise words and gave them effect, because the legally recognized stability of these most sacred human relationships were determined to be paramount by the Legislature and, thus, by this Court.

When the majority augments extant legislation in these cases because the corpus juris does not reflect modern arrangements in which individuals nevertheless yearn to be accorded family status under the law *(compare, Matter of Alison D. v Virginia M., supra),* it significantly dissolves the central rationale of *Alison D. (id.; see also, Simpson v Loehmann,* 21 NY2d 305, 314-316, *supra* [Breitel, J., concurring]). As former Chief Judge Breitel noted in another connection, the "judicial process is not permitted to rove generally over the scene of human affairs. Instead, it must be used, on pain of violating the proprieties, within the framework of a highly disciplined special system of legal rules characteristic of the legal order" (Breitel, *The Lawmakers,* 65 Colum L Rev 749, 772; *see also,* Cardozo, The Nature of the Judicial Process, reprinted in Selected Writings of Benjamin Nathan Cardozo, ***675** 110, 164 [Hall ed 1947] [A Judge "is not a knight-errant, roaming at will in pursuit of his (or her) own ideal of beauty or of goodness."]). The rulings today constitute a rejection of such wise admonitions about appropriate limitations on the judicial process and power.

The Per Curiam opinion of the Court in *Matter of Alison D. v Virginia M.* (77 NY2d 651, *supra)* also instructively refrained from any reliance on or reference to *Braschi v Stahl Assocs. Co.* (74 NY2d 201). Thus, the incorporation of *Braschi* into the instant cases is inapposite and should be unavailing, because these are very different cases with very different issues and operative policies.

II.

A key societal concern in adoption proceedings is, we all agree, the best interests of children *(see,* Domestic Relations Law § 114; *Matter of Robert Paul P.,* 63 NY2d 233, 236, *supra).* The judicial power to grant an adoption cannot be exercised, however, by simply intoning the phrase "the best interests of the adoptive child" as part of the analysis to determine qualification for adoption. That approach bypasses crucial, threshold steps and begs inescapably interwoven questions that must be considered and answered at the outset of the purely statutory construction issue in these cases. Before a court can arrive at the ultimate conclusion that an adoption is in the best interests of a child therefore, it is first obliged to discern whether the particular application is legislatively authorized. Reversing the analysis erects the building before the foundation is in place.

Best interests, in any event, is not an abstract concept floating in a vacuum, but must be factually rooted, supported by and applied to an evidentiary record. With no findings or record in any prior court in these cases on that issue, we fail to understand how the majority here makes first-instance assumptions to assert and support its conclusions about the best interests of Jacob and Dana as part of the statutory construction analysis.

The dual, statutorily interlocked inquiries of qualifications and operation-of-law consequences of adoption cannot be shunted aside in favor of an aspiration that a potential adoptive person might provide a child with good, better or best emotional or financial circumstances. An intuitive preference that a particular adoption might likely or generally serve ***676** some child's beneficial interests should not suffice to solve the more comprehensive puzzle of legislative intent that will evolve into a *ratio decidendi* as the juridical adoption charter to govern the whole of a society *(see,* Domestic Relations Law § 114; *compare, Matter of Bennett v Jeffreys,* 40 NY2d 543, 546, 552). We note that the disciplined approach we would use in deciding these appeals does not implicate the bona fides or unchallenged loving and caring motivations and feelings of any of the individuals involved in these cases. While promulgated and applied law may take cognizance of those factors, however, it should not be subordinated to them. Also, these children are not members of a suspect class *(contrast, Gomez v Perez,* 409 US 535; *Plyler v Doe,* 457 US 202). They are members of stable homes, already presently in the permanent placement and custody of their biological mothers.

Courts are ultimately limited to viewing issues as presented in litigated cases within the confines of their evidentiary records. Since the majority agrees that the common issue in these cases is purely statutory construction, its reliance on generalized assumptions about life and health insurance, Social Security and death benefits, constitutes a questionable policy makeweight. Those criteria offer scant guidance towards discovering legislative intent behind Domestic Relations Law §§ 110 and 117. Moreover, they are incomplete policy factors, inappropriate to statutory construction analysis, and their imputation in these cases simultaneously eschews consideration of any competing substantial State interest concerns.

For the benefit of the two youngsters and the preservation of some orderly procedural regularity, we draw assurance from the corrective action that at least remits each case to Family Court, to undertake a first instance, best interests hearing in the *Jacob* case, and an updated hearing in the *Dana* case, now that three years have transpired since the court conducted its original limited inquiry.

III.

A principal factor in these cases must also ultimately include consideration of the inexorable operation-of-law consequences that flow from section 117, a distinctive feature of New York's adoption laws. Specifically, courts are statutorily mandated to apply Domestic Relations Law § 110 together with the interconnected features of ***677** Domestic Relations Law § 117 *(compare, e.g., Matter of Royal Indem. Co. v Tax Appeals Tribunal,* 75 NY2d 75, 79; McKinney's Cons Laws of NY, Book 1, Statutes § 97).

Domestic Relations Law § 117 provides: "After the making of an order of adoption the natural parents of the adoptive child *shall be relieved of all parental duties toward and of all responsibilities for and* shall have no rights over such adoptive child *or* to his [or her] property by descent or succession" (emphasis added). The plain and overarching language and punctuation of section 117 cannot be judicially blinked, repealed or rendered obsolete by interpretation.

Section 117 says that it severs all facets of a biological parent's conjunctively listed relationships upon adoption of the child *(compare, Matter of Bennett v Jeffreys,* 40 NY2d 543, *supra).* This Court has recognized that "[t]he purpose of the section [former section 114, now section 117] was to define the relation, after adoption, of the child to its natural parents and to its adopting parents, together in their reciprocal rights, duties and privileges" *(Betz v Horr,* 276 NY 83, 87; *see also, Matter of Gregory B.,* 74 NY2d 77, 91). That is a critically extant, interpretive proposition from this Court and not some merely atavistic utterance.

In implementation of its prerogative to define family relationships that are accorded legal status, the Legislature even prescribed a stepparent departure from the otherwise automatic section 117 consequence. It thus sought to obviate the inevitable result that an order of adoption might actually effectuate the symbolic Solomonic threat by severing the rights of a consenting biological parent in such specifically excepted circumstances where a biological parent is married to an adopting stepparent. One would have thought promulgation of such an exception unnecessary, yet the Legislature chose certainty of statutory expression for every eventuality as to the severance or nonseverance operation-of-law consequences of section 117.

Appellants in both cases nevertheless propose the theory that section 117 is meant to apply only to inheritance succession of property rights after adoption and should have no effect on the wider expanse and array of rights and responsibilities of a biological parent with an adoptive child. The language of section 117 reveals, however, that the biological parents' duties, responsibilities and rights with respect to the adoptive child are separate and distinct from, and more comprehensive ***678** than, a single, narrow category of inheritance rights. The use of the disjunctive "or" before the phrase, "property by descent or succession," cannot be discounted or avoided; it denotes the important and elemental legislative demarcation. These observations are not some syntactical or grammatical exercise. Indeed, syntax and grammar are necessary tools of precise expression, acceptable norms of interpretation and reasonably uniform understanding and, when coupled with disciplined, thorough statutory construction principles, they bear legitimately and cogently on sound and supportable legal analysis *(see, Matter of Brooklyn El. R. R. Co.,* 125 NY 434, 444-445).

Besides, section 117 (1) (i) merely defines a particular class of restricted inheritance rights, namely, "intestate descent and distribution" of property. Thus, adopted children and their biological parents may still inherit from one another by will or acquire property by inter vivos instrument *(see,* 1986 Report of NY Law Rev Commn, reprinted in 1986 McKinney's Session Laws of NY, at 2560). This again demonstrates that the intestate devolution of property aspect is only a particular species and recent incorporation into this more sweeping, long-standing statute. It does not represent a displacement or total substitution for the statute's predominant purport.

The majority states that "from the very beginning of what is now section 117, both the scholarly commentary about the section and its dozen or so amendments have centered on issues of property rights and inheritance" (majority opn, at 663). This statement sidesteps and subordinates the original and still operative language of section 117 itself: "The parents of an adopted child are, from the time of the adoption, *relieved from all parental duties* toward, and of all responsibility for, the child so adopted, and have no rights over it" (L 1873, ch 830, § 12 [emphasis added]). Inheritance was not mentioned and the comprehensive sweep of the statute could not be plainer. Finally, the primacy of this Court's precedents and legislatively promulgated words as authority must be accorded greater rank and respect than any secondary or tertiary materials characterized as "scholarly commentary."

Betz v Horr (276 NY 83, *supra)* is particularly poignant and cogent. There, a sick and destitute adopted adult sought support from her biological father. In rejecting the claim, the Court recognized that the purpose of former section 114 (now § 117) was the complete termination of parental rights and ***679** responsibilities of the biological parents following adoption. The Court stated that in order to impose upon the biological parent a duty to support, "it would be necessary to read into section 114 [now section 117] of the Domestic Relations Law an intent to preserve the duty and responsibility of the natural parent to support the child *notwithstanding the plain and unambiguous provision that, after adoption, all responsibility of the natural parent for the child ceases" (id.,* at 88 [emphasis added]; *see also, Matter of Harvey-Cook v Neill,* 118 AD2d 109, 111). That the biological mothers in these cases may wish that their parental rights not be terminated by an order of adoption is no more determinative than the compelling circumstances of *Betz.* The statute and our cases remain controlling. Section 117 should not be relegated to, nor was it designed to operate with, case-by-case personal exemptions from universally and equally applied principles of statutory law or precedentially governing authorities.

The rationale of these cases is likely to engender significant legal uncertainty and practical problems between biological and adoptive parents. Conflicts concerning the upbringing of children, for example, with respect to visitation rights, schooling,

medical care, religious preference and training and the like, may ensue. Such a net of foreseeable and unseen sequelae is hardly conducive to the settled, permanent, new home environment and set of relationships directed by section 117.

A careful examination of the Legislature's unaltered intent based on the entire history of the statute reveals the original purpose of section 117 was to enfold adoptees within the exclusive embrace of their new families and to sever all relational aspects with the former family. That goal still applies and especially to the lifetime and lifelong relationships of the affected individuals, not just to the effect of dying intestate *(see,* L 1963, ch 406; *Matter of Best,* 66 NY2d 151, 156, *cert denied sub nom. McCollum v Reid,* 475 US 1083; *see also,* Mem in Support of Bill by Sponsoring Senator Brydges, Bill Jacket, L 1963, ch 406; *see also,* Mem to Governor in Support by Attorney-General Lefkowitz, Bill Jacket, L 1963, ch 406).

Not surprisingly, we believe that the majority's reliance on Social Services Law § 383-c and Domestic Relations Law §§ 114 and 115-b are inapposite and unpersuasive. The use of these attenuated provisions involving entirely different situations to argue for what amounts to a functional, partial repeal ***680** by implication of section 117's unaltered breadth, is a disfavored approach to resolving statutory analysis problems.

IV.

The assembled and varied statutory construction arguments are, in the end, held together by the majority's tincture of constitutional doubt. A crucial utterance illustrates: "[A] construction of the section that would deny children like Jacob and Dana the opportunity of having their two de facto parents become their legal parents, based solely on their biological mother's sexual orientation or marital status, would not only be *unjust under the circumstances, but also might raise constitutional concerns* in light of the adoption statute's historically consistent purpose--the best interests of the child" (majority opn, at 667 [citations omitted] [emphasis added]). This sweeping amalgam renders doubtful even the opportunity for appropriate statutory amendments to deal with perceived ambiguities. It also tolerates no potential for showing in the future any State interest supporting any enactment regulating this field that could survive equal protection constitutional attack.

This "equal protection" concern was not raised in either case before the lower courts, and the majority's preemptive cloud, coupled with a failure to deal with that issue's complexity, and implicated jurisprudential nuances is perplexing *(compare, Campaign for Fiscal Equity v State of New York,* 86 NY2d 307, 312, 324, 332, 344). Further, the generalization of some hypothesized result being "unjust under the circumstances" (majority opn, at 667), while a matter of general concern to any Judge, cannot supplant specific analysis and avoid rational basis judicial scrutiny within an appropriate and rigorous adjudicatory process and developed record of pleadings and proof on an as-applied basis. Whatever labels are used, no constitutional issue is squarely and thoroughly presented in these cases anyway, nor is any appropriate for speculation on these records. Moreover, the vagueness as to precisely which parties'--the children or the adopting petitioner or the biological parent-- constitutional rights are somehow at risk adds bewilderment to the analysis and frustrates any attempted, precise rejoinder.

Overlaying the entire problem about such projections of facial or applied constitutional doubt, cast upon a complex set of statutes, is the inattentiveness to the fundamental presumption of constitutionality of duly enacted legislation and ***681** to the appropriate deference, indeed "supremacy," of the legislative role in this area *(see, People v Thompson,* 83 NY2d 477, 487-488; *Matter of Robert Paul P.,* 63 NY2d 233, 237, *supra; People v Epton,* 19 NY2d 496, 505). These overridden precepts should be central to the dispositional equation in these cases instead of a tenuous statutory construction axiom insinuated on a problematical constitutional premise.

Significantly, this Court did not even have the benefit in these cases of the customary adversarial advocacy dynamic. No briefs or oral arguments supportive of the results below or against the arguments for adoptions were presented, though several *amici* briefs in support of appellants' positions were accepted. Thus, one-sided constitutional claims raised for the first time on appeal should especially be foreclosed from this Court's consideration based on well-settled institutional and precedential principles *(see, e.g., People v Gray,* 86 NY2d 10, 20; *Lichtman v Grossbard,* 73 NY2d 792, 794; *Melahn v Hearn,* 60 NY2d 944, 945; *Matter of Eagle v Paterson,* 57 NY2d 831, 833; *People v Martin,* 50 NY2d 1029, 1031; *Wein v Levitt,* 42 NY2d 300, 306;

Cohen and Karger, Powers of the New York Court of Appeals § 169, at 641 [rev ed]; *see also, Matter of Patchogue-Medford Congress of Teachers v Board of Educ.,* 70 NY2d 57, 71 [Simons, J., concurring]). We emphasize that it is the dubiety cast over very significant constitutional propositions in this fashion that is at least as disquieting as an unequivocal constitutional declaration. This is especially so since the Attorney-General of the State was given no notice or opportunity, as required by Executive Law § 71, to fulfill the obligation of the Department of Law to defend the constitutionality--or against the inchoate unconstitutionality--of the beclouded statutes.

The instant two cases also take the constitutional hook of *Matter of Patchogue-Medford Congress of Teachers v Board of Educ.* (70 NY2d 57, *supra),* where the assertion of a general constitutional claim in a pleading was used by this Court to reach a specific State constitutional basis for decision, two giant steps beyond that significant jurisprudential outer limit. Now, parties may assert constitutional claims at the final appeal stage and appellate courts may drive a debatable statutory construction wedge--a speculative, future constitutional concern--into the disposition of very significant statutes and cases.

The majority's constitutional prognostication is thus linkedto***682** a statutory construction device that teaches courts to avoid reaching constitutional issues when they need not. The rubric is dubiously applied here, however since it is designed primarily to respect the presumption of constitutionality, not becloud it. The presumption is a reservoir of judicial power, preserving judicial capital, resources and power for when they are most and unavoidably needed. The rubric has never been used, as here, to anticipate amorphous doubt over statutes as applied to real, future cases and controversies. By employing a canon of construction *to,* in effect, *reach* an unlitigated issue in order to *avoid* potentially "embarrassing constitutional questions" in the future, the majority in the instant cases violates the very canon it invokes. It ultimately also transgresses another overriding canon, that courts should not legislate under the guise of interpretation *(see, e.g., People v Finnegan,* 85 NY2d 53, 58; *People v Heine,* 9 NY2d 925, 929).

The majority concludes that "[g]iven that section 117 is open to two differing interpretations"--a conclusion with which we have already noted our strong disagreement in any event--the Court must construe the statute to avoid constitutional doubt (majority opn, at 667, 667-668, 668, citing principally *Matter of Lorie C.,* 49 NY2d 161, 171). That case dealt with the State constitutional limits on the jurisdiction of the Family Court in placing juvenile delinquents in foster homes. Since the statutory construction issue directly implicated article VI, § 13 of the State Constitution, it is arguably appropriate for the Court to have added a dictum concerning the special court's jurisdictional limits under the State Constitution. As the Court noted, the statutory question involved the "doctrine of distribution of powers ' "that each department should be free from interference, in the discharge of its peculiar duties, by either of the others" ' " *(Matter of Lorie C., supra,* at 171, quoting *Sexton v Carey,* 44 NY2d 545, 549). Here, the would-be constitutional question involves nothing of that kind and does not implicate a powers section of the State Constitution; rather, it forecasts an equal protection "concern."

As the Court has elsewhere observed, failure to raise a constitutional issue in nisi prius courts results in an inadequate record, lack of joinder, and lack of development and testing of adjudicative analysis to permit and justify the appellate court to make its fair, reasonably tested and long-lasting determination and precedent on the merits *(see, People* ***683** *v Gray,* 86 NY2d 10, 20, *supra; People v Martin,* 50 NY2d 1029, 1031, *supra).* Furthermore, if a litigant does not raise a particular legal argument before a court of first instance, that effectively deprives the other party--if there is one, as there is not in these cases--of a fair opportunity to present and answer the proofs and deprives the process of jurisprudence of the essential check-and-balance against unilateral mistake or misapprehension. This Court has also repeatedly warned that "if any unsought consequences result, the Legislature is best suited to evaluate and resolve them" *(Bender v Jamaica Hosp.,* 40 NY2d 560, 562, citing *Bright Homes v Wright,* 8 NY2d 157; *see, Matter of Robert Paul P.,* 63 NY2d 233, 239, *supra).* These cautions are uniquely appropriate with respect to the Legislature's concededly "supreme" power and provenance concerning its legal creature: adoptions.

In sum, the common issue here involves a subject on which the Legislature has expressed itself. These cases appear on a screen on which the Legislature has delineated its will and judgment methodically and meticulously to reflect its enactments. Ambiguity cannot directly or indirectly create or substitute for the lack of statutory authorization to adopt. These adoption statutes are luminously clear on one unassailable feature: no express legislative authorization is discernible for what is,

nevertheless, permitted by the holdings today. Nor do the statutes anywhere speak of de facto, functional or second parent adoptions. Frankly, if the Legislature had intended to alter the definitions and interplay of its plenary, detailed adoption blueprint to cover the circumstances as presented here, it has had ample and repeated opportunities, means and words to effectuate such purpose plainly and definitively as a matter of notice, guidance, stability and reliability. It has done so before *(see, e.g.,* L 1984, ch 218 [permitting adoption by adults not yet divorced]; L 1951, ch 211 [permitting adoption by a minor]).

Because the Legislature did not do so here, neither should this Court in this manner. Cobbling law together out of interpretative ambiguity that transforms fundamental, societally recognized relationships and substantive principles is neither sound statutory construction nor justifiable lawmaking. Four prior courts in these two cases correctly dismissed the respective adoption petitions. Since those appropriate judicial determinations are based on what the Legislature actually enacted and specifically authorized, the Appellate Division orders should be affirmed.***684**

Judges Smith, Levine and Ciparick concur with Chief Judge Kaye; Judge Bellacosa dissents and votes to affirm in a separate opinion in which Judges Simons and Titone concur.

Order reversed, etc.***685**

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M/O Griffin v. Coughlin, State Corr. Comm'r

(Ct. disallowed Alcoholics Anonymous meetings in prison, as constituting a precluded governmental endorsement of barred religious practice)
88 N Y 2nd 674 – Dissenting Opinion [5-2] [1996]

New York
Official Reports

88 N.Y.2d 674, 673 N.E.2d 98, 649 N.Y.S.2d 903, 65 USLW 2003

In the Matter of David Griffin, Appellant,
v.
Thomas A. Coughlin, III, as Commissioner of the New York State Department of Correctional Services, et al., Respondents.

Court of Appeals of New York
73
Argued February 15, 1996;
Decided June 11, 1996

CITE TITLE AS: Matter of Griffin v Coughlin

SUMMARY

Appeal, by permission of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Third Judicial Department, entered May 18, 1995, which affirmed a judgment of the Supreme Court (James B. Canfield, J.), entered in Ulster County in a proceeding pursuant to CPLR article 78, dismissing the petition to annul a determination of respondents that denied petitioner inmate's grievance requesting that he be excused from further involvement in the Shawangunk Correctional Facility's Alcohol and Substance Abuse Treatment (ASAT) Program without forfeiting his right to participate in the Family Reunion Program, and to require respondents to discontinue the requirement of petitioner's attendance in the "religious" ASAT Program in order to remain eligible for participation in the Family Reunion Program.

Matter of Griffin v Coughlin, 211 AD2d 187, reversed.

Bellacosa, J.

(Dissenting). Judge Ciparick and I would affirm the lower courts' rejection of petitioner's lawsuit. The majority centers its reversal and grant of relief in this case on coercion. That must, however, be coupled with a finding that the Alcohol and Substance Abuse Treatment (ASAT) Program of the New York State Department of Correctional Services fosters a religious practice in the first place. The building blocks rest also on the attribution to the ASAT Program of "religious-oriented practices and precepts" (majority opn, at 677 *et seq.*) culled together from the Alcoholics Anonymous (A.A.) Twelve Step paradigm. The combination, tied together by a tenuous application of a coercion concept, produces a declaration that the Establishment of Religion Clause of the United States Constitution has been violated (US Const 1st Amend).

We conclude that the allegedly compelled religious root--the deistic symbols and allusions selected principally from A.A. literature concerning its Twelve Step Program--does not justify the judicial relief that ultimately excuses petitioner-appellant inmate on First Amendment grounds from the benefits of the ASAT Program, when he wishes to avail himself of the Correctional Services Department's Family Reunion (expanded visitation) Program. The key premises of our votes to affirm include:

The ASAT Program and this case, analyzed within the three-pronged criteria of Establishment Clause review (*see, Lemon v Kurtzman,* 403 US 602) and recent, relevant authorities, do not breach constitutional boundaries;

The ASAT Program is inappropriately analogized to uniquely sensitive public school settings under First Amendment jurisprudence;

The ASAT Program is a rationally justified and voluntary means of serving the important and predominantly secular State goal of treating and reducing inmate substance abuse;

The ASAT Program, to the extent that it incorporates suggested aspects of the A.A. Twelve Step Program that some may perceive as somewhat religious, remains overwhelmingly secular in philosophy, objective and operation;***698**

Petitioner-appellant's challenge and proffered record lack the quality and quantum necessary to justify this first impression holding.

I.

ASAT is the primary umbrella program operated by the New York State Department of Correctional Services to provide treatment options for chemically dependent inmates. Not all of the substance abuse programs offered by the Department are considered to be ASAT Programs; only those operated or overseen by ASAT staff and complying with program standards are treated as such. According to the ASAT Program Operations Manual, the primary mission of ASAT is "[t]o prepare chemically dependent inmates for return to the community and to reduce recidivism ... by providing education and counseling focused on continued abstinence from all mood altering substances and participation in self-help groups based on the 'Twelve Step' approach." The ASAT philosophy declares that it uses the "12-Step approach to recovery" and that "[b]y working the 12 *suggested* steps" a person achieves "a realistic understanding of himself/herself" (emphasis added). It continues: "The 12 steps of A.A. act as a *guide* which provide the tools to build a new way of life without the use of alcohol and/or drugs, one day at a time" to prevent relapses upon release (emphasis added).

The services offered through ASAT involve three main components. First, treatment, education and family counseling services are formally part of the ASAT Program. Second, participants are urged to use other academic, vocational, and social or medical services made available to them although not part of the formal ASAT Program. Third, enrollees are required to participate in independent, volunteer-led self-help groups. The self-help group component provides the sole and slender nexus for the controversy here and the declaration of unconstitutionality. In that respect, the ASAT Program Manual states that "[i]t should be noted that self-help groups such as A.A. and N.A. *are not part* of the formal ASAT Program but are an important *adjunct* to it. The groups must be *separated* from the ASAT Program and not supervised or chaired by ASAT staff. Affiliation and employee involvement is counter to self-help group traditions" (emphasis added).***699**

The basic ASAT treatment method encompasses approximately 330 hours of counseling and therapy spread over a 26-week period. This includes mostly lectures, seminars, group discussions, and counseling focused on addiction and recovery. Self-help group participation is not a predominant part and, indeed, constitutes an attenuated feature of the total ASAT experience, consisting of only 26 hours of the total program period. The ASAT Program, rather than commanding some doctrinal hegemony, is thus notable for its diversity, variety, voluntariness and nuanced interplay of various components.

The center of gravity for the resolution of this lawsuit is a finding that the ASAT Program unconstitutionally compels petitioner to join in religious practices as a condition to his receiving the discretionary benefit of the Correctional Services Department's extra visitation program. The ASAT Program is thus charged with imposing a State endorsement of and entanglement with practices of A.A. deemed religiously intrusive and objectionable. The analysis expressly refers to deistic expressions from A.A.'s Twelve Step modality. Our interpretation of this integral dispositive rationale specifically and fairly identifies its root in a proposition that A.A. advances "religious-oriented practices and precepts" that urge "performance of quite traditional religious devotional exercises" (majority opn, at 677, 688).

A brief overview of A.A. history and its operating principles contradicts the predicate assumptions that drive petitioner's tenuous theory. A.A. was founded in 1935 as a general concept under which community groups of independent individuals voluntarily join together in common experience and discipline to try to stay sober. The two basic texts of A.A. are Alcoholics Anonymous (Alcoholics Anonymous World Services, Inc. [3d ed 1976] ["the Big Book, The Basic Text for Alcoholics Anonymous"]) and Twelve Steps and Twelve Traditions (Alcoholics Anonymous World Services, Inc. [3d ed 1981]), which were originally published in 1939 and 1952, respectively. Substantially, if not overwhelmingly, they reflect suggested secular and spiritual guideposts, not compulsory religious commandments or tenets of some New-Age or even Old-Time religion.

As the Preface to the "Big Book" states, "[b]ecause this book has become the basic text for our Society and has helped such large numbers of alcoholic men and women to recovery, there exists a sentiment against any radical changes being made in it. Therefore, the first portion of this volume, describing the A.A. recovery program, has been left untouched in the courseof*700 revisions made for both the second and the third editions." A.A. has thus refrained from revising its founding texts to conform to politically correct themes and times or to excise expressions objectionable to the school of "secular individualism" (Dent, Book Review, 46 J Legal Educ 130, 131-134 [1996]).

The United States Supreme Court has itself observed that in considering the principles underlying the Establishment Clause, there may be a " 'tendency of a principle to expand itself to the limit of its logic'; such expansion must always be contained by the historical frame of reference of the principle's purpose, and there is no lack of vigilance on this score by those who fear religious entanglement in government" (*Walz v Tax Commn.,* 397 US 664, 678-679, quoting Cardozo, *The Nature of the Judicial Process,* reprinted in Selected Writings of Benjamin Nathan Cardozo, at 127 [Hall ed 1947]). Thus, "the Court consistently has declined to take a rigid, absolutist view of the Establishment Clause. We have refused 'to construe the Religion Clauses with a literalness that would undermine the ultimate constitutional objective *as illuminated by history*' [emphasis in original]. ... In our modern, complex society, *whose traditions and constitutional underpinnings rest on and encourage diversity and pluralism in all areas,* an absolutist approach in applying the Establishment Clause is simplistic and has been uniformly rejected by the Court" (*Lynch v Donnelly,* 465 US 668, 678 [emphasis added]; *see also, Walz v Tax Commn.,* 397 US 664, 671, *supra*; 4 Rotunda and Nowak, Constitutional Law--Substance and Procedure § 21.3, at 459 [2d ed 1992]; Kurland, Religion and the Law of Church and State and the Supreme Court, at 111 [1962]).

Rigidity is eschewed because "[f]ocus[ing] exclusively on the religious component of any activity would inevitably lead to its invalidation under the Establishment Clause" (*Lynch v Donnelly,* 465 US 668, 680, *supra*). The Supreme Court has thus stated that "our precedents plainly contemplate that on occasion some advancement of religion will result from governmental action" (*Lynch v Donnelly, supra,* at 683). The Court has made it abundantly clear, however, that " 'not every law that confers an "indirect," "remote," or " incidental" benefit upon [religion] is, for that reason alone, constitutionally invalid' " (*Lynch v Donnelly, supra,* at 683, quoting *Committee for Pub. Educ. v Nyquist,* 413 US 756, 771). We are satisfied that perceived religious aspects of A.A. transmuted into ASAT are indirect, remote and incidental, and neither compulsory nor mandatory (*see, Lynch v Donnelly, supra*). Yet, the majority ***701** rules that the United States Constitution and Supreme Court precedents demand a virtually pure secularity (majority opn, at 677, 686, 690). In any event, coercion alone cannot transform such incidentalism into an Establishment Clause violation. There is no theory, case or authority that we know of for a theory with that kind of trumping quality (*see generally,* Glendon, *Law, Communities, and the Religious Freedom Language of the Constitution,* 60 Geo Wash L Rev 672, 679 [1992]; *see also,* Gedicks, The Rhetoric of Church and State, at 63-65, 72, 82, 120-121 [1995]).

When A.A.'s Twelve Steps are drawn across the Establishment Clause divide, a challenger must bear a very high burden of demonstrating unconstitutionality beyond a reasonable doubt. The objectant must present more than superficial analysis of the operating principles of the challenged State exertion.

A fair review of the totality of the A.A. message and mission reasonably supports our acceptance of its published and principled representation that its renowned singular aim is simply to help people help themselves in attaining and maintaining sobriety--a salutary public objective pursued through personal, voluntary and secular means. Empirical data makes this goal an especially demonstrable imperative for a rehabilitative correctional facility population. Our examination of the deistic references and semantical icons from the A.A. Twelve Steps discloses a concededly spiritually accented landscape, but not a constitutionally objectionable religious core.

The A.A. Traditions helpfully illustrate the primary and principal effect of the ASAT Program. Tradition Six states, "An A.A. group ought never endorse, finance, or lend the A.A. name to any related facility or outside enterprise, lest problems of money, property, and prestige divert us from our primary purpose." The "Long Form" of Tradition Ten continues this theme, stating: "No A.A. group or member should ever, in such a way as to implicate A.A., express any opinion on outside controversial issues--particularly those of politics, alcohol reform, or *sectarian religion.* The Alcoholics Anonymous groups oppose no one. Concerning such matters they can express no views whatever" (emphasis added). These explicit declarations against sectarian preference or promotion are disdained as irrelevancies in the majority's dispositional analysis (majority opn, at 681, 687, n 5) and turned into a distortion of our dissenting viewpoint (majority opn, at 684).***702**

Notably, too, the reliance upon speculative assertions of some prison staff that ASAT might harbor some religious features based on their personal reading of some of the literature is misplaced and does not materially aid in the resolution of this case. Unfounded, ambiguous and unofficial conclusions provide no basis for arriving at definitive findings regarding State action, with the dispositional and precedential consequences of this ruling.

II.

Our differences, however, must stay focused on the Establishment Clause and the constitutional issue, not on the whole or even selected excerpts of the A.A. message and literature, or A.A. projected into ASAT through A.A.'s original, historical, evolving or modern visage or operational reality. The Supreme Court has stated that "a determination of what is a 'religious' belief or practice" under the Constitution "may present a most delicate question," but that if the belief turned on the "subjective evaluation and rejection of the contemporary secular values," such beliefs would not rest on a religious basis because the choice made by the individual would then be "philosophical and personal rather than religious" (*Wisconsin v Yoder,* 406 US 205, 215-216; *see also,* Tribe, American Constitutional Law § 14-6, at 1183 [2d ed 1988]).

A.A. principles unquestionably arise from a secular philosophy and psychology, which espouse a fellowship of different individuals sharing their experiences in a confidential and voluntary manner that can mutually reinforce the individual desire and effort to overcome a terrible addiction and propensity more readily than if people tried to survive and conquer the disabling disease alone. The transcendent, human, spiritual qualities of this commitment and endeavor do not thrust the experience into a religious realm. Nor does the recognition and acceptance of some "Higher Power," outside of the "Ego," constitutionally connote a theistic ontology (*see,* Glendon, *op. cit.*, at 679).

Professor Stephen Carter has noted that the religious characterization with which A.A. is sometimes cloaked does not come from its throngs of participants and beneficiaries, and that constitutional hostility to religion may be lessening (*see,* Carter, The Culture of Disbelief, at 121, n, and in context at 120-123 [1993]; Carter, *The Resurrection of Religious Freedom?,* 107 Harv L Rev 118, 119, 130-132, 142; *see also,* ***703** *Allegheny County v Greater Pittsburgh Am. Civ. Liberties Union,* 492 US 573; *Abington School Dist. v Schempp,* 374 US 203, 205; Gedicks, *Public Life and Hostility to Religion,* 78 Va L Rev 671; Gedicks, The Rhetoric of Church and State [1995]). Professor Philip Kurland, in a seminal work, urged "neutral principles" of adjudication in such controversies and offered these insights:

"[T]he wisdom of the framers of the first amendment [is] in their objectives of keeping the church free from domination by government and the state free from alliance with religion. ... *The freedom and separation clauses should be read as stating a single precept: that government cannot utilize religion as a standard for action or inaction because these clauses, read together as they should be, prohibit classification in terms of religion either to confer a benefit or to impose a burden.* This test is meant to provide a starting point for the solution to problems brought before the Court, not a mechanical answer to them" (Kurland, *op. cit.,* at 111-112 [emphasis added]).

Despite the competition of vocabulary and classifications between secularism versus communitarianism and neutrality versus accommodation, no one should lose sight of the relevant analytic framework and fact that this petitioner's entire claim is predicated on the Establishment of Religion Clause. He makes no complaint whatsoever of restriction of his freedom to exercise religion or nonreligion. Yet, the majority's vital building block is a coercion element, applied in a novel fashion as a matter of law that echoes between the twin chords of the First Amendment's religion clauses. This is far beyond the coerced formal prayer in a school setting in *Lee v Weisman* (505 US 577) relied on so heavily by the majority (majority opn, at 688, n 6; *contrast, Zorach v Clauson,* 343 US 306).

We join, nevertheless, in the majority's hope for no broader precedential and practical sweep than necessary, and that public officials will continue to recognize and utilize valuable treatment modalities offered through instrumentalities like ASAT and A.A. At the same time, we remain legitimately concerned about how they do so in light of the reasoning that leads to the precise holding. For example, if purely voluntary, unconditional participation in an ASAT-A.A. Program satisfies all the *Lemon* prongs and, thus, would not constitute an Establishment Clause violation in that universe and fact pattern, how ***704** and why does the addition of a dominant coercion element transcend and neutralize the satisfaction of the core criteria on establishment grounds? Stated conversely, if coercion of the distinctive kind asserted here is not present, how and why, then, would the same ASAT-A.A. Program, in a purely voluntary regimen, escape the Establishment Clause cloud engendered by the whole of the rationale of this case? The answers to these troublesome queries, for us at least, are elusive, unpersuasive and puzzling.

III.

The Establishment Clause in 10 words declares that "Congress shall make no law respecting an establishment of religion" and is applicable to the States through the Fourteenth Amendment (US Const 1st, 14th Amends; *Abington School Dist. v Schempp,*

374 US 203, 205, *supra*). The Supreme Court realistically recognizes that total separation of Religion and State in a pluralistic society with this Nation's history and traditions is not possible or even desirable.

Towards the preservation and recognition of renowned laudatory ends and multifaceted protections, the Supreme Court has stood by a test to determine whether particular government endorsements or entanglements with religion are prohibited by analyzing "the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority" (*Lemon v Kurtzman,* 403 US 602, 615, *supra*). In *Lemon,* the Supreme Court declared the well-known tripartite test: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion ...; finally, the statute must not foster 'an excessive governmental entanglement with religion' " (*id.,* at 612-613 [citations omitted]).

Individual Justices of the Supreme Court have expressed varying qualms about the continued usefulness and viability of *Lemon* (*see, Allegheny County v Greater Pittsburgh Am. Civ. Liberties Union,* 492 US 573, 655, *supra* [Kennedy, J., concurring in part and dissenting in part]; *Edwards v Aguillard,* 482 US 578, 636-640 [Scalia, J., dissenting]; *Lynch v Donnelly,* 465 US 668, 688-689, *supra* [O'Connor, J., concurring]). The evident unevenness generated by the *Lemon* approach, as reflected in the Supreme Court's latest cases, may be rectified someday and, in its place, a less separationist and more communitarian ***705** and beneficial approach may emerge (*see especially,* Witte, *The Essential Rights and Liberties of Religion in the American Constitutional Experiment,* 71 Notre Dame L Rev 371, 425-430 [1996]; *see, e.g., Rosenberger v Rectors & Visitors of Univ. of Va.,* 515 US ___, ___, 115 S Ct 2510, 2522-2523; *Capitol Sq. Review v Pinette,* 515 US ___, 115 S Ct 2440; *Bowen v Kendrick,* 487 US 589). The Supreme Court, however, has for the most part held onto the *Lemon* set of guideposts for Establishment Clause jurisprudence, analysis and application (*see, Lamb's Chapel v Center Moriches Union Free School Dist.,* 508 US 384, 395, n 7).

The majority's overriding emphasis on a coercion prong, however, is disconcerting, especially when applied in this dispositional setting (majority opn, at 680, 686; *compare, Zorach v Clauson,* 343 US 306, 311-312, *supra; Grumet v Board of Educ.,* 81 NY2d 518, 527, *affd* 512 US 687; *New York State School Bds. Assn. v Sobol,* 79 NY2d 333, 339; *Matter of Klein [Hartnett],* 78 NY2d 662, 666; *see also,* Witte, *op. cit.,* at 426-427). Indeed, the primary-and-principal-effects prong of *Lemon* seems to be altered and diluted in a way that may jeopardize other State actions under *Lemon* (majority opn, at 677, 686; Gedicks, The Rhetoric of Church and State, at 72-73).

All experts, scholars and commentary aside, in any event, the First Amendment and the Supreme Court cases dominate. Petitioner's core claim thus ought to be meticulously examined to see how it measures up against the existing array of authorities--not petitioner's theoretical construct. His complaint centrally relies upon the importation into the ASAT Program of assertedly objectionable religious symbols from the A.A. Twelve Step method. That *is his lawsuit,* not our characterization of it.

Notwithstanding the majority's objections to our dissenting viewpoint that analyzes the case as it comes to us, coercion--without a linked religious nucleus that emerges as constitutionally offensive--cannot alone justify the reversal in this case. After all, everything this appellant-petitioner prisoner does or does not do is largely governed by the innately coercive atmosphere of his incarceration. He is in a correctional facility. He should not be allowed in the circumstances of this case to wield the Establishment Clause "as a sword to justify repression of religion or its adherents from any aspect of public life" (*McDaniel v Paty,* 435 US 618, 641; *see generally,* Carter, *The Culture of Disbelief, op. cit.*). Yet, petitioner is allowed to do just that when he asserts, and the majority agrees, that the Twelve Steps of A.A. unconstitutionally compel him to participate ***706** in a collection of content-based, "religious-oriented practices and precepts," that by permeation into ASAT are together deemed to violate *Lemon,* solely because he wishes and chooses to apply for privileges permitted under a discretionary expanded visitation regulation.

Petitioner, it should be noted, concedes that ASAT's overriding purpose to treat and reduce substance abuse among prison inmates is secular and, therefore, satisfies *Lemon*'s first criterion (*see, Boyd v Coughlin,* 914 F Supp 828, 832 [ND NY 1996]). Thus, petitioner's claim, taken in the terms of his own argument, rises or falls under *Lemon*'s second and third criteria, that is, whether ASAT, through A.A., principally or primarily advances religion or impermissibly entangles government with religion.

Whether the primary effect of a governmental policy advances or inhibits religion, in turn, depends on whether the "challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices" (*Grand Rapids School Dist. v Ball,* 473 US 373, 390). Mere exposure to religious ideas or pure personal subjectivity do not breach the constitutional "blurred, indistinct, and variable barrier" (*Lemon v Kurtzman,* 403 US 602, 614, *supra*), nor do individuals possess constitutional rights and power to force government "to tailor public school programs [or the ASAT curriculum, we would respectfully submit] to individual preferences, including religious [or nonreligious] preferences" (*see, Ware v Valley Stream High School Dist.,* 75 NY2d 114,

125). This is precisely what petitioner succeeds in doing by this case. Indeed, not "every state action impacting religion is invalid if one or a few citizens find it offensive. People may take offense at all manner of religious as well as nonreligious messages, *but offense alone does not in every case show a violation*" (*Lee v Weisman,* 505 US 577, 597, *supra* [emphasis added]).

The only references in the ASAT materials to the actual text of the A.A. Twelve Steps--which we believe do not constitute an unconstitutional State-compelled participation in religious practices--are found in Attachment E to the Operations Manual, entitled "ASAT Program Curriculum." The implementation and underlying focus of the counseling provided pursuant to these steps, however, is functionally and decidedly nonreligious (so far as we know on this record), no matter what the incorporated deistic references semantically purport to invoke, suggest and portray.***707**

The petitioner objects particularly to the incorporation by reference of A.A. Steps Three, Five, Six, Seven, Eleven and Twelve into the ASAT curriculum, claiming that parts of their text foster or force a theistic point of view upon his agnostic beliefs. Though the majority agrees with petitioner's argument, we disagree; finer line-drawing is the more progressive and enlightened trend and task (*see, Rosenberger v Rectors & Visitors of Univ. of Va.,* 515 US ___, ___, 115 S Ct 2510, 2526, *supra* [O'Connor, J., concurring]). Thus, petitioner's claims are not supportable in this case and should not be remediable by the constitutionally rooted relief granted here.

The ASAT curriculum states that the goal of Step Three is "[t]o explore the concepts and barriers in accepting a power beyond self" as well as "[e]xploration of self-centeredness," and that the group counseling focus is to "explore issues of fear (feelings) and its relationship to chemical use." Although the list of *suggested discussion topics* includes "barriers to faith" and "prayer and meditation," no documentation by the party bearing the heavy burden of proof in such a case is presented that these are anything more than talking points and topics. It cannot be overlooked that, in this group setting, counselors must be prepared to handle inquiries from and concerns of all members of the group, religious and nonreligious alike, and that inhibiting individual inmates from expressing personal views in a secular program may impinge upon their free exercise, free speech and free association rights (*see, Rosenberger v Rectors & Visitors of Univ. of Va., supra,* 515 US, at ___, ___1, ___, 115 S Ct, at 2513, 2520, 2523; *Capitol Sq. Review v Pinette,* 515 US ___, ___, 115 S Ct 2440, 2448-2449, *supra*). In a diverse and pluralistic universe, including a prison environment, a curriculum's identification of faith and neutrally described feelings of hope, fear, and trust do not dissipate or override the significantly secular quality within the over-all treatment regimen. Nor do they project religiosity. Moreover, spirituality is not synonymous with religion generally or constitutionally, no matter what Webster's dictionary may acontextually assemble as a general definition (majority opn, at 681).

Steps Eleven and Twelve focus on discussions of the effect of addiction on others and continue to maintain a sense of momentum towards the freedom from dependency developed with the help of the program and its participants. Step Eleven does refer to "prayer and meditation" and "contact with God," but then identifies the goal as: "[A]ssist[ing] in understanding the relationship between disease and its effects on the next ***708** generation" and "viewing parenting in terms of recovery behavior." Step Twelve refers to a "spiritual awakening," but rather than having any formalized religious significance or content, the goal of this step is a "[p]ersonal exploration of the feelings related to leaving treatment (and prison)." ASAT is, thus, thoroughly free of religious organization, theses, ritual or doctrine, as expressly ordained by its curriculum. The group discussions are cued to family and recovery issues in a therapeutic and nonreligious manner. The talking points accompanying these A.A. Steps do not implicate religious proselytization or preference, except by petitioner's ingenuously subjective attenuation in this case--and that does not rise to the level of a constitutionally coerced religious entrapment of this petitioner.

In sum, the majority finds that the ASAT "curriculum" suffers from a dominating form of religious coercion and, thus, declares it constitutionally encumbered, sufficiently to justify the final decree of this case. The curriculum focuses principally on assisting inmates on their voyages of self-discovery away from addiction to self-awareness and recovery, and the personal, psychological, social and spiritual means to maintain that state of sobriety or avoidance of dependency once outside the prison walls. Yet, the evidence submitted by petitioner to the courts below to support the constitutional nullification consists principally of the A.A. Twelve Steps sheet distributed as a "*suggested handout*" to ASAT participating inmates in an attempt to explain non-ASAT self-help group dynamics. Thus, the inordinate constitutional inflation of A.A. texts, pamphlets and personal parables to superimpose an assertedly compulsory religious exertion onto petitioner's participation in ASAT (the only Program at issue in this lawsuit, in which A.A. is not even a party) is seriously flawed because it is not documented by a customary and requisite as-applied record basis.

Persuasively, other courts have concluded that A.A. practices are not constitutionally religious, although they may partake of a blend of secular and spiritual qualities (*see, O'Connor v State of California,* 855 F Supp 303; *Stafford v Harrison,* 766 F Supp 1014, 1016; *Feasel v Willis,* 904 F Supp 582, 586). The District Court in *O'Connor* found that it was "undisputed that the primary purpose of requiring attendance at self-help meetings such as A.A. is to prevent drunk driving and the tragic injuries and deaths that result from it, while at the same time providing treatment for individuals with substance abuse problems. *The*

'principal and primary effect' of ***709** *encouraging participation in AA is not to advance religious belief but to treat substance abuse*" (*O'Connor v State of California, supra,* at 307 [emphasis added]).

Similar reasoning was employed in the recent decision of *Boyd v Coughlin* (914 F Supp 828 [ND NY 1996], *supra*), which dismissed an inmate's complaint alleging that the ASAT Program violated both the establishment and free exercise components of the Religious Clause. The court noted that "the expressly stated principal and primary goal of the [ASAT] program is the preparation of chemically dependent inmates for return to the community and to reduce recidivism" (*id.,* at 833). In dismissing the plaintiff's claim, the court "determine[d] that there is no material question of fact as to whether the principal and primary purpose of [ASAT] program is to promote or inhibit religion" (*id.,* at 833).

Petitioner and the majority instead misdirect *Warner v Orange County Dept. of Probation* (870 F Supp 69). In examining that plaintiff's Establishment Clause claim, the District Court stated that its inquiry was limited to "whether the A.A. program *as plaintiff experienced it was essentially religious in nature*" (*id.,* at 70 [emphasis added]). It found that the plaintiff had established that "[g]roup prayer was common at the A.A. meetings plaintiff attended" and that "those attending the meetings were strongly encouraged to pray," and therefore concluded that "the A.A. program *that plaintiff experienced* placed a heavy emphasis on spirituality *and prayer,* in both conception and in practice" (*id.,* at 71 [emphasis added]). In finding that the A.A. program *as applied* in that case had a direct religious essence and particularized experience, the District Court limited its ruling, stating, "the testimony and evidence *in this case* support the finding that the A.A. *meetings plaintiff attended* were the *functional equivalent of religious exercise*" (*id.,* at 72 [emphasis added]). Additionally, *Warner* expressly declined to apply the *Lemon* test (*id.,* at 73, n 2). Thus, it is of no value because it avoided the *Lemon* test and was decided on the unique as-applied facts evidenced in a Federal trial court.

When a "program or regulation has a sufficiently secular effect" and the "secular impact is sufficiently separable" from any conceivable religious impact, no Establishment Clause violation is presented (*see,* Tribe, *op. cit.,* § 14-10, at 1216). In this case, petitioner has failed even minimally to demonstrate that the primary and principal purpose of the ASAT Program is to compel advancement of constitutionally implicated religious practices or to stifle agnostic or atheistic preferences.***710**

IV.

Petitioner also argues, and the majority accepts, that the petitioner is "compelled" to attend the ASAT Program, and that this by itself shows that the primary purpose and effect of ASAT becomes one of advancement of religious practices that violates Establishment of Religion strictures. This argument and analysis are factually and legally incorrect and inapplicable to this case. First, coercion is not an abstraction and must be particularized. Second, the ASAT Program is initially voluntary and intrinsically discretionary.

This situation is not at all appropriately analogized to school prayer settings (*see, infra,* part V.). The Supreme Court has stated that "while proof of coercion might provide a basis for a claim under the Free Exercise Clause, it [is] not a necessary element of any claim under the Establishment Clause" (*Committee for Pub. Educ. v Nyquist,* 413 US 756, 786, *supra; see also, Abington School Dist. v Schempp,* 374 US 203, 223, *supra*; *Allegheny County v Greater Pittsburgh Am. Civ. Liberties Union,* 492 US 573, 597, n 47, *supra; Engel v Vitale,* 370 US 421, 430; *compare, Zorach v Clauson,* 343 US 306, 311-312, *supra*). Indeed, the special circumstances of prison settings prompted the Supreme Court to hold and pointedly observe:

" 'Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system.' *Price v. Johnston,* 334 U.S. 266, 285 (1948). The limitations on the exercise of constitutional rights arise both from the fact of incarceration and from valid penological objectives--including deterrence of crime, *rehabilitation of prisoners,* and institutional security [citations omitted]. ... '[W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests.' *Turner v. Safley, ante,* at 89. This approach ensures the ability of corrections officials 'to anticipate security problems and *to adopt innovative solutions to the intractable problems of prison administration,' ibid., and avoids unnecessary intrusion of the judiciary into problems particularly ill suited to 'resolution by decree'* " (*O'Lone v Estate of Shabazz,* 482 US 342, 348-350 [emphasis added]).***711**

Petitioner admitted in his original grievance (before a lawsuit and this appeal ensued) that he was not "being forced to attend the [ASAT] program, but my attendance is required if I intend to continue participation in the FRP program." Thus, the institutional and constitutional compulsion of which petitioner now complains must be considered within the qualifying criteria for the discretionary expanded visitation program. This crucial constitutional distinction--the prisoner has an initial choice

whether to participate at all in the extended visitation program and the prison officials correspondingly have wide discretion to regulate the participants--is disregarded in the resolution of this key aspect of this appeal.

The Family Reunion Program grants some inmates the opportunity to receive selected visitors for extended time periods (7 NYCRR 220.1). Eligibility is dependent on satisfying specified criteria, including a minimum length of stay at a correctional facility and a clean disciplinary record (7 NYCRR 220.2 [a], [b]). A relevant feature in this case is attendance by inmates at therapeutic treatment programs related to their particular offenses or over-all histories (7 NYCRR 220.2 [a] [3] [ii]). Because of appellant's admitted heroin use, correctional authorities properly invoked this regulation to require his participation in ASAT for treatment of his addiction (*see,* 7 NYCRR 220.2 [a] [3] [ii]; 220.8).

Appellant's claim that this requirement legally converts his attendance and participation in the ASAT Program into a compulsory religious exercise, with Establishment Clause implications and consequences, does not withstand scrutiny. He voluntarily chose the course of action that placed his agnosticism and nonbeliefs at risk because he wished to receive something he is not unqualifiedly entitled to from the State. Yet, he wins this lawsuit and the State is charged with compromising his First Amendment Establishment Clause rights.

In *Matter of Doe v Coughlin* (71 NY2d 48), this Court stated that:

"Given the present regulatory scheme of the Family Reunion Program, [inmates] could have *no legitimate expectation* that they would be afforded [visits]. ... Although the regulations establish guidelines, the guidelines do not create an entitlement of [visits] because the review *system is heavily discretionary* and holds out no more than the possibility ***712** of [visits] .... Moreover, even though an inmate has previously been approved and participated in the program, there can be no legitimate expectation of continued participation because the regulations provide that inmates must reapply each time they seek a visit, and each application is subjected to a new discretionary review" (*id.,* at 55-56 [emphasis added]).

This significant precedent from this Court bearing directly on the part of the analysis that the majority self-describes as the dispositive feature of its rationale--coercion--is left entirely unanswered and substantially deflected.

Contrary to petitioner's present coercion claim, he suffers no subjugation to unconstitutionally offensive religious practices or influences, even if ASAT and A.A. were deemed to harbor proscribed religious attributes in some constitutionally cognizable sense. The correctional officials exercised appropriate regulatory authority over petitioner's participation in a discretionary visitation program, so long as he also availed himself of a therapeutic program to treat his undeniable substance abuse history that might then earn him the privilege of such extra visitations. This is an appropriate, not "narrow" or "grudging" limitation on petitioner's expectations and entitlements, because the privilege of special visitations is necessarily circumscribed by the threshold circumstance of his incarceration, the nature of the visitation program and the individualized discretionary assessment (majority opn, at 695; *see, Matter of Doe v Coughlin,* 71 NY2d, *supra,* at 58; *see also, Matter of Rivera v Smith,* 63 NY2d 501, 510; *O'Lone v Estate of Shabazz,* 482 US 342, 348, *supra*).

A keen parallel for this aspect of the case may be drawn from *Hamilton v Regents* (293 US 245). The Supreme Court found no privileges and immunities or due process violations predicated on plaintiffs' objection on religious and conscientious grounds to a California statute requiring enrollment and completion of a military science and tactics course as a condition to attending the State's university. Justice Cardozo aptly added his "extra word" to the Court's holding in his inimitable voice:

"Manifestly a different doctrine would carry us to lengths that have never yet been dreamed of. ... *The right of private judgment has never yet been so exalted above the powers and the compulsion of the* ***713** *agencies of government.* One who is a martyr to a principle--which may turn out in the end to be a delusion or an error--does not prove by his martyrdom that he has kept within the law" (*id.,* at 268 [Cardozo, J., concurring] [emphasis added]).

V.

Petitioner also presses that the ASAT Program violates the Establishment Clause in that it is similar to requiring public school students to participate in mandatory prayer. This argument, expressly endorsed by the majority, should be flatly rejected. Initially, it must be noted that the petitioner has never claimed that he was required or even urged as part of the ASAT Program to pray or even privately meditate in some religious mode. Thus, at the outset, the ASAT Program can by no stretch of the argumentative method be analogized to the sectarian prayer setting and activity which the Supreme Court condemned as a "state-sponsored religious exercise" in *Lee v Weisman* (505 US 577, 592, *supra*) and *Engel v Vitale* (370 US 421, 424, *supra*).

The majority's transference of these two cases concerning *formal prayer* in *public school settings* into this case is particularly unpersuasive.

This should be contrasted to *Zorach v Clauson* (343 US 306, *supra*), for example, where New York's released time program was upheld. It allowed pupils to leave their public schools during school hours, but only on condition and for compulsory attendance at religious instruction. The opinion of the Court repelled the Establishment Clause challenge and explicitly rejected the argued "coercion" element as irrelevant. Its analysis is even more pertinent to this case, because neither formal public school prayer nor public financial aid to secular religious schools is implicated here. Those features make the instant case exceptionally different from the authorities so intensely relied on by the majority.

The Supreme Court has stated that "there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools. ... Our decisions ... recognize, among other things, that prayer exercises in public schools carry a particular risk of indirect coercion. The concern may not be limited to the context of schools, but it is most pronounced there" (*Lee v Weisman, supra,* at 592 [citations omitted]). In *Lee,* the Court even drew the ironically apt distinction between imposing religion on children and the choices open to adults, adding ***714** that it did "not address whether [the] choice is acceptable if the affected citizens are mature adults, but we think the State may not, consistent with the Establishment Clause, place primary and secondary school children in this position" (*id.,* at 593).

The reasoning that likens a prison environment to a school's "inherently authoritarian atmosphere" and prisoners to pupils is wrong. Fundamentally, among other considerations, this ignores the maxim that heightened constitutional analysis governs the protected enclave of students in schools, in contradistinction to the differentiated constitutional protections preserved for mature adults in prisons (*see, O'Lone v Estate of Shabazz,* 482 US 342, 349, *supra; see also, Pell v Procunier,* 417 US 817).

The ASAT Program finally suffers no excessive entanglement between State and religion under *Lemon*'s third prong. The assertion of a "delegat[ion of] the State's discretionary authority" (majority opn, at 690) is factually unsupportable on this record. Also, *Board of Educ. of Kiryas Joel Vil. School Dist. v Grumet* (512 US 687, *supra*) is totally inapposite in that regard. Here, the State has by no means authorized some religious sect or its functionaries to carry out a public function. Indeed, the majority's expectation that A.A. volunteers working in the ASAT Program will "wholeheartedly" engage in proselytization and religious indoctrination (majority opn, at 689) is gratuitous and finds no support in the record or in empirical data.

VI.

Many people may believe that A.A. is an entity of spiritual essence or experience. Referenced incorporation of its literature into ASAT to forge a religious alchemy that implicates the Establishment Clause of the First Amendment by some foreboding compulsion feature, however, is not justified or proven. Greater quantum and quality should be required to cross that constitutionally blurred barrier. Indeed, the repeated evocation of a generalized deity figure and symbol or some nondenominational, secular alternative "Higher Power" fails to support this profound absorption of A.A. and ASAT into the territory of a compulsory, constitutionally forbidden religious encounter. We reiterate, in summary, the cogent resolution of this case by the unanimous Appellate Division:

"[I]t is our conclusion that petitioner has failed to ***715** make an adequate record to state a claim for an Establishment Clause violation. The petition cites nothing of a religious nature about this particular ASAT program or its practices other than the fact that it is modeled after the principles of AA which make references to 'God' and a 'Higher Power'. We hold that under the facts and limited record in this case, the inclusion of the 12-step AA component into the ASAT program did not make the program a religious exercise and, therefore, did not violate petitioner's rights under the Establishment Clause of the 1st Amendment" (211 AD2d 187, 194 [Spain, J.]).

Nevertheless, this case is now concluded by this Court with a torrent of competing words and interpretations of the record, relevant authorities and constitutional analysis. In the end, Judge Ciparick and I agree with the lower courts and disagree with the reversal decree here because ASAT and A.A., in their essences and practices, have not been shown to compel or proselytize a State-imposed religious activity and participation generally or as to petitioner that violate the precepts of the Establishment Clause of the First Amendment of the United States Constitution.

Chief Judge Kaye and Judges Simons, Titone and Smith concur with Judge Levine; Judge Bellacosa dissents and votes to affirm in a separate opinion in which Judge Ciparick concurs.

Order reversed, etc.***716**

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People v. Damiano

(Ct. applied strict stare decisis principle of a prior case holding in maintaining a questionable statutory provision)
87 N Y 2nd 477, at 490 – Dissenting Opinion [6-1] [1996]

New York
Official Reports

87 N.Y.2d 477, 663 N.E.2d 607, 640 N.Y.S.2d 451

The People of the State of New York, Appellant-Respondent,
v.
Jeffrey Damiano, Respondent-Appellant.

Court of Appeals of New York
284
Argued October 26, 1995;
Decided January 16, 1996

CITE TITLE AS: People v Damiano

SUMMARY

Cross appeals, by permission of the Chief Judge of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Third Judicial Department, entered November 23, 1994, which modified, on the law, and, as modified, affirmed a judgment of the Ulster County Court (Francis J. Vogt, J.), rendered upon a verdict convicting defendant of murder in the second degree, reckless endangerment in the first degree and reckless endangerment in the second degree. The modification consisted of reversing defendant's conviction of murder in the second degree and remitting the matter to Ulster County Court for a new trial on that charge.

People v Damiano, 209 AD2d 873, affirmed.

Bellacosa, J.

(Dissenting in part). A theoretical flaw on the written "statement of charges" given by the Trial Judge to help the jury sort out its verdict choices in this case is allowed to nullify an otherwise fair trial that resulted in a valid murder conviction. Defendant Damiano does not deserve a new ***491** trial, and the law of the State of New York on verdict sheets should not compel this miscarriage of justice.

The Trial Judge exhibited a keen awareness of the limitations of the rules governing materials that can be given to assist a deliberating jury. He openly expressed his inability to give the jury helpful written material after correctly, fully and repeatedly instructing the jury orally. Nevertheless, the jury's finding of guilt is ironically overturned because an authorized verdict sheet contained a parenthetical set of five demonstrably nonprejudicial, legally innocuous words, i.e., "depraved mind murder" and "reckless manslaughter." Because the pertinent judicial interpretations, derived from statutes, should be either applied more realistically or readjusted, I respectfully dissent.

Judge Ciparick's opinion recites the salient facts depicting the random and fatal violence of this case. After an eight-month investigation, defendant Damiano and two other culprits were identified and caught. All three confessed and were prosecuted.

Only Damiano, who was convicted after a jury trial (whose fairness is not contested here), is now before this Court on cross appeals by the People and himself. The Court is unanimous that his appeal as to the voluntariness of his admissions to the police lacks merit. The People's appeal from the Appellate Division order directing a new trial on the murder conviction, on the other hand, divides the Court. The interpretation of the original file, the procedural rubrics, and a realistic, objective appraisal of a legal principle and its snowballing application are the valid points of difference.[1]

[1] Judge Simons' concurring opinion would suppress my obligation to vote as my judicial conscience dictates and would silence my

voice. His constricting thesis on stare decisis is incompatible with that doctrine's essential nature and generous spirit, marked by a long-standing institutional, capacious tolerance of differing viewpoints (*see,* part IV of this opinion).

The defendant argued in the Appellate Division that his trial counsel was "apparently" not afforded an opportunity to object to a verdict sheet given to the jury by the Trial Judge during deliberations, and that "it does not appear" that defense counsel had notice of the verdict sheet at all. Appellate defense counsel argued that despite the absence of any defense requests or objections, even after two timely open court notifications, the trial court committed per se reversible error.

In an effort to aid the jury's work and pursuant to authority expressly invested in trial courts by the Legislature (*see,* ***492** CPL 310.20 [2]), the Trial Judge gave the jury a checklist of the alternative charges to be considered. The sheet was a menu of the charged crimes of the indictment and certain lesser included counts. The sheet correctly distinguished the top murder charge from the lesser included offenses of manslaughter and criminally negligent homicide in two relevant particulars as follows: "1st Count MURDER IN THE SECOND DEGREE (Depraved Mind Murder) if not guilty MANSLAUGHTER IN THE SECOND DEGREE (Reckless Manslaughter) if not guilty CRIMINALLY NEGLIGENT HOMICIDE" (officially marked Court's Exhibit 4 [emphasis added]).

These parentheticals are the whole essence of this controversy and case, and the sole basis for the grant of a new trial on the homicide count.

The overwhelming evidence of guilt in this case renders it inconceivable that the jury was wrongly swayed by the parenthetical expressions, especially in light of the trial court's meticulous explanations of all the elements of the crimes. To persuade anyone of the potential danger or actuality of prejudice, one would have to show and believe that the jury, upon seeing the few parenthetical words on the verdict sheet, decided to ignore the court's explicit instructions on second degree murder and proceeded to concentrate only on whether the defendant had a depraved mind. This theory is unrealistic and unfair to the facts and participants, including the Trial Judge and jurors. It also fails to take account of common sense and the experience and problems of all levels of courts engaged in the continuing struggle to deal with the dynamic interplay between jury instructions and jury deliberations.

The Trial Judge's intentions to submit a verdict sheet, expressed in defendant's and defense counsel's presence, could not be more plain:***493**

"THE COURT: Incidentally, *I will submit a statement of the charges* and the lesser included charges which might assist you here" (emphasis added).

After further, thorough, oral reinstructions on the criminal elements as requested by the jury, the Trial Judge again declared:

"THE COURT: *I'll send you a statement of the charges which I hope will assist you.* We are here to help you and as I said it's unfortunate I just can't give you a transcript of this for your ready reference but I can't. All right, you may retire to your deliberations" (emphasis added).

Moreover, the Trial Judge in this case instructed the jury repeatedly on the particularized elements earmarked by the parenthetical labels. Although the oral instructions had the advantage of having been communicated with full explanations of each of the crimes, the case nevertheless collapses under the weight of a rule that neutralizes, and even obliterates, all of the concededly correct instructions and efforts (*contrast, People v Knight,* 87 NY2d 873). Once a jury sees *any* written words that are presented more fully in the customary and regular oral instructional form, a fiction is superimposed that its powers of reason and faithful responsiveness are suspended and it is deemed to have deliberated in an irretrievably "skewed" process.

This dissenting approach includes three principal facets relating to the application of this Court's lines of precedent to the present situation. First, I urge consideration of prejudice as a factor before convictions arrived at after eminently fair trials are reflexively reversed. That would restore some reasonable respect for CPL 470.05 (1), which legislatively directs that appeals be decided "without regard to technical errors or defects which do not affect the substantial rights of the parties." If deference to statutorily construed mandates reigns, then analysis of the entire panoply of rules of interpretation should also include the long-standing dictate of CPL 470.05 (1) and the fact that CPL 310.20 does not include a "consent of the parties" prerequisite. Based on the actual record, the jury should be deemed to have followed the court's instructions on the law, repeated in response to questions from the jury. This relevant give-and-take demonstrates the conscientious care the jury was taking *not* to make a hasty, oversimplified or "skewed" decision.***494**

Second, the record does not in any principled way support the supposition that defense counsel (a) never saw the verdict

sheet, (b) never had a meaningful opportunity to object to it, or (c) had no affirmative professional obligation to make requests or objections in the face of unequivocal notification of the verdict sheet submission (*see, People v Kinchen,* 60 NY2d 772, 774). A thorough analysis of the record (including the court's supplemental instructions, the jury notes, the verdict sheet, and the trial court clerk's continuous, contemporaneously recorded, handwritten minutes of the proceedings) points compellingly to the conclusion that defense counsel not only saw the checklist of charges, but undoubtedly had ample time and opportunity to object. Any other view fails to give the record its due and fair reading and inescapable inferences.

Third, the rule, as it has inexorably expanded into another per se dictate, lacks a valid doctrinal underpinning and sufficient empirical verification or necessity to sustain the amplification here. This case presents a timely and propitious occasion to consider and correct this unforeseen overextension. While my appreciation of this phenomenon is belated since I concurred in the prior cases, I am justified in now acknowledging my errant steps and lack of prescience in order to bring sharper attention to the matter so it can be rectified here or in the Legislature. Candid pursuits towards the growth and development of the law and to correct miscarriages of justice warrant exposition, not interdiction (*see,* Cardozo, The Growth of the Law [1923], reprinted in Selected Writings, *seriatim* from p 185 [Hall ed 1947]).

I.

No valid reason exists to bar a prejudice analysis when evaluating the verdict sheet claim. Harmless error factors and the reasonable interpretation of this record could certainly sustain the People's appeal in this case, to save an otherwise valid and deserved murder conviction.

A prejudice feature is supportable in light of *People v Piazza* (48 NY2d 151). While that case was decided before the seminal *People v Owens* (69 NY2d 585), *Piazza*'s rationale relates directly to verdict sheets and not, as *Owens* did, to providing the jury with written instructions. *Piazza* thus more directly applies to the question of harmless error in this context than *Owens* and its progeny.

In *Piazza,* the verdict sheet listed 15 possible guilty verdicts, and then one choice of "not guilty of anything." The Court correctly ***495** found that this was error because it "unduly emphasized the options of guilt" (*id.,* at 165). It nevertheless wisely found the error harmless (*id.,* at 165). It is inconceivable that the supposed danger in the instant case is any more serious than that in *Piazza.* If *Piazza*'s miscalibration of the jury's duty did not constitute prejudice as a matter of law, then surely the labelling additives in this case should not be deemed to have prejudiced Damiano as a matter of law in a legally cognizable or principled way. Since the Legislature prescribed no consent component in CPL 310.20, the majority acknowledges that no violation of that verdict sheet statute occurred (majority opn, at 485, n 2). The *Piazza* approach should, therefore, still be perfectly valid.

This assessment is especially pertinent here in light of the trial court's detailed instructions during its main charge on the distinctions among depraved indifference murder, reckless manslaughter, and criminally negligent homicide. After the main charge, the Trial Judge twice reinstructed the jury on the homicide counts, both times stressing all of the distinctive elements of murder in the second degree and manslaughter in the second degree. Manifestly, the supplemental instructions may be deemed to have "unskewed," i.e., cured, any theoretical "skewing." Since the over-all charge was also error-free, there is ample reason for reinstating the conviction on this ground.

Under the analysis of *People v Piazza* (*supra*) and *People v Crimmins* (38 NY2d 407), the labels in this case plainly played no part in defendant's murder conviction. On the contrary, the two people who substantively contributed the overwhelming evidence of defendant's guilt were defendant himself, for committing the crime and then incriminating himself in his detailed written statement and trial testimony, and his accomplice, Jamie Rullan, who confirmed Damiano's complicity by testifying against him at trial. The proof of guilt is beyond doubt or reproach.

II.

Defendant argues in this Court that the Trial Judge deprived trial counsel of the opportunity to see the verdict sheet and decide whether to challenge it or consent to it. This smooth argument is a leap from the two-page subsidiary argument first made before the Appellate Division, where appellate counsel never actually claimed that trial counsel did not see the verdict sheet or that he was deprived of an opportunity to ***496** object to it. Instead, defendant's Appellate Division brief used the

clever term "apparently" to shade the pertinent events--or nonevents--and declared that "it does not appear from the record that the parties were even aware that the [Trial] Court submitted a verdict sheet to the jury" (appellant's brief to App Div, at 47). The record proves that assertion to be at best disingenuous and, at worst, plainly false.

The Court is urged, nevertheless, to ignore defense counsel's failure to present any concrete and unqualified affirmation, and, instead, grant a new trial because of a perceived "silence" in the record. But the record is not silent. It fairly and reasonably shows that defense counsel did not object to the verdict sheet *not because he did not see it,* but rather because he either was indifferent or made a strategic choice not to object or make appropriate inquiry or request. He would now have this Court believe he does not have to ask to see it, when he undeniably knows it is about to be given to the jury and even when the jury later asks about it in a note precisely echoing the now fatal parenthetical caption (*see, People v Kinchen,* 60 NY2d 772, *supra*).

This Court is further asked to believe that this manifestly careful Trial Judge would risk automatic reversal and retrial by slipping only this verdict sheet to the jury in ex parte fashion. In light of the evidence that appears in the record regarding the verdict sheet, one would have to assume also that defense counsel, aware of every nuance in all other developments unfolding at the trial, was somehow sandbagged by the Trial Judge instead of the other way around.

The following chronology, meticulously culled from the trial transcript, court exhibits, and the trial clerk's contemporaneously recorded handwritten file minutes tells anyone who examines it closely at which precise point defense counsel and the jury had to have seen and been aware of the critical verdict sheet. The Trial Judge instructed the jurors on October 20, 1992, and they returned with their verdict in the late afternoon of October 21, 1992. The court record reflects that the Judge began his final instructions to the jury at 12:13 P.M. on October 20. A jury note sent out during deliberations requests a "List of charges given or Re-Read," and bears a time marking of 1:21 P.M. Because the original file is unmistakable that between 11:25 A.M. and 1:46 P.M. on the following day, October 21, the jury was in court listening to a readback of the testimony of accomplice Jamie Rullan, interrupted only by a lunch break, the pertinent note was necessarily sent out by the jury at 1:21 P.M. on October 20.***497**

The trial court, however, did not bring the jury out until 2:30 P.M. on October 20, after it received another jury note, marked Court Exhibit 5. That note requested in part that the Judge give "the definition of charges again," requesting "1st, 2nd, manslaughter, murder." The verdict sheet, despite having been officially marked Court Exhibit 4, unquestionably had not yet been given to the jury. In response to the definitional request in Exhibit 5, the court thoroughly reinstructed the jury on the full legal definitions of all of the charges in the indictment and lesser included offenses. During this supplemental instruction, the Judge twice stated his intention to submit a statement of charges to the jury, as it had earlier requested. The Trial Judge was particularly fastidious about the very bone of contention here--submission of only authorized, written materials to the jury--and thus was careful *not* to submit his actual written instructions.[2]

[2] A telling irony is that if the Trial Judge had given the jury the indictment itself, instead of the innocuously labelled verdict sheet, then the murder conviction would be sustained (*People v Moore,* 71 NY2d 684).

Shortly after the first set of supplemental instructions, at 4:20 P.M. on October 20, came another jury note, marked Court Exhibit 6, that defense counsel had to have seen (*see, People v O'Rama,* 78 NY2d 270). It read in its entirety:

"Request Please Difine the Term 2nd Degree Murder (Dipraved Mind Murder)" *(sic).*

The salient and most pertinently significant feature of this note is that it *tracks the precise terminology of the first parenthetical item on the verdict sheet,* i.e., "MURDER IN THE SECOND DEGREE (Depraved Mind Murder)." The jury's reiteration mirrors the label that now vitiates the integrity of this jury verdict. The inescapable inference is that this question was in direct response to the verdict sheet that had by then been given to the jury, shortly after the Trial Judge twice told the jury and everyone else that he would submit the statement of charges. Thus, the record unassailably supports the conclusion that the verdict sheet was submitted some time after the Trial Judge's instructions in response to the question in Court Exhibit 5, before receiving the jury question in Court Exhibit 6 and, of course, a whole day before the jury returned the guilty verdict.

Notably, the record does not show defense counsel at any point of the critical sequence declaring something to the effect of, "Wait a minute, I never saw this 'statement of the charges' ***498** before," even though the Trial Judge twice put him on notice of it in open court. Neither did the trial court ever hear counsel say, "Excuse me, what is that language and where did it come from?" or "Wait, may I see that 'statement of charges' before you give it to the jury, as I might have an objection," or even, "My client has been prejudiced by this piece of paper reflected in this jury note." The only silence in this record is defense counsel's; the pointed inference from the illuminating, record-based jury deliberation sequences is that events did not unfold

as theorized. Defense trial counsel thus slipped a surefire reversal ace up the defendant's appellate sleeve.

The excusal, at the very least, of defense counsel's indifference for a whole day before the guilty verdict was rendered is not only unreasonable, but also contradicts the presumption of regularity applicable to all official acts (*see, People v Richetti,* 302 NY 290). "The general presumption is that no official or person acting under an oath of office will do anything contrary to his [or her] official duty, or omit anything which his [or her] official duty requires to be done" (*Matter of Marcellus,* 165 NY 70, 77; *see also, Virag v Hynes,* 54 NY2d 437, 443). The presumption governs unless there is *"substantial evidence"* in the record to overcome it (*see,* Prince, Richardson on Evidence § 3-120, at 71 [Farrell 11th ed 1995] [emphasis added]). The official duties of a Trial Judge include showing all parties everything that is marked for identification, let alone marked, as the verdict sheet was in this case, in evidence (*see, Benderson Dev. Co. v State of New York,* 139 AD2d 927, 928; *see also,* Fisch, New York Evidence § 16, at 7 [2d ed 1977]; 1 McCormick, Evidence § 51, at 195 [4th ed 1992]). To take yet another diligent Trial Judge to task in another of this string of cases by presuming a dereliction of judicial responsibility is most unjustified and unfair in this case and flatly ignores the presumption of regularity.

Once it is established that defense counsel had the opportunity to object but did not, such actual notice, opportunity and failure to object should be deemed consent. Even assuming all verdict sheet notations should be considered tantamount to supplemental instructions forbidden under CPL 310.30--the only relevant section requiring consent--this Court's long-standing jurisprudence should prevail that a failure to object under the circumstances of this record binds the defendant and precludes appellate relief to him (*see, e.g., People v Lawrence,* 64 NY2d 200, 206-207).

In sum, my extrapolations from this record and the clerk's minutes are reasonably rooted in fact and the regularity of the ***499** proceedings, contrary to the wholly speculative suppositions defendant has made with success in two appellate courts. More complete and more accurate recordations by the court stenographer, court clerk, and Trial Judge may very well be preferred practice. Likewise, appellate review would be easier if the Trial Judge had ensured that the views of both sides were heard on the record when he twice declared his intentions with respect to the verdict sheet. It is well to recall the axiom, however, that "the Constitution entitles a criminal defendant to a fair trial, not a perfect one" (*Delaware v Van Arsdall,* 475 US 673, 681; *see also, Ross v Oklahoma,* 487 US 81, 91; *United States v Hasting,* 461 US 499, 508).

III.

Since 1987, this Court has increased the per se mandate, producing reversals of criminal convictions after jury trials without harmless error analysis. By today's ruling, the disproportionate phenomenon will apply whenever a Trial Judge adds a parenthetical label or differentiation of one or more crimes on a verdict sheet. This application does not stem, as one might assume, from CPL 310.20 (2), which specifically *allows* submission of verdict sheets to the jury, and, importantly, contains no "consent of the parties" prerequisite. Yet, lack of consent becomes the linchpin of the majority's analysis.

In a series of cases, the judicial interpretation skipped instead to CPL 310.30, which also *allows* Trial Judges to provide jurors with the *text* of relevant statutes, but only with the consent of both parties (*see, People v Spivey,* 81 NY2d 356; *People v Kelly,* 76 NY2d 1013; *People v Taylor,* 76 NY2d 873; *People v Nimmons,* 72 NY2d 830). The fear and reasoning have developed that a parenthetical additive is tantamount to providing juries with only partial or potentially prejudicial statutory material. The Court has combined the statutes and resolved that parentheticals, therefore, invariably create the risk of unfairly skewing the deliberative process for juries (*see, e.g., People v Kelly, supra*).

One problem with this development is that the cases have transformed a kernel of statutory procedure and its appropriate interpretation by this Court (CPL 310.30; *People v Owens,* 69 NY2d 585, *supra*) into an inviolate and absolute right. I stress that this dissenting viewpoint would not unravel the line of cases beginning with *People v Owens* (69 NY2d 585, *supra*), which properly bar the submission of jury instructions or statutory text *over defense objection.* Since the analysis of ***500** parts I and II has not prevailed, however, a narrow course correction as to that part of the rule embodied in *People v Kelly* (*supra*) and *People v Spivey* (*supra*), which perfunctorily disallows even helpful, neutral or innocuous parenthetical classifications on verdict sheets, is worthy of attention and consideration.

In the most recent pronouncement on this topic, *People v Spivey* (81 NY2d 356, *supra*), the Court held that it was per se reversible error for a trial court to differentiate between two otherwise identical robbery counts by adding the parentheticals, "aided by another person" and "caused physical injury." The holding in *Spivey* is traced back to *People v Owens* (69 NY2d 585, *supra*), in which the Court condemned as reversible error, under CPL 310.30 and the right to a fair trial, the submission *over defense objection* of the portion of the Judge's instruction that defined the elements of the drug charge. Because the trial

court did not also submit the instruction relating to the defendant's agency defense, the partial submission created an unfair risk that the jury might believe that the court meant to highlight as more important the statutory elements of the offense.

Between *Owens* and *Spivey,* the Court decided seven related cases, all but one of which used relatively conclusory analysis (*People v Sotomayer,* 79 NY2d 1029; *People v Kelly,* 76 NY2d 1013, *supra; People v Taylor,* 76 NY2d 873, *supra; People v Nimmons,* 72 NY2d 830, *supra; People v Moore,* 71 NY2d 684, *supra; People v Brooks,* 70 NY2d 896; *People v Sanders,* 70 NY2d 837). Interestingly, *People v Moore* is a 4 to 3 decision with two fully developed opinions in which the majority held it proper for a trial court, in response to a jury's request during deliberations, to provide a copy of the indictment. The Court reasoned that the risk of the jury process being skewed was slight, as the indictment "did not purport to be a statement of the law," and the jury was presumed to follow the court's instructions to this effect (71 NY2d, at 688, *supra*). This reflected a wise weighing analysis and proportional approach. But that case, representing a correct step and solid footprint, has been largely sidetracked. Despite the balance between *Owens* and *Moore,* the predominant rule has slipped into what I now believe to be "errant footsteps" (*compare, People v Hobson,* 39 NY2d 479, 488).

After *Owens,* in *People v Sanders* (70 NY2d 837, *supra*), the Court reversed a conviction because the Trial Judge submitted the text of the statutes defendant was accused of violating, ***501** *over defense objection.* The Court felt constrained by *Owens* to reverse, especially since, as in *Owens,* the Trial Judge had not also provided the jury with the text of the justification defense on which defendant relied.

People v Brooks (70 NY2d 896, *supra*) extended *Owens* and *Sanders* to the submission to the jury of *incomplete* statutory language, *again over defense objection.* The court had submitted a two-page sheet containing an abbreviated portion of the oral jury instruction, but with only an incomplete explanation of the defendant's justification defense. The Court held that the error could not be held harmless, concluding that the submission of actual instructional or statutory language is per se reversible error. Still, *Brooks* did not involve treating parenthetical labels as per se reversible error. The Court came closer to that crossroads in *People v Nimmons* (72 NY2d 830, *supra*), decided following *Brooks* and *People v Moore* (71 NY2d 684, *supra*).

In *Nimmons,* the Judge submitted a verdict sheet to the jury, as authorized *under CPL 310.20.* However, the Judge also presented a second sheet "listing the various counts of the indictment and defining the elements of each count in statutory language" (*id.,* at 831). The Court simply declared this procedure to be reversible error *under CPL 310.30,* citing *Owens, Sanders,* and *Brooks,* and necessarily reflected the blended rationale that this sheet was tantamount to submitting statutory text to the jury.

Next came *People v Taylor* (76 NY2d 873, *supra*), in which the elements of the crime were on the verdict sheet itself. Citing *Nimmons,* the Court reversed under CPL 310.30. For the first time, the *Owens* rationale that "such an error creates a risk that the jury's deliberative process will be unfairly skewed" and that "it puts in serious question the reliability of the ultimate guilt determination" (*People v Taylor, supra,* at 874) was fully integrated to condemn *an error on a verdict sheet.*

In *People v Kelly* (76 NY2d 1013, *supra*), the *Owens* seed sprouted a new branch. The Court held that a verdict sheet that listed the charged robbery counts along with the parenthetical descriptions "use of a dangerous instrument" and "armed with a deadly weapon" violated the rule in *Nimmons* and *Taylor,* even though neither of those cited cases involved parenthetical material. While the Court in *Kelly* did not cite CPL 310.30, the decision evidently applied its concerns by reference to *Nimmons* and *Taylor.* After *Kelly, Spivey* also felland***502** the Court again rejected harmless error analysis (*People v Spivey,* 81 NY2d, at 361, *supra*).

A major flaw on the journey from *Owens* to *Kelly* and *Spivey* is that parenthetical words on a verdict sheet simply are not the same as written jury instructions, statutory text or elements of crimes, as such. Rather, as analyzed in *People v Kelly* (164 AD2d 767, 769 [Sullivan, J., dissenting], *affd* 76 NY2d 1013, *supra*), "the court did not, as in *Nimmons,* submit a copy of 'the text of any statute', which constitutes a statutory violation and per se violation (CPL 310.30; *People v Sanders,* 70 NY2d 837[, *supra*]), but, rather, only a descriptive phrase to distinguish the two counts of robbery in the first degree being submitted." Far from being the equivalent of a partial or skewed jury instruction, "the verdict sheet made no pretense of being the written equivalent of the court's oral charge" (*id.*).

The net consequence is that rather than assessing the real impact, if any, of innocuous labels on verdict sheets--"however limited, neutral and helpful [they] might be, especially in distinguishing two similar crimes or crimes of the same name"--Appellate Divisions instead are constrained to reverse convictions automatically and repeatedly, as this Court has instructed and is now doing itself (*People v Rogers,* 181 AD2d 419 ["Whatever we think of the wisdom of such a rule, we are

bound by precedent"], *vacated* 184 AD2d 453). Yet, parentheticals of the kind used in this case are no more than semantical shorthand for the names of crimes; they are *not,* nor do they purport to be, jury instructions on elements of the crimes charged, and they are not inherently misleading, skewed or suspect. Thus, they ought not to be summarily and absolutely condemned.

The unlimited thrust of this case takes the precedents and their core rationale to an extreme by equating any parenthetical addition fully with substantive statutory material, irrespective of any defense objection or obligation to make inquiry, and under a statute, CPL 310.20, that does not contain a "consent of the parties" requirement that is nevertheless woven into a CPL 310.30 violation. Those are the features that make this case significantly different, promulgating an altered rule that substantially expands the original *Owens* rationale.

When all is said and done, the Trial Judge in this case did not presume or pretend to provide the jury with *any* statutory materials in this case; the jury simply received a verdict sheet under CPL 310.20. The sheet did no more than list two alternative kinds of homicide with nondispositive, innocuous parentheticals. ***503** Different in kind and degree from the prejudicial material in *Owens,* the submission by the trial court in this case did not implicate the provisions of CPL 310.30. That is a fundamental difference between my position and the majority analysis and in no way reflects a misconstruction of what is being done here (majority opn, at 485, n 2). Manifestly, the rationale of *Owens* is being inexorably overextended to this situation when it should, instead, be curtailed, because it is rooted in a different statutory prerequisite and constitutes inapplicable speculation as to the nature of the harm or prejudice inflicted or feared.

Neither CPL 310.20 nor CPL 310.30 was enacted for any purpose other than as commonsense guidelines and expedients to facilitate the fair and orderly deliberations of juries in criminal cases. The myriad of trial circumstances and appellate reviews of such cases demonstrate complete frustration, not fulfillment, of these laudable legislative goals.

Section 310.20 (2), enacted in 1970 with the original Criminal Procedure Law (L 1970, ch 996, § 1), allows jurors to take into deliberations "[a] written list prepared by the court containing the offenses submitted to the jury by the court in its charge and the possible verdicts thereon." The Commission Staff Notes state that the provision merely "codifies a practice followed by numerous trial courts" (Commn Staff Notes, reprinted in Proposed NY Criminal Procedure Law § 160.20, at 229 [1967]). It is reasonable to believe that the Legislature could not have envisioned that a neutral, or at least demonstrably nonprejudicial parenthetical label, would be elevated to per se reversible status (*contrast,* CPL 470.05 [1]).

Similarly, the provision in CPL 310.30 that allows for the submission of the text of statutes to the jury was enacted in 1980 as another useful measure to cut down on the "time ... spent by the court reading and rereading statutory material which could be supplied to the jury for easy reference and which would aid the jury in reaching a verdict" (Mem of Office of Ct Admin in Support of L 1980, ch 208, 1980 NY Legis Ann, at 94). This legislative intent, too, has been skewed by judicial interpretation that has implanted a delayed appellate trigger to automatically overturn convictions after fair trials.

Paradoxically, the situations the Court condemned in *Kelly* and *Spivey* are two of the most common situations where help is desirable, in that they differentiate between two theories of the same criminal act. It is common practice, for example, for a murder indictment to include both depraved indifference ***504** murder and intentional murder (*see, e.g., People v Gallagher,* 69 NY2d 525; *People v Trappier,* 87 NY2d 55). Without some special, focused guidance, a jury is left to flounder only on its diverse memory to sort out the verdict choices. Allowing the inclusion of a parenthetical label informing the collective jury concerning the theory out of which each count grew would make good sense and avoid confusion or inconsistent verdicts.

This rubric, which this case finally unmasks as having no outer, qualifying or de minimis limits, contrasts sharply with what courts of other jurisdictions have done in this field. They applaud the practice of putting explanatory phrases on jury sheets as an "expedient" that is "commendable in promoting informed consideration by the jury" (*United States v Bozza,* 365 F2d 206, 225 [Friendly, J.]; *accord, United States v Swan,* 396 F2d 883, 886; *see e.g., State v DeBellis,* 174 NJ Super 195, 413 A2d 986, 989; *People v Mackabee,* 214 Cal App 3d 1250, 263 Cal Rptr 183, 185; *People v Duffie,* 193 Ill App 3d 737, 550 NE2d 691, 694; *State v Brodniak,* 221 Mont 212, 718 P2d 322). The New York interpretive experience remains stubbornly idiosyncratic, even though it lacks doctrinal underpinning. The cases in this latest ripple are steadfastly foreclosed from realistic appraisal, either of the prejudicial impact found in individual rec-ords or the empirical consequences of the per se application of this principle.

This case brings the Court to a crossroads on this verdict sheet issue: whether to adhere to *Kelly* and *Spivey* because they are recent precedents or to recognize them as missteps and promptly and justifiably correct the course. The "rule of *stare decisis* is not a contrivance to hamper the judge in administering justice, but is intended to advance the general usefulness of the law and thus benefit the greatest number" (von Moschzisker, *Stare Decisis in Courts of Last Resort,* 37 Harv L Rev 409, 410). If "the court is convinced, practically beyond a reasonable doubt, that [precedents] were wrongly decided and the ends of justice require their overruling, it should depart from them rather than adhere slavishly to error" (*id.,* at 412).

In perhaps the finest contemporary example of the prudent application of the fullness of the stare decisis doctrine, Chief Judge Breitel wrote for the majority in *People v Hobson* (39 NY2d 479, *supra*). That case overruled three precedents--forthrightly declared wrongly decided--and firmly reestablished ***505** the unique New York right-to-counsel rule on custodial interrogations. Significantly, the majority there could have waited for the Legislature to statutorily supplant *People v Robles* (27 NY2d 155 [Breitel, J., dissenting, at 160]), *People v Lopez* (28 NY2d 23 [Breitel, J., dissenting, at 26], *cert denied* 404 US 840) and *People v Wooden* (31 NY2d 753, 754 [Breitel, J., concurring on constraint of the prior cases]; *see,* CPL 60.45). The Court, instead, proudly did its own work in its own house and did not wait for another Branch to correct the course the Judicial Branch had previously "mis-taken". Chief Judge Breitel traced the history of the detour, including his own persistent, differing votes and expressions in all three prior cases, and then cogently proclaimed the Court's legitimatizing duty to correct precedent when it has "lost its touch with reality" (*People v Hobson, supra,* at 487). The Court boldly acknowledged that it should not "treat every errant footprint barely hardened overnight as an inescapable mold for future travel" (*People v Hobson, supra,* at 488) and applied a vitally realistic version of stare decisis.

Kelly was decided in 1990; *Spivey* in 1993. The Court could responsibly-- and in my view should--forthrightly acknowledge and adjust the loss of "touch with reality" of those cases (*People v Hobson, supra,* at 487; *see,* Note, *Stare Decisis,* 34 Harv L Rev 74, 76). In past cases, when compelled by "reason and substantial justice" (*Silver v Great Am. Ins. Co.,* 29 NY2d 356, 363), the Court has overruled both long-standing precedent (*id.*) and unworkable and unfair rules of more recent vintage (*People v Bing,* 76 NY2d 331). In *People v Bing (supra* [another trilogy]), the Court retreated from some of *Hobson*'s overextension in *Bartolomeo* and redrew the line in an aspect of New York's special right to counsel rule (*see, People v Bartolomeo,* 53 NY2d 225). In doing so, the Court acknowledged both the "failure to elaborate the basis for the [overextension of the] rule, and the questionable policy behind it" (*People v Bing, supra,* at 342). Realism and pragmatism prevailed, yet the principle was preserved and protected.

That the verdict sheet per se reversal rule derives purely from statutory interpretation and not from a constitutional source is also not a reason for this Court to defer consideration of the correction of its own lack of foresight as to where unwarranted applications of the core principle would lead. Errant steps and disproportionate remedies, whether they are affected by constitutional expansion as in *Hobson,* by constitutional retrenchment as in *Bing,* or by candid recognition of judicial ***506** overextension of statutory interpretations--as I see the instant case--merit serious reflection and exposition.

To allow a manifest injustice to be perpetuated in the name of an unremitting stare decisis dishonors the plenitude of the doctrine. I know of no such artificial, categorical prohibitions under stare decisis against the prudent recalibration of a judicial interpretive rule still burgeoning and evolving. Indeed, the concise 15-page text of Chief Judge Cardozo's Yale Law School Storrs Lecture IV (1921), entitled "Adherence to Precedent. The Subconscious Element in the Judicial Process," reveals the dynamic breadth of the doctrine enriched by its realism and acknowledgment of human and even appellate-level fallibility (Cardozo, The Nature of the Judicial Process, reprinted in Selected Writings, at 168-184 [Hall ed 1947]).

Finally, everyone is aware that the Chief Administrative Judge's Advisory Committee on Criminal Law has once again proposed important changes in the very statutes at issue here (*see,* 1995 Report of the Advisory Committee on Criminal Law and Procedure to the Chief Administrative Judge of the Courts of the State of New York, at 70-73). Importantly, the rationale for the change is that "[a]ccess to these materials would significantly aid the jury without *any* unfair prejudice to the parties" (*id.,* at 71 [emphasis added]). Whether the proposal is ever enacted, however, its cogent justification, as presented by the Committee of diversely experienced experts, holds true: there is simply *no* automatic prejudice arising from neutral label additives to verdict sheets.

In any event, no one should forget that the authentic voice of this Court speaks solely through the opinions of its members. Where Judges of a court of last resort stand on a vexing legal and practical problem ought to be reflected, therefore, only through that traditional medium, within the framework of cases properly certified to this Court as containing a leaveworthy question of law. Here, the Court is unquestionably presented with such an important case and a critical issue; the precedential ramifications for untold numbers of other cases are manifest. These concerns merit this exposition as an absolutely legitimate part of the decisional process and an intended contribution to the improvement of the law.

I vote to reverse the order of the Appellate Division on the People's appeal and reinstate the murder conviction.

Chief Judge Kaye and Judges Simons, Titone and Smith concur with Judge Ciparick; Judge Simons concurs in a separate ***507** concurring opinion; Judge Levine concurs in Judge Ciparick's opinion on the defendant's appeal and in result on the People's appeal on constraint of *People v Spivey* (81 NY2d 356) and *People v Kelly* (76 NY2d 1013); Judge Bellacosa dissents only on the People's appeal in a separate opinion.

Order affirmed.***508**

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M/O Juan C. v. Cortines, N Y C Schools Chancellor

(Ct. upheld school discipline in student gun possession situation)
89 N Y 2nd 659 – Majority Opinion, Unanimous [1997]

89 N.Y.2d 659, 679 N.E.2d 1061, 657 N.Y.S.2d 581, 118 Ed. Law Rep. 727, 1997 N.Y. Slip Op. 03194

In the Matter of Juan C., Respondent,

v.

R.C. Cortines, as Chancellor of the New York City Board of Education, et al., Appellants.

Court of Appeals of New York
29
Argued February 5, 1997
Decided April 1, 1997

CITE TITLE AS: Matter of Juan C. v Cortines

SUMMARY

Appeal, on constitutional grounds, from an order of the Appellate Division of the Supreme Court in the First Judicial Department, entered September 17, 1996, which (1) reversed, on the law, a judgment of the Supreme Court (David Levy, J.), entered in Bronx County in a proceeding pursuant to CPLR article 78, dismissing the petition to annul a determination of appellant Chancellor of the New York City Board of Education that affirmed a decision of appellant Superintendent of Bronx High Schools suspending respondent student from school for one year, and (2) granted the petition.

Matter of Juan C. v Cortines, 223 AD2d 126, reversed.

OPINION OF THE COURT

Bellacosa, J.

The Chancellor and President of the New York City Board of *664 Education and the Superintendent of Bronx High Schools appeal from an Appellate Division ruling in a CPLR article 78 proceeding that nullified their actions in the underlying school matter. Student petitioner Juan C. sued them, seeking to annul a determination made, after a plenary hearing, by the Superintendent of the Bronx High Schools and affirmed by the Chancellor, that suspended the student from William Howard Taft High School for one year for carrying a gun into the school. The resolution also provided for the pupil's continued educational needs at the Bronx Outreach Alternative Instruction Center.

Supreme Court dismissed the article 78 challenge. The Appellate Division reversed and annulled the schools' determination. Applying the doctrine of collateral estoppel, it ruled that the educational authorities were precluded from reviewing the reasonableness and legality of the seizure of the gun from the student in a school hallway. The ruling suppressing evidence, rendered in a previously dismissed Family Court juvenile delinquency proceeding, was deemed determinative. That ruling rested on the Family Court Judge's discrediting a school aide's testimony as to what he observed about the student in the corridor.

On this key collateral estoppel aspect of this case, it should be emphasized that the Appellate Division grant of the petition to annul the educational entity's determination rested on this core conclusion: "[t]he prerequisites for applying the doctrine have all been met: identity of parties and issues; a prior proceeding resulting in a final and valid judgment in which the party opposing the estoppel had a full and fair opportunity to litigate" (223 AD2d 126, 130). The appeal is before this Court as of right pursuant to CPLR 5601 (b) (1).

The focus of this decision is entirely on the threshold question whether the doctrine of collateral estoppel applies to foreclose the education officials from separately determining the suspension and reassignment of the then-15-year-old student from whom the gun was seized in 1992 in his high school. We are satisfied that the collateral estoppel doctrine does not automatically block or limit the discrete action and remedial alternatives available to the educational entity.

The fact that the gun had been suppressed in a prior Family Court juvenile delinquency proceeding, instituted and prosecuted by the presentment agency in the name of the New York City Corporation Counsel pursuant to distinctively delegated ***665** special authorization in Family Court Act § 310.1, is not preclusive here. Thus, the otherwise sustainable findings and determination should not be disturbed in this proceeding. A reversal and reinstatement of the Supreme Court judgment dismissing the student's CPLR article 78 proceeding is in order, and because the case is resolvable on that sole basis, we reach no other issue.

I.

The testimony before the Board of Education Hearing Officer showed these salient facts about this case. On December 8, 1992, a school security aide at William Howard Taft High School, Luis Mujica, observed Juan C. walking towards him in the hallway. The security aide suspected the presence of a gun because he noticed something resembling the handle of a gun pulling down the left side of the student's jacket, which was halfway closed. As the student passed, Mujica grabbed at him and the student then moved to avoid the aide. A hallway chase ensued, ending with Mujica catching Juan C. and feeling the gun on his person. Another school security aide arrived and removed the gun from the jacket. A third school security officer entered the scene and handcuffed the student, who was then taken to the Dean's office. The youngster was later questioned by a police officer, who gave the student his custodial interrogation rights. Juan C. admitted taking the gun into the school but explained that he had found it in a park.

In Bronx County Family Court, Juan C. was charged with criminal possession of a weapon. After a suppression hearing, at which only Mujica testified, Family Court determined, essentially on credibility grounds, that the seizure of the gun was unreasonable and in violation of constitutional standards. It thus suppressed the gun and dismissed the juvenile delinquency petition for lack of evidence. The presentment agency took no appeal.

The Superintendent of the Bronx High Schools, shortly thereafter, instituted the educational disciplinary review that is the subject of this judicial proceeding and appeal. The Hearing Officer opened with a detailed explanation of the precise focus and pedagogical purpose of this distinct forum. In the framework of this hearing and with additional witnesses and evidence presented, the officer ultimately recommended that (1) collateral estoppel principles should not bar reexamination of the legality of the seizure of the gun for the purpose of thisschool***666** disciplinary matter, and (2) Mujica had the initial, individualized, reasonable suspicion to believe that Juan C. possessed a gun, thus justifying the actions initiated and undertaken by the various school employees, including the eventual seizure of the weapon in the school corridor (Chancellor's Regulations, Nos. A-432, A-441; *compare, Matter of Gregory M.,* 82 NY2d 588, 592). The particularized findings were adopted by the schools Superintendent, who then imposed the one-year suspension and alternative school arrangement for Juan C. The Chancellor upheld the ruling on administrative appeal, specifically agreeing that the prior Family Court ruling was not preclusive against the school system which conducted its inquiry, made its findings, and addressed its special responsibilities in its separate forum (*see,* Chancellor's Regulations, No. A-441).

Up to that point in the administrative process, New York City school personnel were in complete control of the pedagogical proceeding; they were the only official participants. The office of the New York City Corporation Counsel, which had presented and controlled the juvenile delinquency proceeding in Family Court pursuant to uniquely delegated responsibility under the Family Court Act, had no evident function in the subsequent school disciplinary examination (*see,* Family Ct Act §§ 254, 254-a, 301.2 [12]; *see also,* Sobie, Practice Commentary, McKinney's Cons Laws of NY, Book 29-A, Family Ct Act § 310.1, at 328). The reason for this discrete division of responsibility is that the Board of Education is an entity with an authority source and base that is distinctively separate from other usual City operations and powers and specifically distinct from the Corporation Counsel's role under Family Court Act direction (*id.; see also,* Education Law arts 52, 52-A).

II. A.

Appellants were not parties to the Family Court proceeding. They cogently demonstrate that the collateral estoppel doctrine does not apply here to make the Family Court's suppression ruling preclusive because no identity of parties and no full and fair opportunity to contest issues affecting the distinct pedagogical responsibilities were present or involved in the Family Court setting or adjudication. The contention continues that they, singly and as a collective educational entity, were never parties in any sense in the Family Court proceeding, any more than the Corporation Counsel was a party or even the legal representative in the school disciplinary track in any of ***667** ficial role or participation--until later down the judicial review litigation route. Therefore, appellants contend, and we agree, that the educational entity did not share actual or functional identity as parties and did not receive in the Family Court setting any opportunity--no less a full and fair one--to contest the issues suffusing its unique educational responsibilities, especially as they are so prominently affected by the presence of the gun on school premises and the manner in which it was perceived and seized by school personnel.

The equitable doctrine of collateral estoppel is "intended to reduce litigation and conserve the resources of the court and litigants and it is based upon the general notion that it is not fair to permit a party to relitigate an issue that has already been decided against it" (*Kaufman v Lilly & Co.,* 65 NY2d 449, 455). It "is grounded on concepts of fairness and should not be rigidly or mechanically applied" (*D'Arata v New York Cent. Mut. Fire Ins. Co.,* 76 NY2d 659, 664). Its essential ingredients are: "[f]irst, the identical issue necessarily must have been decided in the prior action and be decisive of the present action, and second, the party to be precluded from relitigating the issue must have had a full and fair opportunity to contest the prior determination" (*Kaufman v Lilly & Co., supra,* at 455, citing *Gilberg v Barbieri,* 53 NY2d 285, 291). Significantly, "[t]he party seeking the benefit of collateral estoppel has the burden of demonstrating the identity of the issues in the present litigation and the prior determination, whereas the party attempting to defeat its application has the burden of establishing the absence of a full and fair opportunity to litigate the issue in the prior action" (*Kaufman v Lilly & Co., supra,* 65 NY2d, at 456).

In general, "a nonparty to a prior litigation may be collaterally estopped by a determination in that litigation by having a relationship with a party to the prior litigation such that his own rights or obligations in the subsequent proceeding are conditioned in one way or another on, or derivative of, the rights of the party to the prior litigation" (*D'Arata v New York Cent. Mut. Fire Ins. Co., supra,* 76 NY2d, at 664; *see also, People v Roselle,* 84 NY2d 350). This constitutes a form of privity; however, "the term privity does not have a technical and well-defined meaning" (*Watts v Swiss Bank Corp.,* 27 NY2d 270, 277). Rather, it "is an amorphous concept not easy of application" (*D'Arata v New York Cent. Mut. Fire Ins. Co., supra,* at 664), and "includes those who are successors to a property interest, those who control an action although not formal parties ***668** to it, those whose interests are represented by a party to the action, and possibly coparties to a prior action" (*Watts v Swiss Bank Corp., supra,* 27 NY2d, at 277). Importantly, "all the circumstances must be considered from which one may infer whether or not there was participation amounting to a sharing in control of the litigation" (*id.*).

To round out the discussion of generally relevant authorities, we also note the collateral estoppel doctrine in its criminal or quasi-criminal context. Although collateral estoppel is "a common-law doctrine rooted in civil litigation," the principle has

some limited overlap into criminal matters (*People v Aguilera,* 82 NY2d 23, 29). Notably, however, "collateral estoppel is not as liberally applied in criminal prosecutions as in civil actions" (*People v Acevedo,* 69 NY2d 478, 485, citing *People v Goodman,* 69 NY2d 32, 37; *People v Plevy,* 52 NY2d 58, 64; *People v Berkowitz,* 50 NY2d 333, 344-346; *People v Reisman,* 29 NY2d 278, 285, *cert denied* 405 US 1041). Rather, "[w]e have actually employed the doctrine only once in a criminal case--to preclude the People from relitigating the fact of defendant's alleged presence at a crime scene" (*People v Aguilera, supra,* 82 NY2d, at 29, citing *People v Acevedo,* 69 NY2d 478, *supra*). This is so, because "in criminal prosecutions, where defendant's liberty interest is at stake, the preeminent concern is to reach the correct result, and hence the policies underlying issue preclusion are different" (*People v Aguilera, supra,* 82 NY2d, at 30 [citations omitted]).

II. B.

We turn our attention now especially to the identity of party aspect of the doctrine. Generally, a party appearing in an action in one capacity is not bound by the doctrine of collateral estoppel in a subsequent action in which the party appears in a different capacity (*see, e.g., Green v Santa Fe Indus.,* 70 NY2d 244, 254; *see also,* Restatement [Second] of Judgments § 36 [2], at 359).

The situation presented in the instant case is quite distinctive because of the nature, particular function and purpose of the two governmental entities and the discrete issues in each matter. Since "the source of authority of two government entities is not dispositive of whether they are in privity" for collateral estoppel purposes (*United States v Romero,* 836 F2d 39, 43, *cert denied* 488 US 817), both the circumstances of the actual relationship between the two agencies as demonstrated by the record and their statutory relationship are relevant (*see, e.g.,* ***669** *Matter of Home of Histadruth Irvith v State Facilities Dev. Corp.,* 114 AD2d 200, 205). Consequently, "[i]n some circumstances, a prior determination that is binding on one agency and its officials may not be binding on another agency and its officials" (Restatement [Second] of Judgments § 36, comment *f,* at 364). To be sure, "[i]f the second action involves an agency or official whose functions and responsibilities are so distinct from those of the agency or official in the first action that applying preclusion would interfere with the proper allocation of authority between them, the earlier judgment should not be given preclusive effect in the second action" (Restatement [Second] of Judgments, § 36, comment *f*).

Thus, despite the respective appearances of the Corporation Counsel in the juvenile delinquency forum and in the eventual article 78 judicial proceeding challenging the Chancellor's educational determination, the Corporation Counsel's roles in the two procedures were functionally discrete and traced to very different source lines of authority. The mere fact that the Corporation Counsel may eventually become the Chancellor's lawyer for ultimate litigation purposes--as in this article 78 proceeding and appeal--does not automatically and retrospectively satisfy the party identity prerequisite demanded for collateral estoppel to have its powerful issue preclusive effect. We find no support or authority or analysis for the proposition that would allow that consequence to flow out of the juvenile delinquency proceeding and its legal management. The Family Court role was plainly in contradistinction to the separate educational disciplinary proceeding and forum that the Corporation Counsel entered after it was administratively complete in all respects, including the Chancellor's administrative appeal.

Concomitantly, too, the Corporation Counsel, as presentment agency, played no role whatsoever in school safety or education and had no representational or other responsibility at any stage of the educational forum or administrative determination level. Rather, the core responsibility to provide a secure and appropriate educational environment for all students and school personnel, and all associated procedural offshoots of that function, were reposed in the Chancellor and his associated school officials. Thus, the educational entity's overarching function in a school suspension and relocation proceeding was to provide for and safeguard all students' educational needs, including that of the offending student. It did so in the very proceeding and determination under review in this article 78 challenge.***670**

Our conclusion regarding the distinction between the role of Corporation Counsel in each of the two matters here is buttressed by the decision in *People v Roselle* (84 NY2d 350, *supra*). There, this Court determined that the doctrine of collateral estoppel

did not preclude the criminal prosecution of a defendant for the same incident which resulted in a Family Court determination that defendant neglected a three-year-old child (*id.*, at 352). We reasoned that "[t]he orientation of Family Court is rehabilitative, directed at protecting the vulnerable child, as distinct from the penal nature of a criminal action which aims to assess blame for a wrongful act and punish the offender" (*id.*, at 355). The Court concluded that although the Family Court Act requires the District Attorney (or in New York City, the Corporation Counsel), to be named as a necessary party to certain Family Court Act article 10 child protective proceedings, a subsequent criminal action based on the same incident by the District Attorney was not foreclosed (*id.*, at 352-353, 355-356). An opposite conclusion would be "contrary to our jurisprudence" because the passive function of the District Attorney in the protective proceeding is significantly distinct and separate from its plenary role in the criminal action (*id.*, at 356; *see also, Brown v City of New York*, 60 NY2d 897, 898). Conversely, this analysis and articulation help pave the way to the result and rationale we espouse in deciding that the Family Court ruling in this case should not preclude the school system examination and determination to serve its purposes and responsibilities.

That the Corporation Counsel appeared in different capacities in the Family Court and article 78 proceedings is also underscored by article 3 of the Family Court Act. The Family Court Act provides that "[i]n all cases involving abuse ... outside the city of New York, the appropriate district attorney shall be a necessary party to the proceeding" (Family Ct Act § 254 [b]; *see, People v Roselle, supra*, at 355-356). Notably, the numerous local school boards throughout this State are unquestionably distinct from local District Attorneys, who are charged with the prosecution of many juvenile delinquency cases in Family Courts. It would be unsupportable and too high a jurisprudential price to pay to use the doctrine of collateral estoppel to bar all such local school boards from exercising their educational, community-wide responsibility, independently and distinctively from the control and consequences of the actions of the local District Attorneys, flowing from their individualized, narrower and distinctive Family Court juvenile ***671** delinquency responsibilities. Thus, we discern no precedential or policy justification for concluding that a different set of rules should govern when Family Court proceedings, brought by the Corporation Counsel pursuant to Family Court mandate, happen to occur in New York City.

Importantly, under the statutory scheme of article 3 of the Family Court Act, the Corporation Counsel is not acting as the chief legal officer of the New York City government. Rather, that officer is designated by State statute as the presentment agency for all juvenile delinquency charges, except designated felony acts or criminal proceedings removed to the Family Court from the criminal courts (*see,* Family Ct Act §§ 254, 254-a, 301.2 [12]). The effect of the designation as the presentment agency under article 3 is a legislative delegation of the exclusive prosecutorial function for the criminal acts of juveniles committed within the appropriate territorial jurisdiction.

Under Family Court Act § 310.1 (2), only a presentment agency may originate a juvenile delinquency proceeding, by the filing of a petition. That section makes the presentment agency "the actual petitioner [and] confers full ... prosecutorial authority upon the presentment agency" (Sobie, Practice Commentary, McKinney's Cons Law of NY, Book 29A, Family Ct Act § 310.1, at 328). The presentment agency is given exclusive authority to screen cases, refuse to file petitions and decide whether to take appeals (*id.*). The presentment agency's exclusive status as petitioner was adopted to avoid having its authority "seriously compromised if the petition remained the instrument of a private aggrieved party" (*id.*).

Thus, the statutory framework expressly negates any interpretation that school officials possess a legally recognized role or right to exercise control over or even participate in any meaningful way in the presentation of and decisions affecting a juvenile delinquency proceeding. Everything in theory and practice points the other way. Likewise, the complete autonomy and independence of the presentment agency in the statutory scheme negates any inference that its role was to represent the interest of the school officials in the delinquency proceeding prosecution (*Watts v Swiss Bank Corp.*, 27 NY2d 270, *supra*).

Additionally, in *Brown v City of New York* (60 NY2d 897, *supra*), this Court concluded that issue preclusion did not apply against the defendant City of New York in a civil action for ***672** false arrest, false imprisonment and assault based on the dismissal of a criminal charge against the defendant in a criminal action for resisting arrest, prosecuted by the Queens District

Attorney (*id.*, at 898). The Court determined that the Queens District Attorney and the City of New York were separate entities and did not "stand in sufficient relationship to apply the doctrine" (*id.*, at 898-899; *see, People v Roselle,* 84 NY2d 350, *supra*). The lack of "sufficient relationship" has been applied to defeat the interposition of collateral estoppel in a variety of factual constructs, most not even close to being as distinctive as the instant circumstance between the presentment agency and the New York City Schools Chancellor (*see, e.g., Matter of Saccoccio v Lange,* 194 AD2d 794, 795; *Doe v City of Mount Vernon,* 156 AD2d 329; *People v Morgan,* 111 AD2d 771, 772; *see also, Matter of New York Site Dev. Corp. v New York State Dept. of Envtl. Conservation,* 217 AD2d 699, 700; *Matter of Mason v Rothwax,* 152 AD2d 272, 285, *lv denied* 75 NY2d 705).

With the guidance and direction of these many authorities, we conclude that these appellants did not share identity as parties, were not allied with the special role of the Corporation Counsel as presentment agency, and were not afforded any full or fair opportunity to litigate their concerns in the Family Court juvenile delinquency proceeding. They are not in legal or practical privity with the presentment agency; they had no legal or functional party status in the Family Court proceeding; petitioner Juan C. in this proceeding wholly failed to meet his burden here for invoking collateral estoppel under our settled precedents; and the Chancellor sufficiently met his corresponding burden that the school officials were not afforded a full and fair opportunity to effectuate their pedagogical interests and responsibilities. Additionally, the fact that the Board had no role to effect an appeal of the Family Court suppression determination illustrates its essential and functional lack of opportunity to litigate issues that relate to its responsibilities (*see, e.g., Johnson v Watkins,* 101 F3d 792, 795, citing *People v Sailor,* 65 NY2d 224, 229, *cert denied* 474 US 982; Restatement [Second] of Judgments § 28 [1]; *United States v Davis,* 906 F2d 829, 835). In law, purpose and actual practice, the Chancellor's and the Board's procedures and wider educational community concerns are functionally and fundamentally discrete and independent from the presentment agency and that office's uniquely delegated and described responsibility in a juvenile delinquency proceeding in Family Court, such as was presented here.***673**

III.

Despite abundant, cogent and integrated authorities as pertinently applied to these facts, petitioner stresses *Matter of Finn's Liq. Shop v State Liq. Auth.* (24 NY2d 647, *cert denied* 396 US 840). There, this Court applied collateral estoppel and the exclusionary rule in State Liquor Authority (SLA) administrative proceedings to preclude evidence unlawfully seized by municipal police officers. The Court determined the officers acted as agents of the Liquor Authority. We rejected the SLA's assertion that it had no association with the District Attorney and, thus, should not have been precluded by the determination in the prior criminal action (*id.*, at 662). Refusing to permit the SLA to reexamine the issue of the legality of the seizure previously decided by the criminal court, the Court reasoned that "[a]lthough the two agencies may be treated, for other purposes, as independent parties, this can hardly be the case where they are both seeking to use the same police officials as their agents to gather evidence" (*id.*). Therefore, the Court concluded, "[i]f the search and seizure was unconstitutional to the extent that it was performed for the benefit of the prosecutor, the same act could hardly be considered lawful for the Authority's purposes" (*id.*).

We are frank to acknowledge that some of that language is facially problematic here because the hall monitor's actions and testimony constitute the same core evidence advanced in each forum. Importantly, however, the analysis of identity of parties and issues involves a case-by-case determination (*see, Watts v Swiss Bank Corp.,* 27 NY2d 270, 277, *supra*). In *Finn,* the Court found an alignment of interests based on the sharing of agents by the parties--the police officials used to gather evidence. *Finn* is, therefore, critically distinguishable in that here there was no alliance, affiliation, privity or identity between the presentment agency and the Chancellor and other school officials. The security aide here hardly constitutes a "shared agent." Additionally, Mujica was a mere witness in both the Family Court matter and the educational forum. The Board of Education proceeding was supported by evidence and witnesses beyond him, and by discrete, supportable findings. Finally, the nature of a quasi-law enforcement proceeding, such as a State Liquor Authority violation hearing, and the fact that the State Liquor Authority works with State law enforcement officers creates a sufficiently distinguishable factual scenario raising the special concerns that drove

the *Finn* analysis. The security aide and other participating school personnel under these circumstances ***674** cumstances are functionally different from ordinary and usual law enforcement officers. That is a key distinction from *Finn.*

A few words are also necessary about *People ex rel. Dowdy v Smith* (48 NY2d 477) because of the reliance given it by Juan C. and the Appellate Division. In *Dowdy,* this Court held that "[a] prior acquittal based on the defense of entrapment in a criminal proceeding collaterally estops the Board of Parole from revoking parole on the basis of the transactions proved and admitted in the criminal action" (*id.,* at 479-480; *see also, People ex rel. Piccarillo v New York State Bd. of Parole,* 48 NY2d 76, 83). The Court determined in *Dowdy* that there was an identity of parties, reasoning that "the People as prosecutors in the criminal action stood in sufficient relationship with the Division of Parole in the parole proceeding to meet the requirements of the doctrine in this respect" (*id.,* at 482; *contrast, People v Roselle, supra*).

Dowdy and *Piccarillo* are, however, likewise readily distinguishable from the instant case. Accepting, again, that the identity of parties determination must be made on a case-by-case basis (*Watts v Swiss Bank Corp.,* 27 NY2d 270, 277, *supra*), the cases are substantially and significantly distinguishable in that their holdings are based on the unique relationship between the Division of Parole and the People, qua prosecutors. That inherent nexus is entirely absent here. Additionally, these cases involved a quasi-law enforcement proceeding (a parole violation), arising in an agency setting that customarily functions directly with State law enforcement officers. That is demonstratively not so for school personnel.

IV.

The flow of these authorities and rubrics on the instant juridical matrix of parties leads us confidently to the conclusion that collateral estoppel should not be deployed to handicap or foreclose the appropriate officials of the New York City Board of Education from exercising their responsibilities and prerogatives, as they did here. A governmental entity (this independent school system) was not afforded the necessary full and fair participatory role within the framework and jurisdiction of the distinctly quasi-criminal, rehabilitative forum and proceeding conducted and controlled exclusively by a legislatively delegated special agent (the Corporation Counsel as presentment agency). Also, the presentment agency did not represent the school officials in any stage of their proceeding at that forum level. Thus, the Chancellor and the other school officials, ***675** in law and fact, demonstratively lacked the requisite "sufficient relationship" or privity or uniformity of interest with the presentment agency in the juvenile delinquency proceeding. The latter official, moreover, has an entirely different purpose and source of authority for its quasi-prosecutorial-rehabilitative role, as contrasted to the specially oriented pedagogical-rehabilitative one of the school system in relating to the problem with which it was confronted in this set of circumstances.

In sum, because indispensable ingredients of the collateral estoppel doctrine are plainly lacking here, that equitable doctrine should not block and interdict the independent inquiry and determination of the educational authorities. Moreover, because the record evidence supports the determination reached by the Chancellor and his affiliated school officials, we reverse and dismiss the article 78 judicial proceeding.

It should be emphasized, however, that while we uphold the action of the school authorities in dealing with this offending student, we should not lose sight of a seeming paradox that these same school authorities must simultaneously exemplify, honor and fulfill their constitutional and pedagogical obligations by respecting the rights of the many thousands of law-abiding students, yearning to learn about school subjects and life in society (*see,* Cardozo, The Paradoxes of Legal Science, in Selected Writings of Benjamin Nathan Cardozo, at 251 [Hall ed 1947]; *see also,* Bellacosa, *Benjamin N. Cardozo: The Teacher,* 47th Cardozo Lecture, vol 3, Memorial Lectures, Assn of Bar of City of NY, Nov. 9, 1994, at 1594, 1612). The natural and inherent tension in trying to satisfy these complementary responsibilities, goals and values--that everyone should cherish highly in our law-governed society--is real and difficult of achievement; yet the challenge is worthy of all our best efforts.

On a policy overview, the courts should be mindful not to incidentally compromise the independence of the authority of the school system of New York City, because such an inference could inappropriately affect pedagogical prerogatives. We caution, on the other hand, that the recognition of the value of independence and the inapplicability of the collateral estoppel doctrine to automatically bar use of evidence in this instance and in this educational proceeding and forum in no way invests the Chancellor and school officials or employees and their actions with immunity from appropriate scrutiny of the Judicial Branch when circumstances not now before us may warrant. The courts should remain vigilant in encouraging incentives ***676** that guarantee, first, within the educational apparatus itself, respect, high regard, training, proper supervision and sanctions, and, second, among all responsible entities, compliance with constitutional standards and safeguards. School officials and employees in their dealings with the pupils placed in their responsible and temporary charge should be held to no lesser standards of high conduct and high purpose.

Accordingly, the order of the Appellate Division should be reversed, without costs, and the petition dismissed.

Chief Judge Kaye and Judges Titone, Smith, Levine, Ciparick and Wesley concur.
Order reversed, etc.***677**

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Rooney v. Mike Tyson

(Ct. certified to Fed Appeals Ct. validity under N Y law of lifetime agency contract with Boxing World Champ)
91 N Y 2nd 685 - Majority Opinion [4-1] [1998]

91 N.Y.2d 685, 697 N.E.2d 571, 674 N.Y.S.2d 616, 13 IER Cases 1825, 1998 N.Y. Slip Op. 05171

Kevin Rooney, Plaintiff,

v.

Michael G. Tyson, Defendant.

Court of Appeals of New York
76
Argued May 5, 1998;
Decided June 4, 1998

CITE TITLE AS: Rooney v Tyson

SUMMARY

Proceeding, pursuant to NY Constitution, article VI, § 3 (b) (9) and Rules of the Court of Appeals (22 NYCRR) § 500.17, to review a question certified to the New York State Court of Appeals by order of the United States Court of Appeals for the Second Circuit. The following question was certified by the United States Court of Appeals and accepted by the New York State Court of Appeals pursuant to section 500.17: "Does an oral contract between a fight trainer and a professional boxer to train the boxer 'for as long as the boxer fights professionally' establish a definite duration, or does it constitute employment for indefinite duration within the scope of the at-will rule?"

OPINION OF THE COURT

Bellacosa, J.

A precise issue in this Federal case is certified to this Court by the United States Court of Appeals for the Second Circuit. We are asked to provide an authoritative statement on the threshold question of whether an oral personal services contract between a fight trainer and a boxer to last "for as long as the boxer fights professionally" provides a definite legally cognizable duration. Conversely, the problem can be framed as whether this temporal description constitutes an employment for an indefinite period, within the strictures of New York's at-will employment doctrine.

The Federal lawsuit is for an alleged breach of an oral agreement essentially between plaintiff, Kevin Rooney, and defendant, Michael Gerard Tyson. Rooney was to receive 10% of Tyson's boxing earnings as compensation for his personal training services. The case was tried in the Federal District Court for the Northern District of New York; a jury rendered a $4,415,651 verdict for Rooney. The Trial Judge granted Tyson's posttrial motion for judgment as a matter of law; the verdict was set aside and the lawsuit dismissed. Rooney appealed to the Second Circuit Court of Appeals. It certified the question to this Court in order to decide its appeal in accordance with ***688** governing New York substantive law. We narrowly answer the core question as posed, that this durational clause satisfies New York's standard with sufficient definitiveness.

I.

The undisputed facts are taken from the trial evidence and the certified statement. In 1980, at 14 years of age, Tyson was placed under the supervision of Cus D'Amato, a renowned boxing figure and manager. When Tyson's mother died in 1983, D'Amato also became his legal guardian. At the beginning of the young man's boxing career, Rooney and D'Amato agreed that Rooney would train Tyson without compensation until the fighter became a professional athlete. The two further agreed that when Tyson advanced to professional ranks, Rooney would be Tyson's trainer "for as long as [Tyson] fought professionally."

Rooney trained Tyson for 28 months without compensation. In March 1985, Tyson turned professional and began enjoying meteoric success. D'Amato died that same year. James Jacobs became Tyson's manager in 1986. When rumors started in some sports media that Rooney would be replaced as Tyson's trainer, Rooney queried Jacobs. To quell the speculation, Tyson allegedly authorized Jacobs to state publicly that "Kevin Rooney will be Mike Tyson's trainer as long as Mike Tyson is a professional fighter." Jacobs sent Rooney a copy of a press release to that effect. Thereafter, Rooney continued to train Tyson and was compensated for each of Tyson's professional fights until 1988.

In 1988, apparently in connection with Rooney's alleged comments regarding Tyson's divorce and other business-related litigation, Rooney allegedly read a newspaper article stating that Tyson would no longer train with Rooney. Tyson formally terminated his boxer-trainer relationship with Rooney later that year. The Federal lawsuit, claiming breach of the 1982 oral agreement, was begun in 1989.

The jury in Federal court in Albany returned its verdict in favor of Rooney in 1996. Tyson countered after the trial that the agreement was for an indefinite duration and was terminable at will under New York law and therefore unenforceable as a matter of law, regardless of the jury's verdict. The District Trial Court agreed with Tyson's legal position and granted him the posttrial victory. The Trial Judge reasoned that "under New York law, terms such as 'permanent employment', 'until retirement' or 'long term' do not state a definite term of employment ***689** as a matter of law" (956 F Supp 213, 216). The court concluded that "the alleged term of the employment contract, 'for as long as Tyson boxes professionally,' does not state a term of definite duration as a matter of law" (*id.*, at 216). It finally declared that "the nature of the proof offered at trial cannot sustain a finding that the employment relationship was anything other than one at-will" (*id.*, at 216).

On Rooney's appeal, the Second Circuit Court of Appeals certified the question to this Court (127 F3d 295, 298) pursuant to this State's Constitution and this Court's Rules of Practice (NY Const, art VI, § 3 [b] [9]; 22 NYCRR 500.17). The focus and role of this Court are confined by the precise and narrow question certified under the collaborative juridical arrangement. No plenary adjudicative authority is authorized or contemplated because the matter is not a case or controversy, as such, in the State court system.

II.

In New York, "*[a]bsent an agreement establishing a fixed duration,* an employment relationship is presumed to be a hiring at will, terminable at any time by either party" (*Matter of De Petris v Union Settlement Assn.*, 86 NY2d 406, 410 [emphasis added]; *see, Matter of Hanchard v Facilities Dev. Corp.*, 85 NY2d 638, 641; *Murphy v American Home Prods. Corp.*, 58 NY2d 293, 300). The at-will presumption may be triggered when an employment agreement fails to state a "definite period of employment," "fix[ ] employment of a definite duration," "establish[ ] a fixed duration" or is otherwise "indefinite" (*compare, Ingle v Glamore Motor Sales,* 73 NY2d 183, 186, 188; *Sabetay v Sterling Drug,* 69 NY2d 329, 333; *Murphy v American Home Prods. Corp.*, 58 NY2d 293, 300, 305, *supra; Weiner v McGraw-Hill, Inc.*, 57 NY2d 458, 460, 465-466; *Martin v New York Life Ins. Co.*, 148 NY 117).

A sensible path to declare New York law starts with these two steps: (1) if the duration is definite, the at-will doctrine is inapplicable, on the other hand, (2) if the employment term is indefinite or undefined, the rebuttable at-will presumption is operative and other factors come into the equation (*see, Weiner v McGraw-Hill, Inc.*, 57 NY2d 458, 466, *supra; see also, Martin v New York Life Ins. Co.*, 148 NY 117, 121, *supra; Ingle v Glamore Motor Sales,* 73 NY2d 183, 186, *supra*).

Initial consideration of the at-will presumption, as the threshold pivot to answer the certified question, bypasses the logical prerequisite and precedential preference to search out ***690** and resolve the definiteness aspect first (*see, Sabetay v Sterling Drug,* 69 NY2d 329, 333, *supra; Murphy v American Home Prods. Corp.,* 58 NY2d 293, 301, *supra*). That is a major difference of approach between the majority and the dissent.

Our ample previous precedents have not categorically delineated what may differentiate a "definite," "indefinite," or "fixed" employment term or duration utilized in various contractual formulations. That ellipsis prompted the certification to us from our Federal court counterpart with respect to this case and appeal in its court. The guidance we advisorily tender should be dispositive of the precise law query as transmitted to us (*see,* 22 NYCRR 500.17 [a]; *Retail Software Servs. v Lashlee,* 71 NY2d 788, 790; Karger, Powers of the New York Court of Appeals § 65, at 393-394 [3d ed]). Everything else--including especially the relevant application and actual decision of the case--is, of course, within the exclusive juridical competence of the Second Circuit Court of Appeals.

Notably, this Court has consistently reaffirmed the threshold determination that a definite employment duration does not implicate the at-will employment presumption (*see, Matter of De Petris v Union Settlement Assn.,* 86 NY2d 406, 410, *supra; Wieder v Skala,* 80 NY2d 628, 633; *Ingle v Glamore Motor Sales,* 73 NY2d 183, 186, *supra; Sabetay v Sterling Drug,* 69 NY2d 329, 333, *supra; Murphy v American Home Prods. Corp.,* 58 NY2d 293, 300, *supra; Parker v Borock,* 5 NY2d 156, 159; *Arentz v Morse Dry Dock & Repair Co.,* 249 NY 439, 443-444; *Martin v New York Life Ins. Co.,* 148 NY 117, 121, *supra*). This is not simply a chicken-or-egg-which-comes-first puzzle; it is the sensible, analytical progression.

When an agreement is silent as to duration, however, it is presumptively at-will, absent an express or implied limitation on an employer's otherwise unfettered ability to discharge an employee (*see, Sabetay v Sterling Drug,* 69 NY2d 329, 336, *supra; O'Connor v Eastman Kodak Co.,* 65 NY2d 724, 725; *Murphy v American Home Prods. Corp.,* 58 NY2d 293, 305, *supra; Weiner v McGraw-Hill, Inc.,* 57 NY2d 458, 465-466, *supra*). Only when we discern no term of some definiteness or no express limitation does the analysis switch over to the rebuttable presumption line of cases. They embody the principle that an employment relationship is terminable upon even the whim of either the employer or the employee. The agreement in this case is not silent and manifestly provides a sufficiently limiting framework.***691**

This Court, for example, found indefinite such temporally amorphous terms as "permanent" (*Arentz v Morse Dry Dock & Repair Co.,* 249 NY 439, 443-444, *supra*), to "continue indefinitely and will follow [the employee] in each succeeding year" (*Gressing v Musical Instrument Sales Co.,* 222 NY 215, 218), to "devote [the employee's] whole time and attention" to the employer's business (*Watson v Gugino,* 204 NY 535, 537), and yearly employment for a specified annual salary (*Martin v New York Life Ins. Co.,* 148 NY 117, 119-121, *supra*). Moreover, we have distinguished employment "for life or a definite period" from those varying terms (*Arentz v Morse Dry Dock & Repair Co.,* 249 NY 439, 444, *supra; see,* 1 Corbin, Contracts § 4.2, at 560-561 [rev ed 1993]). None of the unenforceable porous phrasings is delimited by legally and realistically cognizable boundaries, as are found in this case.

For context, moreover, this Court adopted the at-will presumption doctrine in *Martin v New York Life Ins. Co.* (148 NY 117, *supra; see, Watson v Gugino,* 204 NY 535, 541, *supra; Gressing v Musical Instrument Sales Co.,* 222 NY 215, 218-221, *supra; see also,* Feliu, Primer on Individual Employee Rights, at 3). There, a general hiring was found to result from an employment agreement that was "yearly" or "by the year" (*Martin v New York Life Ins. Co., supra,* 148 NY, at 119-120). Because those terms were deemed too indefinite, the at-will rubric took precedence. In reinforcing the still prevailing at-will doctrine, this Court stated:

" 'In England it is held that a general hiring, *or a hiring by the terms of which no time is fixed,* is a hiring by the year ... With us, the rule is inflexible, that *a general or indefinite hiring is prima facie a hiring at will;* and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof. *A hiring at so much a day, week, month or year, no time being specified, is an indefinite hiring, and no presumption attaches that it was for a day even, but only at the rate fixed for whatever time the party may serve.* ... A contract to pay one $2,500 a year for services is not a contract for a year, but a contract

to pay at the rate of $2,500 a year for services actually rendered, and is determinable at will by either party. ... [I]n all such cases the contract may be put an end to by either party at any time, *unless the time is* ***692** *fixed*' " (*id.*, at 121, quoting Wood, Master and Servant § 136 [2d ed 1886] [emphasis added]).

Distinctions crop up even in cases where a limitation exists on an employer's right to discharge an otherwise at-will employee (*see, Murphy v American Home Prods. Corp.*, 58 NY2d 293, *supra; see also, Weiner v McGraw-Hill, Inc.*, 57 NY2d 458, 460, *supra; Sabetay v Sterling Drug*, 69 NY2d 329, *supra*). Though an employment contract is of indefinite duration, an express or implied limitation on an employer's right to discharge may still become operative (*see, Weiner v McGraw-Hill, Inc.*, 57 NY2d 458, 465, 467, *supra*). Most pertinently, this Court has emphasized also that " 'if the employer made a promise, either express or implied, not only to pay for the service *but also that the employment should continue for a period of time that is either definite or capable of being determined,* that employment is not terminable ... "at will" after the employee has begun or rendered some of the requested service or has given any other consideration' " (*id.*, at 465, quoting 1A Corbin, Contracts § 152, at 14 [emphasis added]).

New York's jurisprudence is supple and realistic, and surely not so rigid as to require that a definite duration can be found only in a determinable calendar date. Thus, although the exact end-date of Tyson's professional boxing career was not precisely calculable, the boundaries of beginning and end of the employment period are sufficiently ascertainable. That is enough to defeat a matter-of-law decision by a Judge, in substitution for resolution at the Federal trial by jury verdict. Under the employment agreement, the durational term was understandable to the parties and reasonably determinable by the fact finders. Moreover, Rooney's compensation under the contract--for the legal consideration he bound himself to and rendered for years without payment prior to Tyson "turning pro"--was expressly linked to a percentage of Tyson's earnings within the professional career measuring rod (*see,* 1A Corbin, Contracts § 152, at 14 [1963]).

The range of the employment relationship, concededly created and actualized for several years in the framework of this Federal dispute, is established by the definable commencement and conclusion of Tyson's professional boxing career. Though the times are not precisely predictable and calculable to dates certain, they are legally and experientially limited and ascertainable by objective benchmarks. That is what makes this case distinctive within the myriad of arrangements people may undertake.***693**

It is imperative, too, that we emphasize that the aspect of New York's jurisprudence that we propound today in no way alters the force and effectiveness of general long-standing principles relating to commercial agreements, otherwise governed by common-law or statutory standards (*compare, North Shore Bottling Co. v Schmidt & Sons*, 22 NY2d 171, 175; *Cammack v Slattery & Bro.*, 241 NY 39, 44-45; *Ehrenworth v Stuhmer & Co.*, 229 NY 210; *Jugla v Trouttet*, 120 NY 21, 28-29; *with Sabetay v Sterling Drug*, 69 NY2d 329, 335, *supra; Murphy v American Home Prods. Corp.*, 58 NY2d 293, 304-305, *supra; Haines v City of New York*, 41 NY2d 769, 772-773; *see also,* UCC 2-309 [2]). The dissent ironically faults the majority repeatedly for such things as "heralds" some "new era" in "oral promises of potentially long-term employment" (*see,* dissenting opn, at 694). Nothing could be further from the fact. The oral nature of this agreement, unassailably made, is not even in issue since that was conceded out of the case by the parties. Only the definiteness is controverted.

Moreover, we deem it necessary to comment briefly also on the extent of the dissent in relation to the precisely posed certified question. The phrasing in the Second Circuit Court of Appeals' request is instructive: "in certifying a question of the validity of the particular contractual relationship before us, we are not asking the New York Court of Appeals to interpret a contract or to decide a case ... but rather to elucidate a series of open and recurring questions of New York law" (127 F3d 295, 297, *supra*). The preliminary and dispositive question, as we are bound to and have also emphasized, turns on definiteness.

That Court's question is whether the contract between this fight trainer and this professional boxer to train the boxer "for as long as the boxer fights professionally" may support a definite duration finding. This Court's response by our majority expression not only answers the question but also adheres to the realistic plenitude of New York's jurisprudence in this area of the law, and we are well aware of the personal and commercial consequences of the myriad types of arrangements made between parties to these transactions. We are also mindful of the scale of this Court's role, in constitutionally participating with

the Federal court in its exclusive jurisdictional application and adjudication of substantive principles of New York State law is formally and appropriately limited (*see,* NY Const, art VI, § 3 [b] [9]; 22 NYCRR 500.17; *see also,* Karger, Powers of the New York Court of Appeals § 65, at 393-396 ***694** [3d ed]). The majority's authoritative response is measured out in proportion to these operative principles and strictures, and with a full appreciation of our heralded common-law interstitial developmental process. We do not at all abandon the tradition that has wisely guided the careful progression of the at-will doctrine and its application in particular circumstances (Cardozo, *Nature of the Judicial Process,* in Selected Writings of Benjamin Nathan Cardozo, at 115, 134 [Margaret E. Hall ed 1947] [observing that Judges proceed " 'interstitially' " " 'from molar to molecular motions' "], quoting *Southern Pac. Co. v Jensen,* 244 US 205, 221 [Holmes, J., dissenting]).

The dissent, on the other hand, strongly disagrees with and variously over-characterizes the import and reach of the majority rationale (*see,* dissenting opn, at 694, 698-699, 704-706). The dissent uses a different and broader approach of its own, not unlike that of the Federal District Court (*see,* dissenting opn, at 696, 699-705, 706). To be sure, those two differing views reach a conclusion that the agreement is indefinite, but that postulate cannot trigger a dispositional at-will analysis, when this majority, qua Court, determines, as we do, in the threshold step of analysis that the agreement measures up as sufficiently definite. We need not, nor may we, venture in dictum or additional discussion, and we need respond to the Second Circuit and to the dissent no further.

Accordingly, the certified question of the Second Circuit Court of Appeals should be answered that an oral contract between a fight trainer and a professional boxer to train the boxer "for as long as the boxer fights professionally" is a contract for a definite duration.

Judges Levine, Ciparick and Wesley concur with Judge Bellacosa; Judge Smith dissents and answers the certified ***707** question by stating that the purported contractual language indicates employment of indefinite duration which merely raises a rebuttable presumption under the at-will rule, in a separate opinion; Chief Judge Kaye and Judge Titone taking no part.

Following certification of a question by the United States Court of Appeals for the Second Circuit and acceptance of the question by this Court pursuant to section 500.17 of the Rules of the Court of Appeals (22 NYCRR 500.17), and after hearing argument by counsel for the parties and consideration of the briefs and the record submitted, certified question answered as follows: An oral contract between a fight trainer and a professional boxer to train the boxer "for as long as the boxer fights professionally" is a contract for a definite duration.***708**

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Norcon Power v. Niagara Mohawk Power

(Ct. certified to Fed Appeals Ct. the validity of a demand for security of future performance principle in commercial breach of contract cases)
92 N Y 2nd 458 – Majority Opinion, Unanimous [1998]

92 N.Y.2d 458, 705 N.E.2d 656, 682 N.Y.S.2d 664, 37 UCC Rep.Serv.2d 323, 1998 N.Y. Slip Op. 10518

Norcon Power Partners, L.P., Respondent,

v.

Niagara Mohawk Power Corp., Appellant.

Court of Appeals of New York

172

Argued October 22, 1998;

Decided December 1, 1998

CITE TITLE AS: Norcon Power Partners v Niagara Mohawk Power Corp.

SUMMARY

Proceeding, pursuant to NY Constitution, article VI, § 3 (b) (9) and Rules of the Court of Appeals (22 NYCRR) § 500.17, to review a question certified to the New York State Court of Appeals by order of the United States Court of Appeals for the Second Circuit. The following question was certified by the United States Court of Appeals and accepted by the New York State Court of Appeals pursuant to section 500.17: "Does a party have the right to demand adequate assurance of future performance when reasonable grounds arise to believe that the other party will commit a breach by non-performance of a contract governed by New York law, where the other party is solvent and the contract is not governed by the U.C.C.?"

OPINION OF THE COURT

Bellacosa, J.

The doctrine, known as demand for adequate assurance of future performance, is at the heart of a Federal lawsuit that stems from a 1989 contract between Norcon Power Partners, L.P., an independent power producer, and Niagara Mohawk Power Corporation, a public utility provider. Niagara Mohawk undertook to purchase electricity generated at Norcon's Pennsylvania facility. The contract was for 25 years, but the differences emerged during the early years of the arrangement.

The case arrives on this Court's docket by certification of the substantive law question from the United States Court of Appeals for the Second Circuit. Our Court is presented with an open issue that should be settled within the framework of New York's common-law development. We accepted the responsibility to address this question involving New York contract law:

"Does a party have the right to demand adequate assurance of future performance when reasonable grounds arise to believe that the other party will commit a breach by non-performance of a contract governed by New York law, where the other party is solvent and the contract is not governed by the U.C.C.?" (*Norcon Power Partners v Niagara Mohawk Power Corp.*, 110 F3d 6, 9.)

As framed by the particular dispute, we answer the law question in the affirmative with an appreciation of this Court's traditional common-law developmental method, and as proportioned to the precedential sweep of our rulings.

The Second Circuit Court of Appeals describes the three pricing periods, structure and details as follows:***461**

"In the first period, Niagara Mohawk pays Norcon six cents per kilowatt-hour for electricity. In the second and third periods, the price paid by Niagara Mohawk is based on its 'avoided cost.' The avoided cost reflects the cost that Niagara Mohawk would incur to generate electricity itself or purchase it from other sources. In the second period, if the avoided cost falls below a certain floor price (calculated according to a formula), Niagara Mohawk is obligated to pay the floor price. By the same token, if the avoided cost rises above a certain amount (calculated according to a formula), Niagara Mohawk's payments are capped by a ceiling price. An 'adjustment account' tracks the difference between payments actually made by Niagara Mohawk in the second period and what those payments would have been if based solely on Niagara Mohawk's avoided cost.

"In the third period, the price paid by Niagara Mohawk is based on its avoided cost without any ceiling or floor price. Payments made by Niagara Mohawk in the third period are adjusted to account for any balance existing in the adjustment account that operated in the second period. If the adjustment account contains a balance in favor of Niagara Mohawk--that is, the payments actually made by Niagara Mohawk in the second period exceeded what those payments would have been if based solely on Niagara Mohawk's avoided cost--then the rate paid by Niagara Mohawk will be reduced to reflect the credit. If the adjustment account contains a balance in favor of Norcon, Niagara Mohawk must make increased payments to Norcon. If a balance exists in the adjustment account at the end of the third period, the party owing the balance must pay the balance in full within thirty days of the termination of the third period" (*Norcon Power Partners v Niagara Mohawk Power Corp.*, 110 F3d 6, 7, *supra*).

In February 1994, Niagara Mohawk presented Norcon with a letter stating its belief, based on revised avoided cost estimates, that substantial credits in Niagara Mohawk's favor would accrue in the adjustment account during the second pricing period. "[A]nalysis shows that the Cumulative Avoided ***462** Cost Account ... will reach over $610 million by the end of the second period." Anticipating that Norcon would not be able to satisfy the daily escalating credits in the third period, Niagara Mohawk demanded that "Norcon provide adequate assurance to Niagara Mohawk that Norcon will duly perform all of its future repayment obligations."

Norcon promptly sued Niagara Mohawk in the United States District Court, Southern District of New York. It sought a declaration that Niagara Mohawk had no contractual right under New York State law to demand adequate assurance, beyond security provisions negotiated and expressed in the agreement. Norcon also sought a permanent injunction to stop Niagara Mohawk from anticipatorily terminating the contract based on the reasons described in the demand letter. Niagara Mohawk counterclaimed. It sought a counter declaration that it properly invoked a right to demand adequate assurance of Norcon's future payment performance of the contract.

The District Court granted Norcon's motion for summary judgment. It reasoned that New York common law recognizes the exceptional doctrine of demand for adequate assurance only when a promisor becomes insolvent, and also when the statutory sale of goods provision under UCC 2-609, is involved. Thus, the District Court ruled in Norcon's favor because neither exception applied, in fact or by analogy to the particular dispute (*decided sub nom. Encogen Four Partners v Niagara Mohawk Power Corp.*, 914 F Supp 57).

The Second Circuit Court of Appeals preliminarily agrees (110 F3d 6, *supra*) with the District Court that, except in the case of insolvency, no common-law or statutory right to demand adequate assurance exists under New York law which would affect non-UCC contracts, like the instant one. Because of the uncertainty concerning this substantive law question the Second Circuit certified the question to our Court as an aid to its correct application of New York law, and with an eye toward settlement of the important precedential impact on existing and future non-UCC commercial law matters and disputes.

II.

Our analysis should reference a brief review of the evolution of the doctrine of demands for adequate assurance. Its roots spring from the doctrine of anticipatory repudiation (*see,* Garvin, *Adequate Assurance of Performance: Of Risk, Duress, and Cognition,* 69 U Colo L Rev 71, 77 [1998]). Under that familiar precept, when a party repudiates contractual duties ***463** "prior to the time designated for performance and before" all of the consideration has been fulfilled, the "repudiation entitles the nonrepudiating party to claim damages for total breach" (*Long Is. R. R. Co. v Northville Indus. Corp.,* 41 NY2d 455, 463; *see,* II Farnsworth, Contracts § 8.20; Restatement [Second] of Contracts § 253; UCC 2-610). A repudiation can be either "a statement by the obligor to the obligee indicating that the obligor will commit a breach that would of itself give the obligee a claim for damages for total breach" or "a voluntary affirmative act which renders the obligor unable or apparently unable to perform without such a breach" (Restatement [Second] of Contracts § 250; *see,* II Farnsworth, Contracts § 8.21; UCC 2-610, Comment 1).

That switch in performance expectation and burden is readily available, applied and justified when a breaching party's words or deeds are unequivocal. Such a discernible line in the sand clears the way for the nonbreaching party to broach some responsive action. When, however, the apparently breaching party's actions are equivocal or less certain, then the nonbreaching party who senses an approaching storm cloud, affecting the contractual performance, is presented with a dilemma, and must weigh hard choices and serious consequences. One commentator has described the forecast options in this way:

"If the promisee regards the apparent repudiation as an anticipatory repudiation, terminates his or her own performance and sues for breach, the promisee is placed in jeopardy of being found to have breached if the court determines that the apparent repudiation was not sufficiently clear and unequivocal to constitute an anticipatory repudiation justifying nonperformance. If, on the other hand, the promisee continues to perform after perceiving an apparent repudiation, and it is subsequently determined that an anticipatory repudiation took place, the promisee may be denied recovery for post-repudiation expenditures because of his or her failure to avoid those expenses as part of a reasonable effort to mitigate damages after the repudiation" (Crespi, *The Adequate Assurances Doctrine after U.C.C. § 2-609: A Test of the Efficiency of the Common Law,* 38 Vill L Rev 179, 183 [1993]; *see,* Robertson, *The Right to Demand Adequate Assurance of Due Performance: Uniform Commercial* ***464** *Code Section 2-609 and Restatement [Second] of Contracts Section 251,* 38 Drake L Rev 305, 310 [1988-1989]; Dowling, *A Right to Adequate Assurance of Performance in All Transactions: U.C.C. § 2-609 Beyond Sales of Goods,* 48 S Cal L Rev 1358, 1358-1360, 1386-1387 [1975]; II Farnsworth, Contracts § 8.23a).

III.

The Uniform Commercial Code settled on a mechanism for relieving some of this uncertainty. It allows a party to a contract for the sale of goods to demand assurance of future performance from the other party when reasonable grounds for insecurity exist (*see,* UCC 2-609; II Farnsworth, Contracts § 8.23). When adequate assurance is not forthcoming, repudiation is deemed confirmed, and the nonbreaching party is allowed to take reasonable actions as though a repudiation had occurred (*see,* 4 Anderson, Uniform Commercial Code § 2-609:3 [3d ed 1997 rev]).

UCC 2-609 provides, in relevant part:

"(1) A contract for sale imposes an obligation on each party that the other's expectation of receiving due performance will not be impaired. When reasonable grounds for insecurity arise with respect to the performance of either party the other may in writing demand adequate assurance of due performance and until he receives such assurance may if commercially reasonable suspend any performance for which he has not already received the agreed return. ...

"(4) After receipt of a justified demand failure to provide within a reasonable time not exceeding thirty days such assurance of due performance as is adequate under the circumstances of the particular case is a repudiation of the contract."

In theory, this UCC relief valve recognizes that "the essential purpose of a contract between commercial [parties] is actual performance ... and that a continuing sense of reliance and security that the promised performance will be forthcoming when due, is an important feature of the bargain" (UCC 2-609, Comment 1). In application, section 2-609 successfully implements the laudatory objectives of quieting the doubt a party fearing repudiation may have, mitigating the dilemma flowing ***465** from that doubt, and offering the nonbreaching party the opportunity to interpose timely action to deal with the unusual development (*see,* II Farnsworth, Contracts § 8.23a; 4 Anderson, Uniform Commercial Code § 2-609:36 [3d ed 1997 rev]; Robertson, *op. cit.,* at 353; Dowling, *op. cit.,* at 1359, 1364-1365; Campbell, *The Right to Assurance of Performance under UCC § 2-609 and Restatement [Second] of Contracts § 251: Toward a Uniform Rule of Contract Law,* 50 Fordham L Rev 1292, 1296-1297 [1982]; *but see,* 1 White and Summers, Uniform Commercial Code § 6-2 [4th ed 1995]).

Indeed, UCC 2-609 has been considered so effective in bridging the doctrinal, exceptional and operational gap related to the doctrine of anticipatory breach that some States have imported the complementary regimen of demand for adequate assurance to common-law categories of contract law, using UCC 2-609 as the synapse (*see, e.g., Lo Re v Tel-Air Communications,* 200 NJ Super 59, 490 A2d 344 [finding support in UCC 2-609 and Restatement (Second) of Contracts § 251 for applying doctrine of adequate assurance to contract to purchase radio station]; *Conference Ctr. v TRC--The Research Corp. of New England,* 189 Conn 212, 455 A2d 857 [analogizing to UCC 2-609, as supported by Restatement (Second) of Contracts § 251, in context of constructive eviction]).

Commentators have helped nudge this development along. They have noted that the problems redressed by UCC 2-609 are not unique to contracts for sale of goods, regulated under a purely statutory regime. Thus, they have cogently identified the need for the doctrine to be available in exceptional and qualifying common-law contractual settings and disputes because of similar practical, theoretical and salutary objectives (*e.g.,* predictability, definiteness, and stability in commercial dealings and expectations) (*see, e.g.,* Campbell, *op. cit.,* at 1299-1304; *see generally,* White, *Eight Cases and Section 251,* 67 Cornell L Rev 841 [1982]; Dowling, *op. cit.*).

The American Law Institute through its Restatement (Second) of Contracts has also recognized and collected the authorities supporting this modern development. Its process and work settled upon this black letter language:

"(1) Where reasonable grounds arise to believe that the obligor will commit a breach by non-performance that would of itself give the obligee a claim for damages for total breach under § 243, the obligee may demand adequate assurance of due ***466** performance and may, if reasonable, suspend any performance for which he has not already received the agreed exchange until he receives such assurance.

"(2) The obligee may treat as a repudiation the obligor's failure to provide within a reasonable time such assurance of due performance as is adequate in the circumstances of the particular case" (Restatement [Second] of Contracts § 251).

Modeled on UCC 2-609, Restatement § 251 tracks "the principle that the parties to a contract look to actual performance 'and that a continuing sense of reliance and security that the promised performance will be forthcoming when due, is an important feature of the bargain' " (Restatement [Second] of Contracts § 251, comment *a,* quoting UCC 2-609, Comment 1). The duty of good faith and fair dealing in the performance of the contract is also reflected in section 251 (*see,* Restatement [Second] of Contracts § 251, comment *a*).

Some States have adopted Restatement § 251 as their common law of contracts, in varying degrees and classifications (*see, e.g., Carfield & Sons v Cowling,* 616 P2d 1008 [Colo] [construction contract]; *Spitzer Co. v Barron,* 581 P2d 213 [Alaska] [construction contract]; *Drinkwater v Patten Realty Corp.,* 563 A2d 772 [Me] [sale of real estate]; *Jonnet Dev. Corp. v Dietrich Indus.,* 316 Pa Super 533, 463 A2d 1026 [real estate lease]; *but see, Mollohan v Black Rock Contr.,* 160 W Va 446, 235 SE2d 813 [declining to adopt section 251, except to the extent that failure to give adequate assurance on demand may be some evidence of repudiation]).

IV.

New York, up to now, has refrained from expanding the right to demand adequate assurance of performance beyond the Uniform Commercial Code (*see, Sterling Power Partners v Niagara Mohawk Power Corp.*, 239 AD2d 191, *appeal dismissed* 92 NY2d 877; *Schenectady Steel Co. v Trimpoli Gen. Constr. Co.*, 43 AD2d 234, *affd on other grounds* 34 NY2d 939). The only other recognized exception is the insolvency setting (*see, Hanna v Florence Iron Co.*, 222 NY 290; *Pardee v Kanady*, 100 NY 121; *Updike v Oakland Motor Car Co.*, 229 App Div 632). Hence, the need for this certified question emerged so this Court could provide guidance towards a correct resolution of the Federal lawsuit by settling New York law with a modern pronouncement governing this kind of contract and dispute.***467**

Niagara Mohawk, before our Court through the certified question from the Federal court, urges a comprehensive adaptation of the exceptional demand tool. This wholesale approach has also been advocated by the commentators (*see generally,* Dowling, *op. cit.;* Campbell, *op. cit.*). Indeed, it is even reflected in the breadth of the wording of the certified question.

This Court's jurisprudence, however, usually evolves by deciding cases and settling the law more modestly (*Rooney v Tyson,* 91 NY2d 685, 694, citing Cardozo, *Nature of the Judicial Process,* in Selected Writings of Benjamin Nathan Cardozo, at 115, 134 [Margaret E. Hall ed 1947] [observing that Judges proceed interstitially]). The twin purposes and functions of this Court's work require significant professional discipline and judicious circumspection.

We conclude, therefore, that it is unnecessary, while fulfilling the important and useful certification role, to promulgate so sweeping a change and proposition in contract law, as has been sought, in one dramatic promulgation. That approach might clash with our customary incremental common-law developmental process, rooted in particular fact patterns and keener wisdom acquired through observations of empirical application of a proportioned, less than absolute, rule in future cases.

It is well to note the axiom that deciding a specific case, even with the precedential comet's tail its rationale illuminates, is very different from enacting a statute of general and universal application (*see,* Breitel, *The Lawmakers,* 2 Benjamin N. Cardozo Memorial Lectures 761, 788 [1965] ["(P)rocedurally, courts are limited to viewing the problem as presented in a litigated case within the four corners of its record. A multiplication of cases will broaden the view because of the multiplication of records, but the limitation still persists because the records are confined by the rules of procedure, legal relevance, and evidence."]).

Experience and patience thus offer a more secure and realistic path to a better and fairer rule, in theory and in practical application. Therefore, this Court chooses to take the traditionally subtler approach, consistent with the proven benefits of the maturation process of the common law, including in the very area of anticipatory repudiation which spawns this relatively newer demand for assurance corollary (*see,* Garvin, *op. cit.,* at 77-80; Robertson, *op. cit.,* at 307-310; Dowling, *op. cit.,* at 1359-1362; *see also,* Breitel, *op. cit.,* at 781-782 [1965] ***468** ["The commonplace, for which the Holmeses and the Cardozos had to blaze a trail in the judicial realm, assumes the rightness of courts in making interstitial law, filling gaps in the statutory and decisional rules, and at a snail-like pace giving some forward movement to the developing law. Any law creation more drastic than this is often said and thought to be an invalid encroachment on the legislative branch."]).

This Court is now persuaded that the policies underlying the UCC 2-609 counterpart should apply with similar cogency for the resolution of this kind of controversy. A useful analogy can be drawn between the contract at issue and a contract for the sale of goods. If the contract here was in all respects the same, except that it was for the sale of oil or some other tangible commodity instead of the sale of electricity, the parties would unquestionably be governed by the demand for adequate assurance of performance factors in UCC 2-609. We are convinced to take this prudent step because it puts commercial parties in these kinds of disputes at relatively arm's length equilibrium in terms of reliability and uniformity of governing legal rubrics. The availability of the doctrine may even provide an incentive and tool for parties to resolve their own differences, perhaps without the necessity of judicial intervention. Open, serious renegotiation of dramatic developments and changes in unusual contractual expectations and qualifying circumstances would occur because of and with an eye to the doctrine's application.

The various authorities, factors and concerns, in sum, prompt the prudence and awareness of the usefulness of recognizing the extension of the doctrine of demand for adequate assurance, as a common-law analogue. It should apply to the type of long-term commercial contract between corporate entities entered into by Norcon and Niagara Mohawk here, which is complex and not reasonably susceptible of all security features being anticipated, bargained for and incorporated in the original contract. Norcon's performance, in terms of reimbursing Niagara Mohawk for credits, is still years away. In the meantime, potential quantifiable damages are accumulating and Niagara Mohawk must weigh the hard choices and serious consequences that the doctrine of demand for adequate assurance is designed to mitigate. This Court needs to go no further in its promulgation of the legal standard as this suffices to declare a dispositive and proportioned answer to the certified question.

Accordingly, the certified question should be answered in the affirmative.*469

Chief Judge Kaye and Judges Smith, Levine, Ciparick and Wesley concur.

Following certification of a question by the United States Court of Appeals for the Second Circuit and acceptance of the question by this Court pursuant to section 500.17 of the Rules of the Court of Appeals (22 NYCRR 500.17), and after hearing argument by counsel for the parties and consideration of the briefs and the record submitted, certified question answered in the affirmative.*470

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World Trade Center [1993 1st Bombing]

(Ct. upheld broad lawsuit for civil damages for injured victims)

93 N Y 2nd 1 – Majority Opinion, Unanimous [1999]

New York
Official Reports

93 N.Y.2d 1, 709 N.E.2d 452, 686 N.Y.S.2d 743, 1999 N.Y. Slip Op. 01391

In the Matter of World Trade Center Bombing Litigation. Steering Committee (Representing Plaintiffs), Respondent,
v.
Port Authority of New York and New Jersey, Appellant.

Court of Appeals of New York
2
Argued January 5, 1999;
Decided February 16, 1999

CITE TITLE AS: Matter of World Trade Ctr. Bombing Litig.

SUMMARY

Appeal, by permission of the Appellate Division of the Supreme Court in the First Judicial Department, from an order of that court, entered March 5, 1998, which modified, on the law, and, as modified, affirmed (1) an order of the Supreme Court (Stanley Sklar, J.), entered May 13, 1997 in New York County, requiring defendant Port Authority of New York and New Jersey to produce certain documents and portions of documents and protecting other documents and portions thereof from disclosure, and (2) two orders of the Supreme Court (Nicholas Doyle, Spec. Ref.), entered in New York County, clarifying the order of the Supreme Court entered May 13, 1997. The modification consisted of vacating the orders of protection and remanding the matter to afford the IAS Court an opportunity to fashion an order requiring that any materials disclosed be kept confidential. The following question was certified by the Appellate Division: "Was the order of this Court, which modified the order[s] of the Supreme Court, properly made?"

Matter of World Trade Ctr. Bombing Litig., 248 AD2d 137, reversed.*2

OPINION OF THE COURT

Bellacosa, J.

The civil lawsuits assembled within this consolidated discovery dispute stem from negligence claims of individuals and businesses that allege various injuries and damages as a result of the World Trade Center (WTC) bombing in 1993. At issue are plaintiffs' pretrial efforts to obtain WTC building security plans and documents from the Port Authority (PA). Defendant PA opposes this document turnover on grounds of public safety. It asserts New York's public interest privilege exception to this State's liberal discovery rules and tradition.

The WTC, at the foot of Manhattan Island, is comprised of a multibuilding office and commercial complex located on a 16-acre site that includes New York City's largest public plaza. As is widely known, a bomb exploded in the B-2 level of the public parking garage located beneath the Concourse of the WTC on February 26, 1993. The explosion killed six people, injured many others, and disrupted numerous businesses and lives. Four terrorists were convicted in Federal court of engaging in a conspiracy that led to the placement and detonation of the bomb. Plaintiffs contend that the PA, which still owns the WTC, negligently failed to implement security measures that would have either kept the bomb out of the garage or mitigated the ensuing injuries, damages and destruction.

We hold that the PA is not required, as a matter of law, to disclose the WTC security-related materials at issue. Rather, an in camera assessment of the disputed documents is necessary to weigh whether the particular, requested data are shielded by a public interest privilege against disclosure of confidential governmental communications.*5

I. The Parties

A. Defendant-Appellant Port Authority and Its Office for Special Planning Report

In 1921, the PA was created by bi-State legislation designed to promote cooperation between New York and New Jersey in developing the terminal, transportation and other facilities of commerce in, about and through the Port of New York for the economic benefit of the Nation, as well as of New York and New Jersey (*see,* McKinney's Uncons Laws of NY §§ 6401-6423; L 1921, ch 154, § 1). Currently, the PA owns, operates or oversees several major facilities, including airports, interstate bridges and tunnels, as well as the WTC.

The WTC was itself created through legislation intended to encourage New York and New Jersey to "preserve and protect the position of the port of New York as the nation's leading gateway for world commerce" (*see,* McKinney's Uncons Laws of NY § 6601 [5]; L 1962, ch 209, § 1). The WTC includes all buildings, structures, improvements and areas constituting a facility of commerce notwithstanding that portions of them "may not be devoted to purposes of the port development project other than the production of incidental revenue available for the expenses of all or part of the port development project" (*see,* McKinney's Uncons Laws of NY § 6602). The defining concept encompasses the "unified plan to aid in the preservation of[ ] the economic well-being of the northern New Jersey-New York metropolitan area and *is found and determined to be in the public interest*" (McKinney's Uncons Laws of NY § 6601 [9] [emphasis added]). Indeed, the WTC is "in all respects for the benefit of the people of the states of New York and New Jersey", and, in so effectuating the project and carrying out the relevant provisions of the law, the PA "shall be regarded as *performing an essential governmental function*" (McKinney's Uncons Laws of NY § 6610 [emphasis added]).

In 1984, terrorist activities occurring in other areas of the world spurred the PA to create the Office for Special Planning (OSP) to address exposure to terrorist acts in all PA-owned facilities. OSP's mission was to conduct an extensive review to address vulnerabilities, identify alternatives and solutions, present recommendations to each facility's management, and obtain a response from each facility to coordinate with the PA's Director of Public Safety. OSP's work generated a document in 1985, entitled "Counter-Terrorism Perspectives: The World ***6** Trade Center" (OSP Report). The OSP Report was submitted to the Executive Director of the PA, the Director of Public Safety of the PA, the Superintendent of the PA Police, and the Director of the World Trade Department.

After the 1993 bombing, portions of the OSP Report were discussed at public hearings conducted by the New York State Senate Committee on Investigations, Taxation and Government Operations. These hearings resulted in a Senate Committee Report, dated August 3, 1993, which found, among other things: "The 1985 OSP report listed a series of possible methods of attacking the World Trade Center. The specifics of the February 26, 1993 bombing at the World Trade Center garage were almost identical to those envisioned in the report." The Senate hearings and report also revealed that numerous governmental security agencies had concurred with the findings of the OSP Report and that the PA had engaged private consulting firms to review the report. These firms also issued summary reports that concurred with the OSP's findings and recommendations.

B. Plaintiffs' Steering Committee

Plaintiffs are represented by a Steering Committee, which was created by a judicial consolidation order dated July 29, 1994. It joins more than 175 cases for trial, discovery and motions. However, at a point prior to the creation of the Steering Committee and the joinder of the various cases, discovery issues arose in two of the discrete actions.

In August 1993, Phoenix Assurance Company of New York sought subrogation against the PA to recover money it paid to one of its policyholders for property damage claims (*Phoenix Assur. Co. v Port Auth.*, Sup Ct, NY County, No. 120788/93). In December 1993, Phoenix demanded production of the OSP Report, reports prepared by the PA's security consultants, and related data. The PA turned over some material, but objected to disclosure of 68 documents. (Plaintiffs refer to 62 disputed documents, though the PA considers certain pages of multiple-page documents as constituting separate documents, yielding a count of 68 documents.) The PA sought to shield the OSP Report and documents related to it, including documents categorized as "security audit[s]" that identify possible vulnerabilities of security systems at the WTC. Phoenix then moved

to compel production of the withheld documents.

In April 1994, plaintiffs in another case (*Dean Witter Reynolds v Port Auth.*, Sup Ct, NY County, No. 106016/94) also *7 moved to compel nonparty security consultants to comply with subpoenas duces tecum, by producing particular documents within the pending discovery motion in the *Phoenix* case. The documents encompassed within these two motions are the core focus of this appeal by the PA from an Appellate Division order that essentially directed a complete turnover to plaintiffs. This disclosure was qualified only by a confidentiality agreement that was to be negotiated on the remittal at the nisi prius court level.

II. Procedural History

After the Steering Committee was created, all parties agreed to deem the two pending discovery applications as a consolidated motion by all parties against the PA. In 1995, Supreme Court formalized this consolidation and ordered delivery of the disputed documents to the court. Pursuant to stipulation, an initial in camera inspection was referred to a Special Master, who issued a report on December 12, 1996. The Master detailed findings in conjunction with the PA's assertions of the public interest privilege regarding specified documents and data.

Supreme Court then conducted its own in camera review of materials that the Special Master had not reviewed. In 1997, Supreme Court adopted, with some revisions, the Special Master's Report. All further discovery issues were referred to a Special Referee who issued two clarifying orders. The orders essentially withheld from disclosure certain documents or parts based on the public interest privilege, withheld material that was deemed irrelevant to security matters beneath the Concourse level of the World Trade Center, and withheld one document subject to the attorney-client privilege.

The contending parties appealed to the Appellate Division. The PA primarily sought to have all documents withheld pursuant to the public interest privilege rooted in the policy incentive for complete candor surrounding confidential government consultation dealing with security analysis. The PA also sought at least to extend Supreme Court's public interest privilege application and relevancy determinations to more documents. Plaintiffs cross-appealed and challenged Supreme Court's application of the public interest privilege at all, and its particularized relevancy determinations.

The Appellate Division ruled in favor of plaintiffs. It held that the PA's function, in its role as owner of the WTC, is indistinguishable from that of any other private landlord. It thus rejected the public interest privilege for this case, as a **8 matter of law. It also determined that the documents objected to on relevancy grounds should be disclosed. Its modification order then remitted the matter to the IAS Court for the fashioning of a confidentiality agreement with regard to disclosure of the disputed documents to the Steering Committee lawyers.

The Appellate Division granted leave to the PA to appeal to this Court. We answer that court's certified question in the negative, and conclude that the public interest privilege is not precluded as a matter of law.

III. Analysis

A public interest privilege inheres in certain official confidential information in the care and custody of governmental entities. This privilege permits appropriate parties to protect information from ordinary disclosure, as an exception to liberal discovery rubrics (*see, Cirale v 80 Pine St. Corp.*, 35 NY2d 113 [1974]). Specifically, the privilege envelops " 'confidential communications between public officers, and to public officers, in the performance of their duties, where the public interest requires that such confidential communications or the sources should not be divulged' " (*id.*, at 117 [citations omitted]). The justification for the privilege is that the public interest might otherwise be harmed if extremely sensitive material were to lose this special shield of confidentiality (*see, id.*, at 117).

Contrary to the sweeping assertions of the respective parties, the privilege is neither absolute as the PA wishes, nor is it so easily evaded as plaintiffs' categorical incantations would effect. The PA is not "just another landlord." Whether the privilege attaches in a particular setting is a fact-specific determination for a fact-discretion weighing court, operating in camera, if necessary. The public interest, and what adds up to sufficient potential harm to it, are necessarily and inherently flexible concepts (*see, id.*, at 118-119). Entitlement to the privilege requires, therefore, that an agency claiming some special governmental-public interest "cone of silence" demonstrate the specific public interest that would be jeopardized by an

otherwise customary exchange of information (*see, id.,* at 119). After all, the public interest correspondingly encompasses societal interests in redressing private wrongs, like those alleged by plaintiffs, and allows for the fair adjudication of private litigation (*see, id.,* at 118). These competing objectives bespeak the weighing and proportionality of redress and access to public, though confidential, information. However, "[o]nce it ***9** is shown that disclosure would be more harmful to the interests of the government than [nondisclosure would be to] the interests of the party seeking the information, the overall public interest on balance would then be better served by nondisclosure" (*id.,* at 118).

Notably, a mere showing by a private litigant in a civil case that information sought would be helpful to secure "useful testimony" is not enough to override a demonstrated or manifest potential harm to the public good (*see, id.,* at 118). Rather, a court must calibrate the need of a litigant for information with the government's duty to try to prevent similar occurrences and to maintain the public peace and welfare (*see, id.,* at 118).

Since *Cirale,* this balancing of interests has been described in various ways and can include the weighing of " 'the encouragement of candor in the development of policy against the degree to which the public interest may be served by disclosing information which elucidates the governmental action taken' " (*see, Martin A. v Gross,* 194 AD2d 195, 202-203, quoting *One Beekman Place v City of New York,* 169 AD2d 492, 493; *see also, McDermott v Lippman,* Sup Ct, NY County, NYLJ, Jan. 4, 1994, at 35, col 3 [applying a statutory Freedom of Information Law exemption to security analyses regarding upstate New York trial courthouses because there was "a possibility that the release of the security surveys conducted by the respondents ... would endanger the lives or safety of the people working in and/or visiting the (buildings)"]). The calibration can also take into account the extent to which pertinent information is available to plaintiffs from other public sources, and the extent to which any overarching goals shared by the parties may be accomplished by nondisclosure (*see, Martin A. v Gross, supra; One Beekman Place v City of New York, supra*).

Due to the fact-specific nature of this inquiry and the required balancing, we conclude that the Appellate Division's matter-of-law rejection of the public interest privilege in the face of the legitimate concerns of the PA is too sweeping. Under the circumstances of this case, further judicial in camera review of the sought-after documents, not unlike the perspicacious gauging conducted at the Supreme Court level with the expert aid of the Special Master, is necessary to determine the extent to which the public interest privilege may protect the concerns that the PA bears under its bi-State enabling legislation and statutory responsibilities.***10**

The public interest privilege adheres to the disputed documents here on a presumptive basis since the PA "is and of necessity has to be a State agency" (*Whalen v Wagner,* 4 NY2d 575, 584; *see also, Trippe v Port of N. Y. Auth.,* 14 NY2d 119, 123; McKinney's Uncons Laws of NY § 6610). Further, some of the disputed documents overtly bear significations that they are confidential communications, "restricted" and "contain[ing] sensitive information" that should be released only on a "need to know" basis. Most of the documents also indicate that they were prepared by the OSP, were circulated among OSP employees, or were prepared by private consultants and directed to the OSP for its evaluation of the WTC complex. The consultants' documents bear such titles as "Vulnerability Study ... For the World Trade Center Complex" and "Physical Security Review of the World Trade Center." On their face and by their evident nature, the disputed documents measure up to the minimum qualifications of *Cirale* for the privilege to be recognized and to become potentially available. The categorical exclusion of the privilege by the Appellate Division, thus, misses the mark and is erroneous.

On remittal, the range of inquiry includes whether the PA can show that the public interest might be harmed if the sought-after materials were to lose their confidentiality shield, such that, on balance, disclosure might produce results more harmful to the public good than beneficial to the private litigating parties seeking it here. As cogently documented and tracked by the Special Master, the PA offered three reasons for how the public interest might be harmed by disclosure here: (1) the documents, or some of their parts, contain confidential information concerning safety or security systems, methods, devices, practices or vulnerabilities, the disclosure of which would endanger lives and property and adversely affect security at the WTC; (2) the disclosure would inhibit candor among persons engaged in efforts undertaken by government agencies to promote public safety; and (3) the disclosure would reveal confidential information regarding criminal activity obtained from law enforcement agencies under a pledge of confidentiality. These arguments are vital and, arguably, unassailable in view of the stark specter of worldwide terrorism and domestic efforts to deal with these growing threats to highly visible public targets of terrorist opportunism (*see,* Note, *Landowner Liability for Terrorist Acts,* 47 Case W Res L Rev 155 [1996]).

Plaintiffs counter that a just adjudication, as they see it, of their negligence claims could also contribute to public safety ***11** more directly than any potential harm flowing from disclosure. They assert that, if the PA was negligent or reckless, money judgments might serve as a meaningful deterrent against future negligence on the part of the PA and other similarly situated landlords. Further, successful resolution of their claims could also serve as an incentive for all landlords to implement security measures reasonably necessary to deter terrorists or similar tragedies in the future.

Plaintiffs' heavily emphasized objection to the interposition of the public interest privilege is that the PA, in its role as the landlord managing and operating the WTC, is gathering and analyzing security-related information just as a typical private landlord seeks to protect the security of its tenants and property. Plaintiffs here assert that because private landlords must engage in this function without the benefit of a special immunity against ordinary discovery overtures and entitlements, the PA should not be able to wrap itself and its WTC operations within the public interest cloak.

However, the mere fact that private landlords also operate and manage other large buildings in Manhattan or elsewhere does not dissolve the essence of this privilege, which may be available to the PA's security-related documents. The public interest privilege was not crafted to apply to private landlords (*see, id.,* at 192), and we need not address the issue of whether the privilege should be absolutely precluded under similar circumstances where private landlords are involved. This case does not represent some slippery slope or opportunity to expand the doctrine. It is enough to decide only that the privilege may apply to the PA, or, at least, is not precluded as a matter of law. Thus, the questions generated for remittal and the augmented intermediate appellate court review include how far and to which documents the privilege should apply in the context and with the benefit of the explicit findings of the Special Master, as adopted by Supreme Court.

In this regard, we note that the Appellate Division decision was pegged to a distinction between the PA's "general" functioning as a governmental agency, and its functioning, in connection with this matter, in a nongovernmental capacity (*see,* 248 AD2d 137, 137-138). However, the Appellate Division did not sufficiently appreciate or attend to the nuance and subtlety of the continuum of governmental and proprietary functions that may overlap (*see, Miller v State of New York,* 62 NY2d 506, 512).***12**

The Appellate Division may also have conflated the test for whether the public interest privilege attaches with the standard for determining whether the PA could be immunized from liability as a State agency (*compare, Cirale v 80 Pine St. Corp., supra, with Clinger v New York City Tr. Auth.,* 85 NY2d 957, *and Miller v State of New York,* 62 NY2d 506, *supra; see also, Clark-Fitzpatrick, Inc. v Long Is. R. R. Co.,* 70 NY2d 382). Notably, nothing requires a defendant to establish immunity from liability as a prerequisite to qualifying for an otherwise available privilege at the pretrial discovery stage. The key to deciding this precise issue is the fact-specific balancing assessment promulgated in *Cirale,* which the Appellate Division failed to perform with its matter-of-law elimination of the privilege (*compare, Brady v Ottaway Newspapers,* 63 NY2d 1031).

We note that the PA also argues that certain documents, or at least some parts, should be withheld based on irrelevancy grounds. "Of course, if the information sought is in fact privileged, it is not subject to disclosure no matter how strong the showing of need or relevancy" (*Cirale v 80 Pine St. Corp., supra,* at 117). Because the scope of the public interest privilege must be determined before relevancy issues are even considered, this Court need not and should not now render a matter-of-law relevancy ruling.

Additionally, plaintiffs urge that the requirement of a confidentiality agreement should mitigate the PA's concerns and essentially eliminate the PA's need to press the public interest privilege. However, if a privilege applies, the documents simply need not be produced. A confidentiality agreement is not a legally cognizable substitute for a legitimately asserted public interest privilege.

In conclusion, both sides seem to propose widely polarized positions. We reject both a per se privilege for security analyses and any absolute preclusion of its availability to the PA. To put this case into perspective, our resolution pointedly rearticulates *Cirale's* governing legal principle, and directs its application with modern, intelligent and prudent guideposts keyed to weighing, to the extent possible, a fact-driven balancing of competing interests that is not readily amenable to matter-of-law dictates.

Accordingly, the order of the Appellate Division should be reversed, with costs, and the matter remitted to the Appellate Division for further proceedings in accordance with this ***13** opinion, and the certified question should be answered in the negative.

Chief Judge Kaye and Judges Smith, Levine, Ciparick, Wesley and Rosenblatt concur.

Order reversed, etc.***14**

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Lauer v. City of New York

(Ct. barred liability for gross negligence on municipal governmental special duty immunity grounds)
95 N Y 2nd 95, at 115 – Dissenting Opinion [2000]

95 N.Y.2d 95, 733 N.E.2d 184, 711 N.Y.S.2d 112, 97 A.L.R.5th 713, 2000 N.Y. Slip Op. 04841

Edward G. Lauer, Respondent,

v.

City of New York et al., Appellants.

Court of Appeals of New York
59
Argued April 5, 2000;
Decided May 16, 2000

CITE TITLE AS: Lauer v City of New York

SUMMARY

Appeal, by permission of the Appellate Division of the Supreme Court in the Second Judicial Department, from an order of that court, entered June 28, 1999, which modified and, as modified, affirmed so much of an order of the Supreme Court (Thomas V. Polizzi, J.; opn 171 Misc 2d 832), entered in Queens County, as denied those branches of a motion by defendants which were to dismiss the first through fifth causes of action and the seventh cause of action, and as granted that branch of defendants' motion which was to dismiss the eighth cause of action. The modification consisted of deleting the provision of the order denying those branches of the defendants' motion which were to dismiss those causes of action which were to recover damages for intentional infliction of emotional distress and substituting therefor a provision granting those branches of the defendants' motion, and deleting the provision thereof granting that branch of the defendants' motion which was to dismiss so much of the eighth cause of action as asserted a cause of action to recover damages for negligent infliction of emotional distress and substituting therefor a provision denying that branch of the defendants' motion. The following question was certified by the Appellate Division: "Was the opinion and order of this court, dated June 28, 1999, properly made?"

Lauer v City of New York, 258 AD2d 92, reversed.

Bellacosa, J.

(Also dissenting).

I agree with Judge Smith's lead dissenting opinion, and add this expression to augment my vote for affirmance of the Appellate Division order.

This State's tort jurisprudence recognizes that "[d]anger invites rescue" (*Wagner v International Ry. Co.*, 232 NY 176, 180). That renowned case offers apt pari materia reasoning, and much more in the way of classic Cardozean guidance that is transcendent (*id.*, at 180-182 ["The law does not ignore these reactions of the mind in tracing conduct to its consequences" and in determining that the "quality" of a defendant's acts relating to duty are appropriately questions of fact for a jury in circumstances such as are presented there and here]).

When an official initiates a course of events that creates a particular danger, then affirmatively maintains the Sword of Damocles over and directly onto the head of a particular individual, a common-law duty to that endangered and harmed person ought to be recognized. This Court would do well to make the policy choice open to it in this case, by acknowledging this legal duty. The effect here would merely allow an opportunity, as in *Wagner,* for a jury to redress the Job-like ruination of plaintiff's life.

The ruling I propose is especially warranted when the public servant, who precipitated the investigation of plaintiff as the suspect in the wrongfully certified homicide of his three-year-old son, fails to remove or at least mitigate the risk and harm that enveloped the life of that one knowable person. Time, circumstance, and place make the Medical Examiner's matter-of-course intervention a reasonable and feasible obligation. The care would, in balanced and controllable theory, extend only to this plaintiff. Indeed, the theoretical, foreseeable class would ***116** be a relatively self-defined, small circle of potential suspects, in any event (compare the widened duty perimeter in *Wagner, supra,* and cases discussed *infra*). Moreover, a mathematical process of elimination naturally reduces the operational reach of this rule, and would not result in some open-ended potential drain on the public purse.

Next, the juridical norm I proffer is particularly appropriate--arguably, at an a fortiori level--when the culpable employee unilaterally possesses the exclusive knowledge and singular power to right the wrong. He should be legally accountable for failing to act reasonably at the time when complete innocence became medically known and certain to him. It should not be overlooked that the public at large was never potentially a suspect in the infant's death; as it turned out and from the outset, only plaintiff was a beleaguered suspect from the moment the mistaken notice of a "homicide" by "blunt injuries to the neck and brain" was reported by the Medical Examiner to the District Attorney of Queens County. Death actually occurred from a natural cause--a ruptured aneurysm within the youngster's brain.

This duty theorem should be as much the legal canon, as it is the humanistic intuition and moral duty of anyone with such official control over another human being--indeed, someone in a unique and proximate position to "rescue" the very person he spliced onto the investigatory slide. This corollary to standard tort duty propositions involving the general governmental responsibility to the public evolves as an inevitably narrowed obligation, directed toward the unmistakably sole identifiable object of the Medical Examiner's series of actions and subsequent inactions (*see,* Restatement [Second] of Torts § 321; *see also, id.,* comment *a,* illustration 2).

The general and the particular duties would thus complement one another, most justifiably (*Moch Co. v Rensselaer Water Co.,* 247 NY 160, 167-168). *Moch* teaches: "If conduct has gone forward to such a stage that inaction would commonly result, not negatively merely in withholding a benefit, but *positively or actively in working an injury, there exists a relation out of which arises a duty to go forward.* ... The query always is whether the putative wrongdoer has advanced to such a point as to have launched a force or instrument of harm, or has stopped where inaction is at most a refusal to become an instrument for good" (*id.* [emphasis added, citations omitted]). Indeed, *Moch* also presciently warns against facile classifications or demarcations that contribute to calcifications in ***117** the articulation and application of legal principles to real cases (*Moch Co. v Rensselaer Water Co., supra; see also,* Cardozo, Nature of the Judicial Process, at 19-23 [Yale Univ Press]). Legal principles should evolve with suppleness and flexible analysis (*see, Palka v Servicemaster Mgt. Servs. Corp.,* 83 NY2d 579, 585 ["Common-law experience teaches that duty is not something derived or discerned from an algebraic formula"]).

To immunize the kind of alleged misconduct described by the pleading of this case would reward government agents who hide the truth and sweep wrongdoings under a rug of tort impunity. In such instances, truly responsible public employees have little to no incentive to own up to wrongdoings, since their official information is usually their secret (especially so in this case), and aggrieved parties will be barred from even entering a courthouse, no less reaching a trial airing of the truth.

The danger to the public purse and public tort policy is not sufficient or proportionate enough to block any chance of accountability and redress here. The zone of the proposed duty, as paradigmed through this case for future guidance, would be

prudently limited by the exceptional quality and quantum of factors in this hard, and yes sympathetic, case. The sympathy feature, I must emphasize, does not drive my analysis; nor should it, on the other hand, disqualify the plaintiff and his case from common-law evolvement. The precedential template I propose is fully consistent with this Court's careful line drawing on the threshold duty question (*see, e.g., Bovsun v Sanperi,* 61 NY2d 219; *see also especially, Crosland v New York City Tr. Auth.,* 68 NY2d 165, 170).

The key language of *Crosland* is particularly instructive, and not legally, realistically or semantically distinguishable, as the majority proposes. We said in *Crosland:* "Watching someone being beaten from a vantage point [subway token booth] offering both safety and the means to summon help without danger is within the narrow range of circumstances which could be found to be actionable (*cf. Putnam v Broadway & Seventh Ave. R. R. Co.,* 55 NY 108, 116; *Scalise v City of New York,* 3 NY2d 951)" (*Crosland v New York City Tr. Auth., supra,* at 170). The allegations of plaintiff's complaint and the accompanying affidavits on this CPLR 3211 (a) (7) motion present enough to warrant further opportunity to proceed in the case. The next stages might uncover the direct and associated dealings of all the parties through EBTs, official files and medical records. Plaintiff is, after all, entitled to every favorable inference at this first pleading stage. Therefore, the Medical Examiner ***118** should not be deemed, unrealistically or simply, ignorant of what he had officially unleashed against this particular plaintiff--the prime and only suspect in a homicide that never was. That is too easy an "out" for the Medical Examiner who ought to be in an even higher duty position and relationship than the subway token booth clerk in *Crosland.* That lesser ranking employee was held to a duty to an ordinary subway passenger--a victim with whom he otherwise never had anything to do.

After the follow-up autopsy proving that no crime was committed, the Medical Examiner did not so much as phone or E-mail the District Attorney or the investigating detectives of the New York Police Department with a simple message, e.g., "I was wrong when I reported this as a homicide. The child died of natural causes. Please stop the investigation of this man." Instead, he did not even amend the death certificate for two years until a newspaper blew the whistle on this tragedy. The duty of care that this Court recognized in *Crosland* places the duty that ought to be recognized in this case within the realm and contemplation of that precedent. The compelling reason is that here the "safe observer" personally and officially initiated the criminal investigation of this plaintiff and had to know that it was ongoing. Yet, he like the subway clerk did not "summon help" from his lofty post, nor did he even lift a finger to stop the ongoing damage to plaintiff. Yet, he was the most proximate, immediate and only agent in a position to do so.

The issue in this case, after all, does not hinge on a general duty to the public or merely a ministerial one that is imposed on the Medical Examiner under the reporting statute (*see,* New York City Charter § 557 [g]). This case involves a heightened duty phase, triggered at the subsequent and next level of particularized obligation.

I am, therefore, persuaded that the fact-pattern parameters and the pinpointed legal rule that would emerge from this case would parallel and build incrementally on the tempered configurations of cases like *Crosland* and *Wagner* (*supra*) (*see also and compare, Kircher v City of Jamestown,* 74 NY2d 251, 262 [dissenting opn, Bellacosa, J.], *Merced v City of New York,* 75 NY2d 798, 800 [concurrence, Bellacosa, J.], *with Mastroianni v County of Suffolk,* 91 NY2d 198).

The principle and analysis that I endorse, along with Judge Smith, are what the law ought to proclaim as the standard measurement of human and governmental conduct to foster ***119** responsible and accountable discharges of specific obligations to generally governed and yet directly affected citizens. That is one of the traditional purposes of tort law principles. Prudent and fair evolvement of the common law supports this tort law policy choice. That is the process and role this Court has long taken, generally toward the positive development of the law, and particularly as applied to cognizable supplicants for judicial redress, like this plaintiff (*see,* Cardozo, Nature of the Judicial Process, at 133-137 and 161-167 [Yale Univ Press]).

The step back from this opportunity--by operation of the majority reversal in this case of the sound Appellate Division majority ruling below--seals an undeniable miscarriage of justice. It was, to be sure, set in motion by the series of alleged blunders by the New York City Medical Examiner in this case. Instead of "rescuing" Lauer with the newly discovered truth, the Medical

Examiner, under the microscope of the most benign reading of the allegations, remained grossly indifferent to stemming the harm he had let loose.

Plaintiff has sought only a day in court that is now foreclosed, thus immunizing the government's alleged wrongdoing against a concededly innocent citizen.

Judges Levine, Ciparick, Wesley and Rosenblatt concur with Chief Judge Kaye; Judges Bellacosa and Smith dissent and vote to affirm in separate opinions in which each concurs.
Order reversed, etc.*120

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People v. Maragh

(Ct. prohibited jurors from imparting personal experiences and "evidence" in deliberations, outside strict trial evidence)
94 N Y 2nd 569 – Majority Opinion, Unanimous [2000]

New York
Official Reports

94 N.Y.2d 569, 729 N.E.2d 701, 708 N.Y.S.2d 44, 2000 N.Y. Slip Op. 04392

The People of the State of New York, Respondent,
v.
Michael Maragh, Appellant.

Court of Appeals of New York
49
Argued March 30, 2000;
Decided May 9, 2000

CITE TITLE AS: People v Maragh

SUMMARY

Appeal, by permission of an Associate Judge of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered July 12, 1999, which (1) reversed, on the law, an order of the Orange County Court (Jeffrey G. Berry, J.), granting a motion by defendant to set aside a jury verdict finding him guilty of criminally negligent homicide and directing a new trial, (2) denied the motion, (3) reinstated the verdict, and (4) remitted the matter for sentencing.

People v Maragh, 263 AD2d 493, reversed.

OPINION OF THE COURT

Bellacosa, J.

([1]) On this appeal, we must determine whether the use of personal professional expertise by jurors, communicated to the whole jury, constitutes juror misconduct affecting its guilty verdict so as to warrant a new trial. Jurors testified at a postverdict CPL 330.30 hearing that during deliberations they were informed of and influenced by two nurse-jurors' professional opinions. The trial court found sufficient misconduct warranting a new trial. The Appellate Division reversed and upheld the verdict. A Judge of this Court granted defendant leave to appeal. We now reverse and reinstate the County Court order directing a new trial.

Defendant was charged with manslaughter in the first and second degrees. At trial, medical issues involving the cause of death were vigorously contested. The prosecution submitted medical evidence including expert testimony that the cause of death was blunt force trauma to the victim's liver and spleen, with massive internal bleeding. The prosecution used this evidence to present to the jury its theory of the case--that defendant repeatedly punched his girlfriend in the abdomen, causing substantial blood loss and death.

Defendant maintained that the victim suffered from seizure-type symptoms and died from a venous air embolism. The defense presented evidence, including expert testimony, to rebut the People's theory of the case and to support its opposing theories. Defense experts testified that autopsy results were consistent with death from an air embolism or other ***572** cardiac event. One defense expert, Dr. Stahl, concluded that the reported blood volume loss was inadequate to cause loss of consciousness or shock, let alone death. He opined that the decedent's ventricular fibrillation and congested blood vessels, as noted in the autopsy

report, were consistent with an air embolism but inconsistent with death from a loss of blood. Dr. Stahl also testified that, although rare, lacerations of the spleen and liver could occur due to improperly administered CPR performed for an extended period of time. Testimony was adduced that CPR was performed on the deceased for approximately two hours.

The jury returned a verdict of not guilty of the manslaughter charges, but guilty of criminally negligent homicide. Defense counsel later became aware of the possibility of juror misconduct through newspaper articles involving the case. A CPL 330.30 motion to set aside the verdict ensued. Insofar as pertinent to this appeal, defendant asserted that the jury deliberations were compromised and the verdict tainted by injection of juror professional opinions shared with the full jury. These opinions consisted of nonevidentiary assessments regarding the volume of blood loss necessary to cause ventricular defibrillation.

At the CPL 330.30 hearing, two jurors testified that another juror, who was a registered nurse, told the jury that, in her medical experience and estimation, the reported volume of the victim's blood loss could have caused ventricular fibrillation which would result in death. The nurse-juror also indicated to the deliberating jury that she had seen patients suffer ventricular fibrillation as a result of blood loss. This opinion was first expressed to another juror, also a nurse, at the hotel room they shared during sequestration. The next day, this information was communicated to the entire jury during their deliberations. The second nurse-juror also performed personal estimations of the blood volume loss and shared them with the rest of the jury.

The trial court granted defendant's motion to set aside the verdict on grounds that a juror became an unsworn witness on the People's behalf, and the jury thus ventured beyond the legally admitted evidence at trial. The Appellate Division reversed and reinstated the verdict (263 AD2d 493).

Defendant urges that the use of juror professional expertise, as in this case, to evaluate and contradict the testimony of trial experts, coupled with the sharing of such nonevidentiary-based ***573** conclusions with fellow jurors, rises to the level of cognizable misconduct. Specifically, defendant argues that the two nurse-jurors became unsworn witnesses against him and that the communications of these jurors reflect a disregard of the trial court's instructions which prejudiced defendant on a material, contested issue in this case.

The People contend that defendant's trial counsel was obliged to seek specific jury instructions or object to the instructions as given by the trial court in order to preserve this issue of law. They press the view that the trial court's instruction that the jurors may utilize their "personal experience" in deciding the facts of the case entitled jurors with medical backgrounds to share their experiences and knowledge with the rest of the jury and to voice their opinions on the evidence. They also urge that defendant's failure to object to the nurse-jurors' prospective service on the jury, or to seek specific cautionary instructions at trial, constituted a waiver of the jury-verdict tainting claims.

Generally, a jury verdict may not be impeached by probes into the jury's deliberative process; however, a showing of improper influence provides a necessary and narrow exception to the general proposition (*see, People v Brown,* 48 NY2d 388, 393; *People v Testa,* 61 NY2d 1008, 1009). Improper influence includes even "well-intentioned jury conduct which tends to put the jury in possession of evidence not introduced at trial" (*People v Brown, supra,* at 393).

CPL 330.30 (2) provides that, after the rendition of a verdict of guilty and before sentence, the court may, upon defendant's motion, set aside the verdict upon the ground "[t]hat during the trial there occurred, out of the presence of the court, improper conduct by a juror, or improper conduct by another person in relation to a juror, which may have affected a substantial right of the defendant and which was not known to the defendant prior to the rendition of the verdict." Defendant argues that jurors who utilized their own expertise to compare their blood volume loss estimations with that of a defense expert and who shared their opinions of the medical consequences with the rest of the jury, engaged in prohibited conduct that is within the remedial reach of CPL 330.30 (2).

This Court has noted, "[b]ecause juror misconduct can take many forms, no ironclad rule of decision is possible. In each case, the facts must be examined to determine the nature of the material placed before the jury and the likelihood that ***574** prejudice

would be engendered" (*People v Brown,* 48 NY2d 388, 394, *supra*). Each instance of juror misconduct must be analyzed with respect to its particular facts (*see, People v Irizarry,* 83 NY2d 557, 561). The trial court is invested with discretion and posttrial fact-finding powers to ascertain and determine whether the activity during deliberations constituted misconduct and whether the verdict should be set aside and a new trial ordered (*see, People v Testa,* 61 NY2d 1008, 1009, *supra*).

We have generally examined juror misconduct in light of unauthorized visits by jurors to areas or crime scenes at issue (*see, e.g., People v Crimmins,* 26 NY2d 319; *People v De Lucia,* 20 NY2d 275), jurors' improper reenactments of incidents (*see, e.g., People v Legister,* 75 NY2d 832), or jurors' performing "tests" to verify testimony at issue (*see, e.g., People v Stanley,* 87 NY2d 1000). In assessing whether a particular activity rises to the level of misconduct, our calculus includes an appreciation that the complained-of conduct must be something more than an application of everyday experience, for that is precisely what peer jurors are instructed and expected to use in their assessment of evidence (*see, People v Brown, supra,* at 394).

A reviewing court should also evaluate whether a juror's or the jury's conduct "created a substantial risk of prejudice to the rights of the defendant by coloring the views of the other jurors as well as her own" (*id.*). In *Brown,* the sole witness' testimony linking the defendant with the crime was bolstered by a juror's description of her unplanned "test." We held that it was reasonable to assume that the jury might give her view extra weight (*id.*).

A similar, grave potential for prejudice is also present here when a juror who is a professional in everyday life shares expertise to evaluate and draw an expert conclusion about a material issue in the case that is distinct from and additional to the medical proofs adduced at trial. Other jurors are likely to defer to the gratuitous injection of expertise and evaluations by fellow professional jurors, over and above their own everyday experiences, judgment and the adduced proofs at trial. Overall, a reversible error can materialize from (1) jurors conducting personal specialized assessments not within the common ken of juror experience and knowledge (2) concerning a material issue in the case, and (3) communicating that expert opinion to the rest of the jury panel with the force of private, untested truth as though it were evidence (*id.,* at 395).***575**

The justification for this careful but fair rule originates from the awareness that jurors otherwise become "unsworn witnesses, incapable of being confronted by defendant," and their expertise injects nonrecord evidence into the calculus of judgment which a defendant cannot test or refute by cross-examination (*People v Stanley,* 87 NY2d 1000, 1001, *supra*). This kind of unauthorized conduct justifies a trial court in setting aside a verdict where the circumstances are evidently prejudicial to the defendant's right to confrontation and cross-examination of witnesses (*see, e.g., People v De Lucia,* 20 NY2d 275, *supra*).

One of the layperson jurors in this case testified at the CPL 330.30 hearing that the nurse-jurors' opinions directly affected the verdict that the jury reached. The hearing evidence and this Court's carefully calibrated precedents combine to support the remedial action, found necessary by the trial court in ordering a new trial.

In passing, we note also the policy goals of recent jury reform measures that eliminated exemptions and facilitated the selection of professionals to jury pools comprising "a fair cross-section of the community" (Judiciary Law § 500, as amended by L 1995, ch 86, § 1; Judiciary Law § 509, as amended by L 1995, ch 86, § 2 [deleting references to exempted or disqualified persons]). This reform plainly contemplates that a class of professional individuals should contribute their "wisdom and life experiences to the deliberative process" (*see,* Kaye, Ch. J., *A Judge's Perspective on Jury Reform from the Other Side of the Jury Box,* 36 Judges' J [No. 4] 18, 21).

Furthermore, we acknowledge that the knowledge and experience of jurors, who happen to be professionals of every type in everyday life, are brought in some part with them into the jury service and deliberations. It would be unrealistic to expect jurors to shed their life experiences in performing this important civic duty just because they are professionals. They may not, however, take the additional, forbidden step beyond the evidence of the cases before them. That would violate the rights of litigants to have their cases decided only on the evidence adduced, and would substitute these jurors' own professional opinions in place of expert proofs adduced at trial. This substitution of professional opinion is fatal when shared with the rest of the jury. That combination produces reversible error because it goes beyond authorized limits and the commendable jury reform

expectations. It instead injects nonrecord evidence into the jury's deliberative process--a fundamental breach of *576 standard operating evidence appraisal and trial adjudication. Indeed, such conduct compromises the integrity of the jury process, as would the introduction of ex parte communications or materials that are not part of tested evidence at trial.

For these reasons it may be useful for trial courts to modify their standard instructions differentiating between ordinary and professional opinions of jurors, and directing that jurors may not use their professional expertise to insert facts and evidence outside the record with respect to material issues into the deliberation process (*see, e.g., Fitzgibbons v New York State Univ. Constr. Fund* [appeal No. 1], 177 AD2d 1033, citing *People v Legister,* 75 NY2d 832, 833, *supra; Alford v Sventek,* 53 NY2d 743, 745; *People v Brown,* 48 NY2d 388, 393, *supra; see also,* Prince, Richardson on Evidence § 6-112 [b] [Farrell 11th ed]). That is not to say that the personal mental processes of any juror and credibility assessments, and the like, will be subject to postverdict impeachment. That is not this case, which goes far beyond those kinds of permissible activities and boundaries.

([2]) We also observe that the Appellate Division's rationale for its reversal, insofar as it rested on the voir dire selection of the jury, cannot stand. The voir dire activity cannot immunize juror misconduct at the deliberation stage. Although one of the nurse-jurors answered a voir dire question that her professional experience might affect what she believed regarding adduced medical evidence, and the defendant did not seek to disqualify her as a prospective juror on that basis, these circumstances cannot justify the later insertion of nonrecord opinion evidence into the jury's consideration by communication during deliberations (*compare, 23 Jones St. Assocs. v Beretta,* 182 Misc 2d 177 [App Term, 1st Dept]).

We have considered all other arguments presented on both sides and are persuaded, for the reasons expressed in this opinion, that County Court was right to order a new trial.

Accordingly, the order of the Appellate Division should be reversed and the order of County Court reinstated.

Chief Judge Kaye and Judges Smith, Levine, Ciparick, Wesley and Rosenblatt concur.
Order reversed, etc.*577

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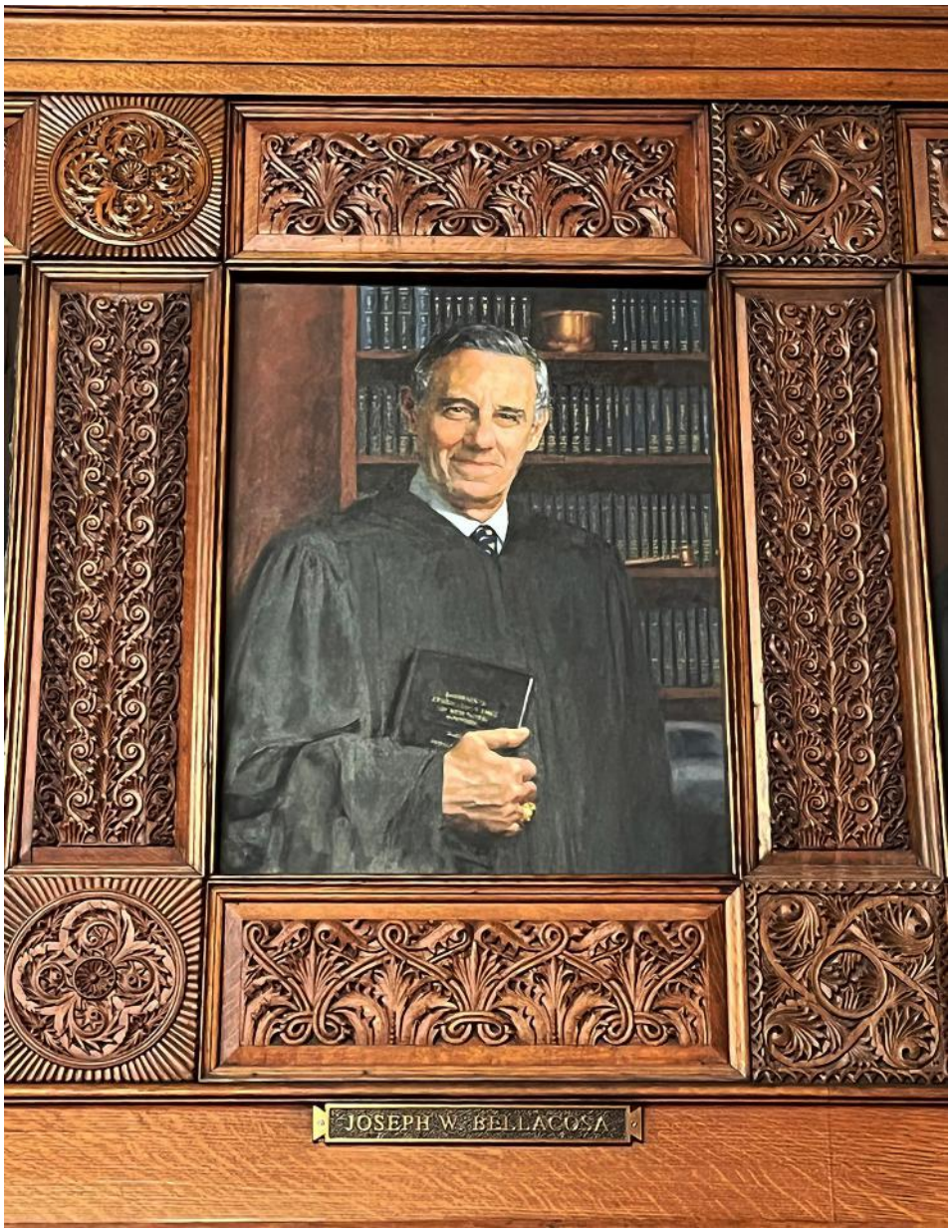
With Love and Appreciation,

Joseph W. Bellacosa
Husband/Dad/Joe
Summer 2022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