A PERIODICAL OF NEW YORK COURT HISTORY

jn JUDICIAL NOTICE

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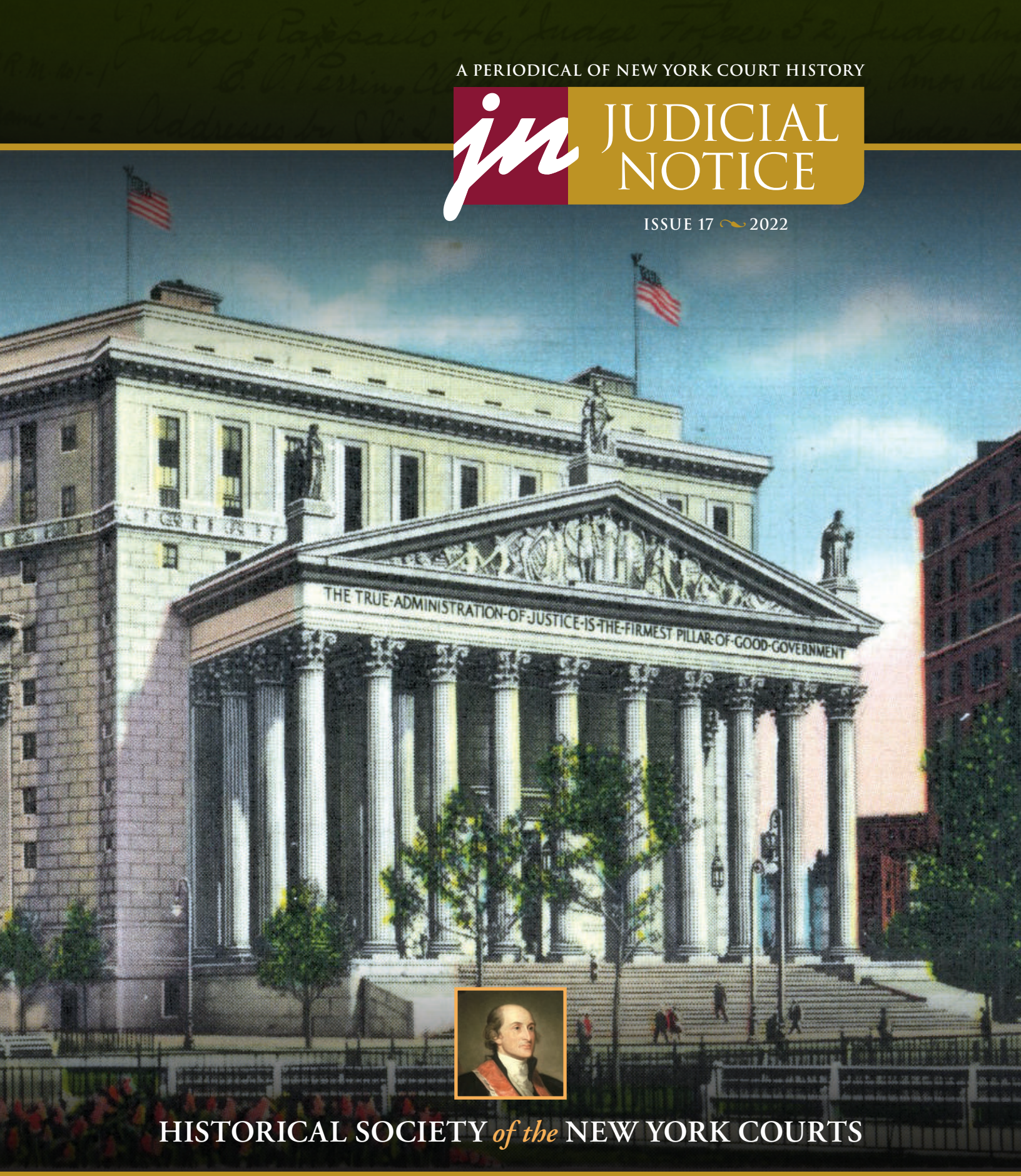

HISTORICAL SOCIETY *of the* NEW YORK COURTS

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From the Editor-in-Chief

Dear Members,

As the Historical Society of the New York Courts celebrates the Rule of Law during its 20th anniversary, it is fitting that *Judicial Notice* 17 features aspects of the New York court system, past and present. For it is our courts that ensure adherence to the Rule of Law. This issue provides a comprehensive history of the New York State Unified Court System, an introduction to two courts less well known to the bar in general, and two selected issues of interest to the legal community.

Marc Bloustein, First Deputy and Legislative Counsel, New York State Office of Court Administration of the Unified Court System, reviews the history of consolidation of the New York courts into a unified system, with his own editorial comment. Originally, New York courts were locally controlled and varied considerably in their ability to handle judicial matters. In the 1960s, a big push for consolidation and unification of New York courts began to take hold, the result of which is now the state-wide Unified Court System. Bloustein concludes by looking to the future.

Hon. Albert M. Rosenblatt, formerly Associate Judge of the New York Court of Appeals, provides a bird's eye view of the use of the term "natural law," in New York jurisprudence. Most decisions rely on positive law, specifically statutes and case law, but from time to courts have invoked "natural law" as a basis for decisions. The provenance may be religious or just generally accepted societal norms. Aristotle described natural law as timeless, but it has been invoked to reflect a particular view or a position whose acceptance changed over time. Courts have cited "natural law" to both uphold and condemn slavery, and to condemn the use of contraceptives. (Justice Oliver Wendell Holmes' outspoken rejection of the concept of "natural law" is probably most apropos).

Professor Merril Sobie has expanded upon and updated the article he wrote about the New York State Family Court in the first issue of *Judicial Notice* published in 2003. His new approach and insights provide a view of a court that serves a very large number of New York residents but is familiar to only a specialized segment of the bar. Similarly, Clara Flebus, a talented court attorney in the Appellate Term, First Department, introduces us to three appellate courts that review the work of a number of trial courts serving New York City, Long Island, and other metro-area counties but are only known to a limited number of lawyers. For litigants with cases under $50,000, commercial landlord/tenant, housing court actions, and for defendants convicted of misdemeanors, the Appellate Term is most often the court of last resort.

Finally, Hon. Alan D. Scheinkman, formerly Presiding Justice of the Second Department, gives a fascinating historical perspective concerning what has been considered the desirable number of judges that make up both intermediate appellate courts and high courts. We learn that there has been nothing sacrosanct about any specific number of judges, even for the New York Court of Appeals or the Supreme Court of the United States. Appellate courts in the United States have functioned with an even number of judges, with as few as one judge, and with as many as twelve or more judges. Judge Scheinkman also discusses the impact of panels of four versus five in New York's Appellate Divisions.

As always, our authors deserve gratitude and praise for their excellent contributions. We again thank Marilyn Marcus as Managing Editor, Allison Morey as Associate and Picture Editor, David L. Goodwin as Associate and Style Editor, and Nick Inverso as Graphic Designer with the New York Court System for all their hard work in producing *Judicial Notice* 17.

- Helen E. Freedman

court of appeals or the major part of them. On the trial of an impeachment against the Governor, the Lieutenant Governor shall not act as a member of the court. No judicial officer shall exercise his office after he shall have been impeached, until he shall have been acquitted. Before the trial of an impeachment, the members of the court shall take an oath or affirmation, truly and impartially to try the impeachment according to evidence; and no person shall be convicted, without the concurrence of two-thirds of the members present. Judgment in cases of impeachment shall not extend further than to removal from office, or removal from office and disqualification to hold and enjoy any office of honor, trust or profit under this State; but the party impeached shall be liable to indictment, and punishment according to law.

Section 2. There shall be a court of appeals, composed of eight judges, of whom four shall be elected by the electors of the state for eight years, and four selected from the class of justices of the Supreme Court having the shortest time to serve. Provision shall be made by law, for designating one of the number elected, as chief judge, and for selecting such justices of the Supreme Court, from time to time, and for so classifying those elected, that one shall be elected every second year.

Section 3. There shall be a Supreme Court having general jurisdiction in law and equity.

Section 4. The State shall be divided into eight judicial districts, of which the City of New York shall be one; the others to be bounded by county lines and to be compact and equal in population as nearly as may be. There shall be four justices of the Supreme Court in each district, and as many more in the district composed of the city of New York, as may from time to time be authorized by law, but not to exceed in the whole such number in proportion to its population, as shall be in conformity with the number of such judges in the residue of the State in proportion to its population. They shall be classified so that one of the justices of each district shall go out of office at the end of every two years. After the expiration of their terms under such classification, the term of their office shall be eight years.

Section 5. The Legislature shall have the same powers to alter and regulate the jurisdiction and proceedings in law and equity, as they have heretofore possessed.

Section 6. Provision may be made by law for designating from time to time one or more of the said justices, who is not a judge of the Court of Appeals, to preside at the general terms of the said Court to be held in the several districts. Any three or more of the said justices, of whom one of the said justices so designated shall always be one, may hold such general terms. And any one or more of the justices may hold special terms and circuit courts, and any one of them may preside in Courts of Oyer and terminer in any County.

Section 7. The judges of the Court of appeals and Justices of the Supreme Court shall severally receive at stated times for their services, a compensation to be established by law, which shall not be increased or diminished during their continuance in office.

Section 8. They shall not hold any other office or public trust. All votes for either of them, for any elective office (except that of justice of the Supreme Court, or judge of the Court of appeals), given by the Legislature or the people, shall be void. They shall not exercise any power of appointment to public office. Any male citizen of the age of twenty one years, of good moral character, and who possesses the requisite qualifications of learning and ability, shall be entitled to admission to practice in all the courts of this State.

Section 9. The classification of the justices of the Supreme Court; the times and place of holding the terms of the Court of appeals, and of the general and special terms of the Supreme Court within the several districts, and the circuit Courts and Courts of Oyer and terminer within the several Counties, shall be provided for by law.

Section 10. The testimony in equity cases shall be taken in like manner as in cases at law.

Section 11. Justices of the Supreme Court and judges of the Court of Appeals, may be removed by concurrent resolution of both houses of the Legislature, if two-thirds of all the members elected to the Assembly and a majority of all the members elected to the Senate concur therein. All judicial officers, except those mentioned in this section, and except justices of the peace, and judges and justices of inferior Courts not of record may be removed by the Senate on the recommendation of the Governor; but no removal shall be made by virtue of this section, unless the cause thereof be entered on the journals, nor unless the party complained of, shall have been served with a copy of the complaint against him, and shall have had an opportunity of being heard in his defence. On the question of removal, the ayes and noes shall be entered on the journals.

Section 12. The judges of the Court of Appeals shall be elected by the electors of the State, and the justices of the Supreme Court by the electors of the several judicial districts, at such times as may be prescribed by law.

Section 13. In case the office of any judge of the Court of appeals, or Justice of the Supreme Court, shall become vacant before the expiration of the regular term for which he was elected, the vacancy may be filled by appointment by the Governor, until it shall be supplied at the next general election of judges, when it shall be filled by election for the residue of the unexpired term.

Section 14. There shall be elected in each of the Counties of this State, except the city and county of New York, one County judge, who shall hold his office for four years. He shall hold the County Court, and perform the duties of the Office of Surrogate. The County Court shall have such jurisdiction in cases arising in justices Courts, and in special cases, as the Legislature may prescribe; but shall have no original civil jurisdiction except in such special cases.

The County judge shall receive an annual salary, to be fixed by the board of supervisors, which shall be neither increased nor diminished during his continuance in office. The justices of the peace, for services in Courts of Sessions, shall be paid a per diem allowance out of the County Treasury.

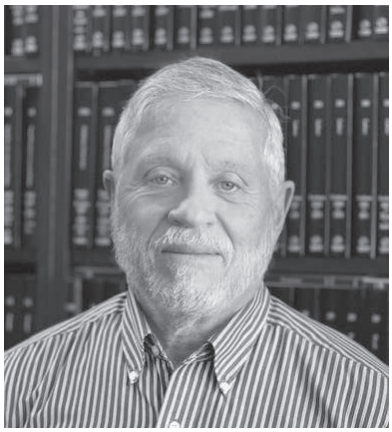
Hold courts of Sessions, with

as may be required by law.

The Third New York State Constitution of 1846, which created the New York Court of Appeals and other court system reorganization. New York State Archives. New York (State). Secretary of State. Third constitution of the State of New York, 1846. A1805-78.

History of Court Administration In New York

by Marc Bloustein



Marc Bloustein, a native of Niskayuna, New York, graduated in 1972 from Wesleyan University in Middletown, Connecticut; and, in 1975, from Albany Law School. He was admitted to the New York State Bar in February 1976. He has been employed by the New York State Judiciary for over 47 years, beginning his legal career as a student intern in the fledgling Office of Court Administration, and then as a law clerk to State Administrative Judge Richard J. Bartlett in 1975. Since then, he has served all six Chief Judges of the State Court of Appeals and all eleven Chief Administrative Judges in office during that time, providing counsel on legal and administrative matters involved in operation of New York's court system. In addition, he has—for the past 41 years—served as the court system's Legislative Counsel, in that capacity overseeing development and promotion of the Judiciary's annual legislative agenda. He frequently lectures groups of judges and other court system employees on legislative developments affecting the courts and has written on court system history.

New York's court system today is very different from the one in place during the State's first 200 years. It's not just that the courts now have many more judges and nonjudicial personnel, as well as modern facilities and advanced technology with which to conduct their business. It's not that, with nearly 1,300 major trial court judges, along with more than 175,000 active New York lawyers spread throughout the State, judges no longer need to ride circuit as they once did, traveling from locale to locale like a carnival that comes to town only once every few months. Finally, it's not just that the State's much larger population makes it far less likely that the people of a community know their judges personally as neighbors and as friends.

These are real differences to be sure, but what makes today's court system truly different is its highly centralized management system. This essay will chronicle the evolution of this system.

For most of the State's history, the courts ran themselves. Each individual court oversaw its own operation. The judge presiding dictated virtually all its procedures and dealt directly with local government for needed resources. Today, however, courts are operated centrally under the aegis of a single State agency: the Office of Court Administration, or "OCA."

Of what significance is this? While judges continue to be elected or appointed locally, OCA now is responsible for overseeing nearly all aspects of court operation. This includes everything from court budgeting, hiring court staff, and negotiating with unions to managing the jury system, gathering data on caseloads, and regulating passage of cases through the courts.

How did this come to be? Under the State's first two Constitutions (adopted in 1777 and 1821, respectively) and for the first 70 years of the State's life, its Judiciary was a fairly limited institution, very similar to the 17th and early 18th century Dutch and later British colonial court systems upon which it was modeled. Judges were few in number. All were appointed by a central authority and, because they rode circuit, sitting in individual locales only once every few months, they had no real constituency and only limited geographical identification. Altogether, there were but a small number of Supreme Court justices and a single Chancellor

to exercise jurisdiction over major court cases, with the former presiding over those in law and the latter presiding over those in equity. These judges did not have fixed terms of office and were subject only to mandatory retirement at age 60. In effect, each had substantial, nearly unfettered authority to determine the rules of legal practice before his (never her) court. Also, each judge generally had the final word in cases before him as there wasn't much of an appellate court structure.

While well-suited to the predominantly agrarian and sparsely-populated society of New York between independence and the early 19th century, this court system fast became inadequate by the middle of the 19th century, as the State became larger and more commercially vibrant. This inadequacy was among the factors leading to a constitutional convention in 1846.

This 1846 convention produced the State's third Constitution, which, in part, completely overhauled New York's court system. Among the many changes this Constitution made to the Judiciary were significantly increasing the number of Supreme Court justices and providing for their popular election to fixed terms in judicial districts consisting of one or more counties; abolishing the office of Chancellor and transferring its equity jurisdiction to Supreme Court, which thereupon became the statewide court of complete and original jurisdiction it is today; and giving constitutional status to trial courts with limited geographical and subject matter jurisdiction—a status that, theretofore, they had rarely enjoyed. Further, the new Constitution gave birth to the beginnings of a two-tiered appellate court structure, consisting of a General Term of Supreme Court, the predecessor of today's Appellate Divisions, to serve as an intermediate appellate court; and a Court of Appeals, to serve as the State's court of last resort. Finally, the new Constitution gave the Legislature broad authority to dictate court procedures.

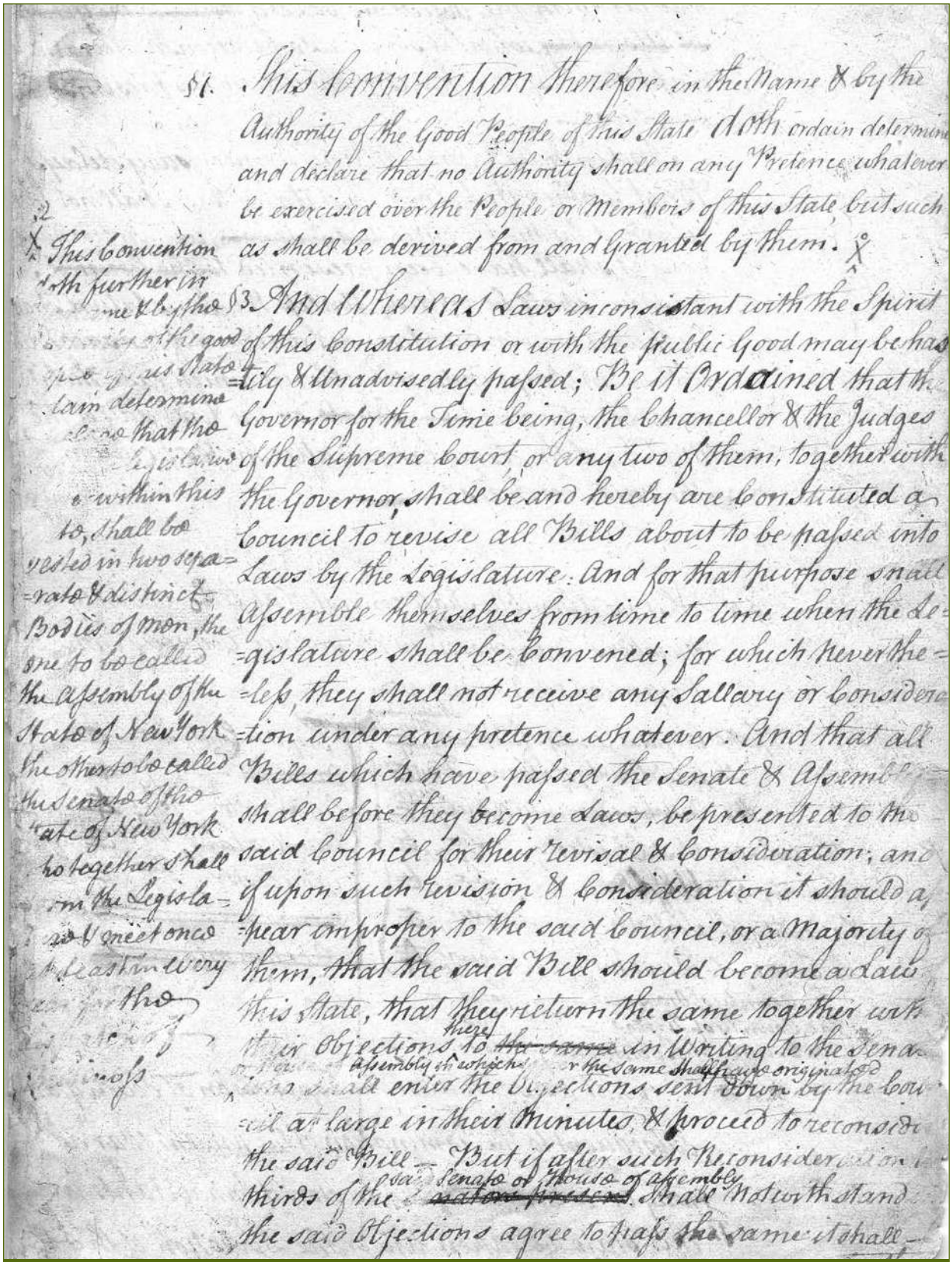
The court system produced in 1846 has proven to be remarkably durable. Most of the courts it established or continued remain with us today, as has the organizational concept of the judicial district that it originated. But as significant as the 1846 changes were, the resulting court system still bore little administrative and organizational resemblance to our modern Judiciary. This is mostly because individual courts retained much of the independence and insularity that marked their predecessors. Trial courts remained virtually autonomous, both administratively and jurisdictionally. Little State funding was available to support their operation, and so each court continued to turn to the local governmental unit of which it was a part for resources and facilities. With few exceptions, each court was self-contained or, where multi-judge courts sat, was administered by a local presiding judge or collegial body of the judges themselves.

The result? There were dramatic differences in the quality of justice across the State. Wealthier communities could field better-resourced, more professionally-run courts while smaller, poorer communities often operated with minimal court staff and judges having little legal assistance.

This said, in the last half of the 19th century, the Judiciary seemed to meet both the demands of New York's public and private institutions and community expectations. Not surprisingly, then, over the next hundred or so years following the 1846 court system overhaul, few efforts were made to change fundamental court structures. Of these, perhaps only two were of any real substance: a further enlargement of the corps of Supreme Court justices, and the 1894 creation of the modern Appellate Division along with division of the State into four separate judicial departments.

First Steps at Modernizing Court Management

But by the mid-twentieth century, just after the end of World War II, life in New York had changed dramatically. The State, along with the rest of the country, was overtaken by a dramatic surge in litigation, often called the "mid-century law explosion." The causes of this surge were many. They included a proliferation of motor vehicles along with the growing hazards of their operation. Another factor was the advent of the baby-boomer generation and an accompanying massive growth in population that enlarged cities and, in the process, spawned new forms of poverty and a soaring crime rate. Finally, in the early fifties, the public became much more rights-conscious and litigious than it had been in previous generations, in part because, helped by the GI bill, it was much



The First New York State Constitution of 1777. New York State Archives. New York (State). Secretary of State. First constitution of the State of New York, 1777. A1802-78.

Major Revision of State's Courts Urged

Panel Proposes Abolition of Bail System and Strict Discipline for Judges

By LESLEY OELSNER

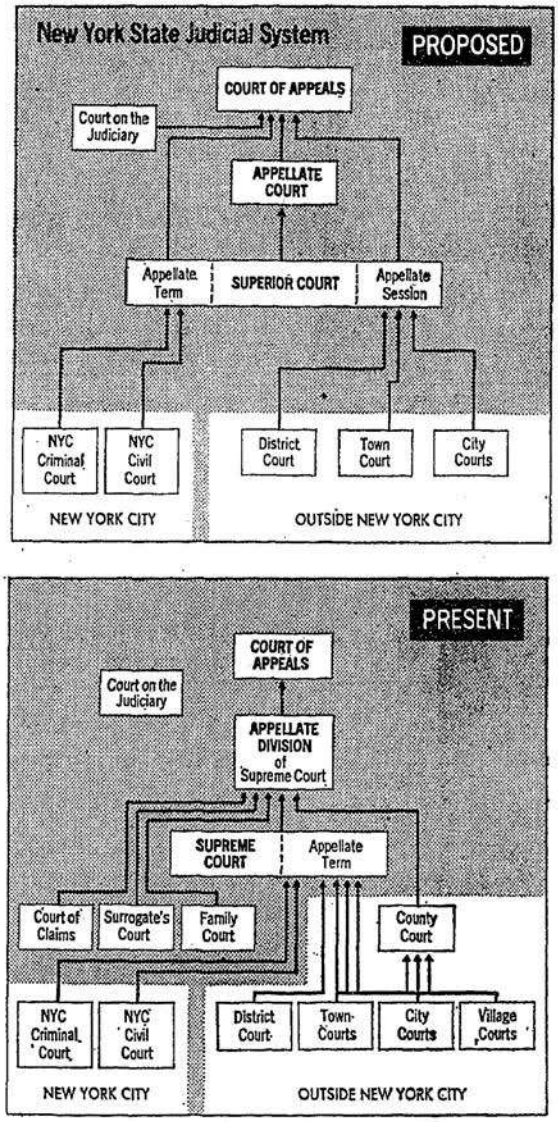
A radical revamping of the state's courts—in which bail would be abolished, judges would be subject to strict discipline and courts would be run by administrative technicians rather than judges—was proposed yesterday by the Temporary Commission on the New York State Court System.

The goal is to rid the courts of their biggest weaknesses—the principal one of which, according to the commission, is extreme administrative inefficiency and lack of central direction— and thus put them in a position to provide what the commission calls "justice for all."

Increase in Costs

The commission plan called for restructuring the courts into a "unified" system, with a merger of the five major trial courts — State Supreme Court, Family Court, Surrogate's Court, County Court and Court of Claims—into a single "Superior Court."

It prescribed centralized management of the courts by a superstructure of administrators with a clear "chain of command" — and with the state's ranking judges stripped of their present administrative powers.



The New York Times/Jan. 2, 1973

The panel called on the state to finance almost all costs of the courts, including probation services and court construction. These costs are now shared by the state and municipalities.

Implementing the recommendations, the commission said, would add about $38-million a year to the already steadily growing total cost of the court system.

The commission explained the $38-million-a-year added cost of its proposals. Some savings, it said, would result from the new "efficiencies," but additional expenses would be incurred by bringing the staffs of now-local courts into the state system at state pay scales, and by providing such extras as expanded probation services.

The cost of courts and related agencies in 1972-73, including capital construction, was estimated at "slightly above $300-million." Projections for 1974-75 and 1983-84, each including the $38-million, were $400-million and almost $900-million, respectively.

The commission—which was created by the Legislature in May, 1970, to recommend ways to overhaul the court system, and whose members were appointed by the Governor and legislative leaders — suggested that the state begin at once to

Continued on Page 51, Column 3

The New York Times, January 2, 1973. Copyright The New York Times.

better educated, and in part because new technologies, especially television, exposed more people to a wider world.

As the courts and the legal system tried to cope with this flood of cases, they found themselves stymied at nearly every turn. Their 19th century design—each trial court accountable only to itself, with judges of widely varying capabilities, backgrounds, and training, and only limited staff assistance—simply was inadequate to meet a growing and increasingly complex caseload. And with the caseload increase came widespread court delay; often, litigants had to wait three or four years for a trial.

Although there was no immediate agreement among judges and lawyers as to how to address the caseload growth, there was one thing all readily agreed upon: fundamental changes were needed in the State's court system. Thus was triggered a series of events that, over some twenty-five years, culminated in the creation of OCA.

The first event took place in 1953. In that year, Governor Dewey asked the Legislature to create a Temporary Commission on the Courts to undertake a thorough study of the State's judicial system and recommend appropriate reforms. The Legislature promptly complied and created what became known as the Tweed Commission, after its chair, lawyer Harrison Tweed. Over the next five years, the Tweed Commission conducted extensive public and private hearings across the State at which judges, lawyers, and interested citizens aired their views on reform of the courts.

In 1955, while the Commission study was underway, the Legislature also created the Judicial Conference—a body of trial and appellate judges representing all areas of the State—along with the office of State Administrator of the Courts. While the Judicial Conference and the State Administrator were initially assigned only data-gathering and advisory functions, they fostered the first ongoing critical examination of court operations statewide. And the Judicial Conference also made it possible, for the first time, for judges from all over the court system to meet to discuss common problems and share information.

In 1958, as the fledgling Judicial Conference settled into place, the Tweed Commission issued its final report. This report proposed extensive structural consolidation of the courts, including a merger of the Court of Claims into Supreme Court, consolidation of Surrogate's Court and Children's Court (the predecessor of today's Family Court) into County Court, and consolidation of New York City's many lower trial courts into a single citywide court.

Even more significant than these calls for structural change were the Commission's recommendations for change in how courts were administered. These recommendations reflected an emerging view that continuing to rely upon each court to manage its own individual affairs no longer served the public interest. In fact, the Commission proposed that full administrative supervision and control of all courts be lodged in the Judicial Conference and the four Appellate Divisions. In such fashion, powers traditionally exercised by individual trial courts, such as the fixing of court terms and assignment of judges to those terms, would belong to more centralized authority. The Tweed Commission also proposed an important new administrative tool: authority for the Appellate Divisions to transfer judges between courts to permit optimal use of available judicial manpower.

Largely for political reasons, however, the Commission's recommendations were not adopted. Nonetheless, the same public pressure for court reform that had prompted the Commission's creation continued unabated, stimulating further efforts to address the problems created by the State's burgeoning caseloads. And so others, including the new Judicial Conference at the request of Governor Harriman, undertook to develop their own remedial proposals. In many respects, these proposals were the same as or similar to those of the Tweed Commission.

After several more years of study and debate, a comprehensive reform proposal was agreed upon. This proposal, which called for an entirely new Judiciary Article for the State Constitution, was passed by the Legislature at its 1960 and 1961 sessions and approved by the voters at the November 1961 general election. This new Article made major changes in the structure and administrative operation of the courts, effective September 1, 1962. Along with a departure from traditional reliance upon local autonomy in court management, the new Article included, for the first time, a mandate for a "unified" State court system.

Following is the text of a statement yesterday by Harrison Tweed on the Legislature's action on court reform. Mr. Tweed formerly was chairman of the Temporary Commission on the Courts.

The Temporary Commission on the Courts, created by the Legislature in 1953, ceased to exist at midnight last Monday, March 31, by reason of the failure of the Assembly to pass the bill, which had already passed the Senate, to extend the life of the Commission for another year.

Logically the Commission could hardly have expected to be continued for purposes of recommending court reorganization after the defeat in the Assembly on March 25 of the Concurrent Resolution of March 17, which constituted a somewhat revised version of the Commission's plan contained in its statement of Jan. 6, 1958, and the Hughes-Kapelman Concurrent Resolution of Feb. 3, 1958.

This action of the Assembly imperilled another responsability of the Commission. This was to recommend a revision of practice and procedure. The work had been more than half done and had already cost $100,000 of the people's money. The action of the Assembly terminated on six days' notice the salaries of the lawyers engaged in this work as well as the salaries of the other lawyers and

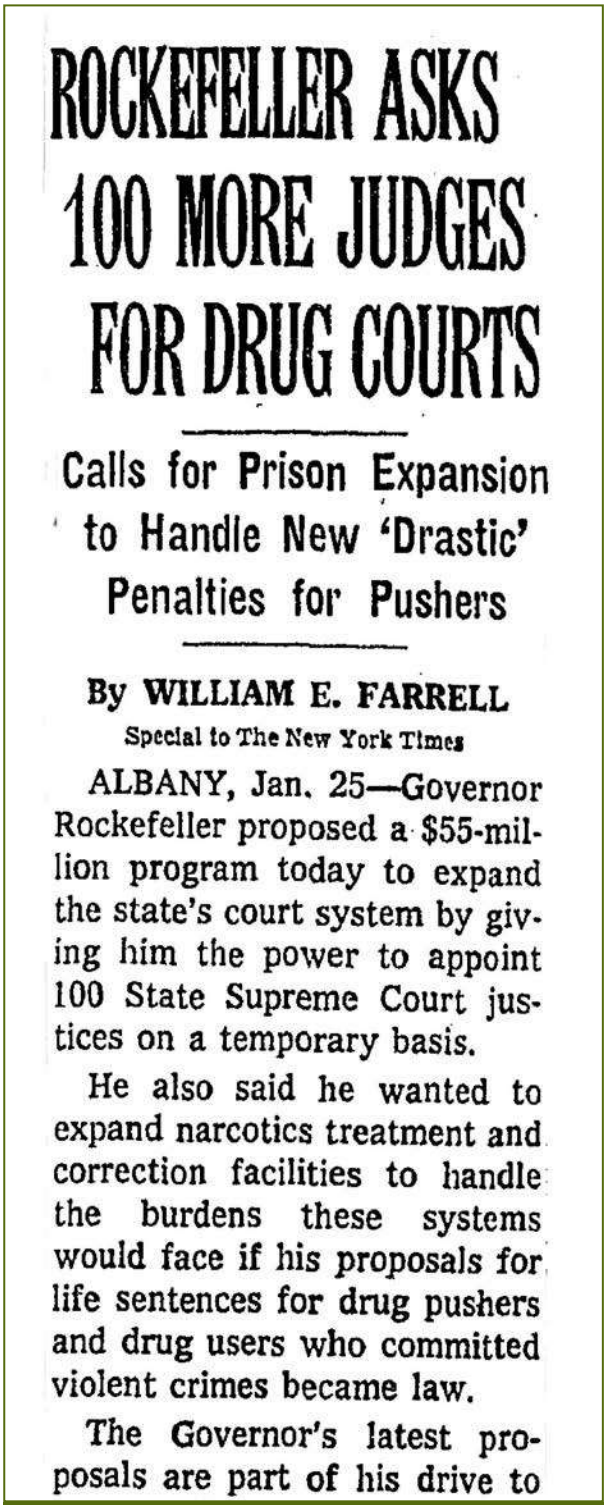
The New York Times, April 4, 1958.

In fact, this unified court system soon proved to be less a mandate than an aspiration. Following adoption of the new Article, the courts were far from "unified." There remained so many of them: eleven trial courts in all, along with methods of judicial selection and judicial terms of office that differed substantially. At the same time, court jurisdiction overlapped and procedures varied dramatically from court to court. Moreover, because individual localities continued to finance their courts, resource levels were far from consistent, and the number and professionalism of court staff differed dramatically from court to court. All of these features would soon come to be seen as major shortcomings.

Also soon to be seen as a shortcoming in the remodeled State court system was the fact that new Article VI set forth in its constitutional text all of the elements of New York's Judiciary. In this respect, it was very different from Article III of the Federal Constitution, which enables the Federal court system. In relevant part, Article III employs but 30 words to provide the barest of mandates ("[t]he judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish."), leaving most of the federal court structure to be determined by Congress through legislative acts. Article VI of the 1962 New York Constitution, by contrast, devoted thirty-seven constitutional sections and more than twenty thousand words—one-third of the whole Constitution—to elaboration of New York's trial and appellate court structure and administration.

New York's approach backed the State into a corner, in the process hobbling future court reform efforts. Because the voters had chosen to dictate virtually all elements of the State's court design in new Article VI, including basic administrative structures, any future modification of those elements would require constitutional amendment—much more difficult and time-consuming than simple statutory change. Also, future legal disputes over the powers of court administrators would require decision by the courts as constitutional matters—making their resolution far more challenging and consequential.

What was the court design enshrined in the Constitution by the 1962 court reforms? New Article VI provided for eleven separate trial courts: (1) a



ROCKEFELLER ASKS 100 MORE JUDGES FOR DRUG COURTS

Calls for Prison Expansion to Handle New 'Drastic' Penalties for Pushers

By WILLIAM E. FARRELL
Special to The New York Times

ALBANY, Jan. 25—Governor Rockefeller proposed a $55-million program today to expand the state's court system by giving him the power to appoint 100 State Supreme Court justices on a temporary basis.

He also said he wanted to expand narcotics treatment and correction facilities to handle the burdens these systems would face if his proposals for life sentences for drug pushers and drug users who committed violent crimes became law.

The Governor's latest proposals are part of his drive to

The New York Times, January 26, 1973.

statewide Supreme Court with plenary jurisdiction over all civil and criminal cases; (2) a statewide Court of Claims to hear claims against the State; (3) a Surrogate's Court in each county to supervise the administration of estates; (4) a Family Court in New York City and in each county outside the City to hear cases involving a wide range of issues bearing upon children and families; (5) a County Court in each county outside New York City to hear major criminal cases; (6) a New York City-wide civil court to hear civil cases seeking limited damages, small claims, and landlord and tenant matters in the City; (7) a New York City-wide criminal court to hear cases involving lesser crimes and conduct preliminary proceedings in felony cases; (8) a District Court that could be set up in any county or portion of a county to hear the same cases being heard in the New York City-wide courts; (9) City Courts in each of the State's 61 cities outside New York City to hear the same cases being heard in District Court; and, lastly, (10) and (11) some 2,500 Town and Village Justice Courts with the same jurisdiction as a City Court.

As for court administration, the new Article VI featured both central and regional elements. The five representatives of the appellate courts on the Judicial Conference—the Chief Judge of the Court of Appeals and the Presiding Justices of each of the four Appellate Divisions—were constituted as an Administrative Board. This Board was authorized to fix standards and administrative policies for statewide application to court operations. At the same time, the four Appellate Divisions were authorized to supervise the daily administration and operation of the trial courts within their respective judicial departments.

Just what this unprecedented grant of administrative authority entailed was not clear. It was left to the Legislature and the newly created court administrative establishment to give it meaning through statute and court rule.

The most significant implementing step actually took place in 1961, before the voters even approved new Article VI. During the legislative session in that year, a Joint Legislative Committee on Court Reorganization was formed to propose revisions of the State's Consolidated Laws in anticipation of the constitutional amendment.

Hon. Charles D. Breitel during his time as an Appellate Division Justice.
Courtesy of Google Arts & Culture.

One revision that the Committee proposed was the addition of a new Article 7-A to the State's Judiciary Law. Consistent with new Article VI of the Constitution, Article 7-A granted extensive supervisory powers to each of the State's four Appellate Divisions. These powers included all those that formerly were exercised by trial judges and nonjudicial court employees in their jurisdictions. The effect was to transfer to the Appellate Divisions all authority to fix trial court terms, to assign judges to those terms, and to appoint many nonjudicial court employees to their posts.

New Article VI itself gave the Appellate Divisions other substantial administrative powers. Probably the most important was authority to transfer trial judges temporarily from court to court. By exercise of this authority, a County Judge, for example, might be assigned to Supreme Court, to another County Court, to Family Court, to Surrogate's Court, or even to the New York City Civil or Criminal Court. Judges of other courts were, with some variations, subject to an equally broad range of temporary assignments.

This was not entirely unprecedented. Temporary judicial assignments were permitted before 1962. But they could involve only Supreme Court justices, who could be shuffled between counties, and other New York City judges, who could be assigned to any of the City's lower courts. Moreover, they were pretty rare. By contrast, the new constitutional transfer provisions exposed all trial judges everywhere to a wide range of possible assignments, and, because of the court system's caseload plight during the sixties and seventies, there were likely to be many such assignments. And, in fact, there were, particularly in New York City. In order to cope with calendar demands in Supreme Court, assignment of judges of the City's Civil and Criminal Courts to serve in Supreme Court parts, many for extended periods of time, became routine.

The importance of having an expanded temporary assignment authority became even clearer a decade later, when the Legislature enacted the 1973 Emergency Dangerous Drug Control Act—what most people know as the Rockefeller Drug Law. Under that law, which was an effort to combat growth of illicit drugs with stiffer penalties for drug offenders, the corps of Court of Claims judges was substantially enlarged. The new judges would not preside in the Court of Claims, however, and hear claims against the State. Rather, through use of the Constitution's temporary assignment authority, they would be assigned to Supreme Court immediately upon attaining office and there preside over many of the greater number of criminal trials authorities expected under the more severe drug laws.

For all intents and purposes, what were called temporary assignments ended up being of indefinite duration and, in many instances, became permanent. They were necessary largely because Article VI imposed a cap on the number of Supreme Court justices that the Legislature could create; and it appeared evident that that cap was nowhere near high enough to allow for creation of such number of justices as would be required to meet the volume of new prosecutions under the Rockefeller Drug Law. The number of Court of Claims judges was not limited by a cap,

Hon. Richard J. Bartlett testifying in Albany, 1975. He served as Chief Administrative Judge and implemented a variety of court reforms. Courtesy of The New York Times.

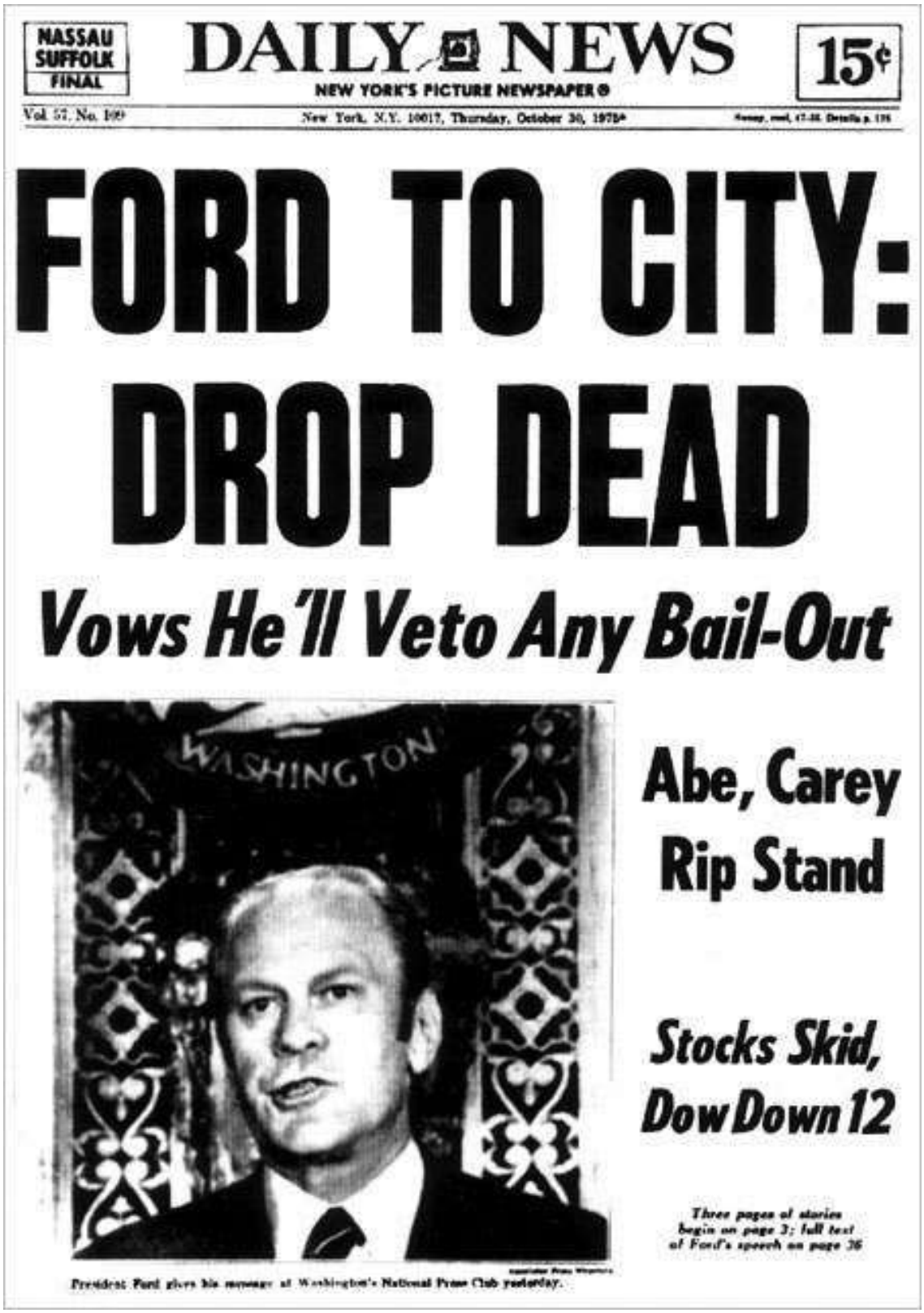
however. Any number of these judges could be created and, through generous use of the available temporary assignment authority, they could be assigned to function as Supreme Court justices.

Not unexpectedly, criminal defendants prosecuted under the Rockefeller Drug Law before Court of Claims judges on temporary assignment to Supreme Court challenged the legality of those assignments. The Court of Appeals rejected these challenges, however, effectively sanctioning temporary assignments of indeterminate duration. The result: To this day, the number of Court of Claims judgeships far exceeds the number of judges who actually serve on the Court of Claims. Indeed, nearly three-quarters of the Court's judges never see the inside of a Court of Claims courtroom, instead devoting all of their nine-year terms to presiding in Supreme Court over criminal and, occasionally, civil cases. And this continues to be true even though the wave of Rockefeller prosecutions has long since abated.

Although heralded for its vital improvements, it quickly became clear that the 1962 reforms were no panacea for the courts' continuing plague of calendar congestion. In fact, as the 1960s moved on, and despite major State initiatives to revamp civil, criminal, and Family procedural laws to expedite case processing, it grew increasingly apparent that, regardless of public expectations, the courts' new system of regional administration, coupled with a traditional reliance upon local funding for the Judiciary, would not produce the kind of efficiencies needed to meet an escalating caseload.

The Court Reforms of the 1970s

No surprise, then, that as the 1970s arrived, there was resurgent interest in court reform. Legislative and executive panels, along with good-government groups, again turned close attention to the Judiciary and unveiled new proposals for improvement. While these proposals varied widely, there often was a common thread. Showing a general dissatisfaction with continuing reliance upon Appellate Division management of the trial courts, many proposals called for a change to truly centralized court administration under a single constitutional officer. Other issues, including court funding, selection and disciplining of judges, and streamlining the trial court structure, were also becoming frequent topics of discussion.



NASSAU SUFFOLK FINAL

DAILY NEWS

NEW YORK'S PICTURE NEWSPAPER

15¢

Vol. 57, No. 169 New York, N.Y. 10017, Thursday, October 30, 1975

FORD TO CITY: DROP DEAD

Vows He'll Veto Any Bail-Out

President Ford gives his message at Washington's National Press Club yesterday.

Abe, Carey Rip Stand

Stocks Skid, Dow Down 12

Three pages of stories begin on page 3; full text of Ford's speech on page 36

The Daily News, October 30, 1975. Copyright The Daily News.

In 1974, uncertain whether the new court reform debate would produce any consensus for change, Chief Judge Charles Breitel persuaded the four Appellate Divisions to delegate a significant measure of their court management authority to the State Administrator, Supreme Court Justice Richard Bartlett. Before then, State Administrators had discharged only advisory functions. Judge Bartlett, however, was given authority to fix terms of court, to assign judges to them, and to make temporary assignments of judges.

In a related move, that administrative delegation also breathed new life into OCA. In fact, there had been a statutory provision authorizing OCA dating back to the 1950s. That provision put OCA (which most people then referred to as the Judicial Conference) under the direction of the State Administrator and empowered it to perform many of the State Administrator's tasks. But because those tasks were essentially ministerial and limited to performing data-gathering functions, OCA had never played much of a role in day-to-day court management.

The 1974 informal administrative centralization of New York's court management authority was operational for four years. During this period, many changes were made, not the least significant of which was that even more inter-court temporary judicial assignments were ordered—with the result being a *de facto* merger of the New York City-based courts. Even in the wake of the Rockefeller Drug Law and extensive deployment of Court of Claims judges as acting Supreme Court justices, the City's Supreme Court was still very much in need of additional judicial help.

During the four-year run of the Breitel-to-Bartlett delegation, two momentous events took place. In late summer in 1976, at an Extraordinary Session of the Legislature called by Governor Carey, a measure was approved providing for full State financing of New York's court system, except for its Town and Village Justice courts. As a result of this measure, known as the Unified Court Budget Act or "State Takeover," judges and staff of all the major trial courts became State employees.

A major catalyst for the State Takeover was the mid-1970s financial crisis that overwhelmed localities in New York, and especially New York City. When it became evident that the Federal government would not be coming to the City's aid (as memorialized in the iconic 1975 *New York Daily News* headline "Ford to City: Drop Dead"), State assumption of court funding responsibility became inevitable.

Adoption of the Unified Court Budget Act set the stage for an even more momentous development. At the same 1976 Extraordinary Session, the Legislature also gave first passage to a constitutional amendment effectuating three significant court reforms. These were: merit selection and gubernatorial appointment of judges of the State's highest court, the Court of Appeals; a streamlined process for disciplining errant judges; and a major overhaul of the way courts were administered, divesting the Appellate Divisions of their regional responsibilities for superintending court operations and substituting a fully centralized system under the aegis of the Chief Judge and a Chief Administrator of the Courts appointed by the Chief Judge. This constitutional amendment was given second passage during the ensuing 1977 legislative session and, after approval by the State's voters at the following general election, took effect on April 1, 1978.

In enacting the Unified Court Budget Act, the Legislature recognized that, in a time of tight budgets and greater demands for court services, the costs of supporting a modern court system had become too great for many localities to bear; and that, even while ensuring consistency in court operations across the State, a State Takeover could in time generate real economies for the taxpayer. The Act also produced other dividends. It made court managers responsible for preparing a single budget for the entire court system. As a result, they saw their clout with local judges and court personnel greatly increased, along with their ability to ensure coordination in deployment of the Judiciary's resources to meet court needs.

While the Unified Court Budget Act was effective in 1977, and court administration was centralized the following year, the transition to this new system of court management took some time and was not without difficulty. Almost immediately, the administrative efforts of the Chief Judge, the new Chief Administrative Judge, and OCA faced considerable resistance. Many judges appeared to resent what they saw as a surrender of control they had long exercised to a new cadre of Albany bureaucrats. This resentment was manifest in occasional failures to cooperate with

the new team of court administrators. Similarly, members of the bar pushed back, in part out of loyalty to their local judges and in part out of fear that outside administrators would now be telling them how to practice law. Finally, there was considerable disappointment across a broad swath of court employees, primarily those in New York City, who expected that in becoming State employees they would immediately get big pay raises—raises that were not forthcoming.

Ultimately, all this collective resentment spilled over into the Legislature, where court administration and the Judiciary faced occasional hostility. Funding, procedural reforms, and statutory change to harmonize the law with the new court administrative arrangement all suddenly became very elusive. Publicly, among legislators, there was much criticism of the Judiciary and its management—and nearly all of it could be laid at the feet of disgruntled lawyers, judges, and court personnel who had the ears of their local legislators.

Also part of the fallout following adoption of the court reforms was a cascade of litigation challenging court administration's use of its new authority. While OCA ultimately prevailed in most of this legislation—which contested everything from the breadth of the Chief Judge's authority to assign judges to the fairness of the title specifications adopted to cover all the new State court employees—it still took years to resolve and, during that time, it only exacerbated the prevailing antagonisms.

By the mid-1980s, however, things began to change. Most of the foundational legal challenges were out of the way, and with both the passing of time and attrition in the ranks of older local officials and members of the bench and bar—and their replacement by a younger generation having no experience with a locally-managed court system—much of the political rancor that marked the early post-court reform days began to abate.

And, when Sol Wachtler succeeded Lawrence Cooke as Chief Judge in 1985, the climate really improved. Chief Judge Wachtler and his Chief Administrator, Joseph Bellacosa, quickly proved to be very popular with legislators and the Governor. There was no surprise in this. Wachtler was an impressive Republican who was a darling of the Republican Senate of the mid-1980s. And Bellacosa was widely known to be a close friend and confidant of then-Governor Mario Cuomo.

Accordingly, by the time Judith Kaye succeeded Wachtler as Chief Judge in 1993, centralized court management was well-established in New York. Essentially a formal codification of Chief Judge Breitel's 1974 arrangement, it vested principal management authority over the trial courts in a Chief Administrator of the Courts, successor to the former position of State Administrator. The Chief Administrator would be appointed by the Chief Judge of the Court of Appeals, with the advice and consent of the Administrative Board, and would exercise such powers and duties as the Chief Judge might delegate to him or to her and any other powers and duties the Legislature might prescribe. The Chief Administrator also would enjoy the same authority to order the temporary assignment of trial court judges as the Appellate Divisions had once exercised. Discharge of the Chief Administrator's authority would be subject to statewide standards and policies promulgated by the Chief Judge after approval by the Court of Appeals.

Although the late 1970s version of Article VI continued to be a highly detailed and specific charter, its basic grant of authority was somewhat vague and open-ended—just as had been the case with the 1962 court reorganization. Much remained to be done by the Chief Judge and the Legislature before the scope of that authority could become clear. First, the Chief Judge made an extensive delegation of administrative powers and duties to the Chief Administrator, effective on April 1, 1978. Among the many functions so delegated was responsibility for establishing the regular hours, terms, and parts of the trial courts and for assigning judges and justices to them. Second, the Legislature also moved to provide more precise definition of the varying responsibilities of the principals in the new administrative hierarchy. It enacted new provisions for the Judiciary Law, to replace those which had been added in 1962. These new provisions, mostly set out in a new Article 7-A of the Judiciary Law, detailed the administrative functions of the Chief Judge and the Chief Administrator, along with those of the Administrative Board and the Judicial Conference, both of which had been retained as largely advisory bodies. In most respects, these statutory provisions echoed the Chief Judge's delegation to the Chief Administrator.

Are Further Changes in Court Administration on the Horizon?

New York's system of centralized court administration has now been in place for over four decades. It has steered the courts through periodic caseload spikes; major threats to operational effectiveness posed by budget cuts and layoffs; and community and institutional disruptions following 9/11 and, most recently, the *Coronavirus* pandemic. And it has managed to do this even while the character of the State's caseload has changed significantly and budgetary resources have grown more limited.

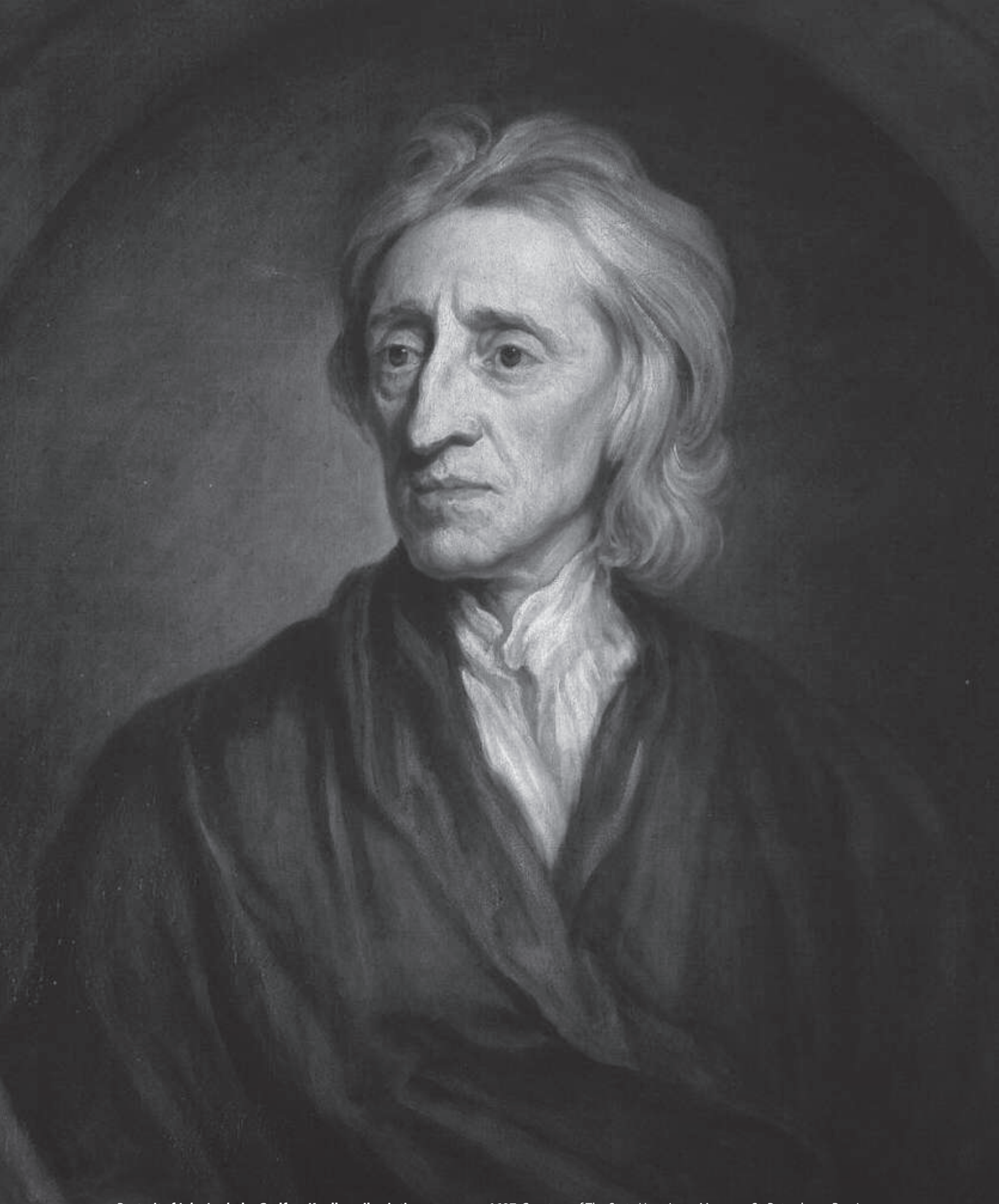
Some believe, however, that further reform is needed before there can be truly effective management of the State's courts. Indeed, almost from the moment the court reforms of the late-1970s took effect, many court watchers have taken the position that, for any system of court administration to function well, it must be coupled with structural reform of the Judiciary—something that is variously called court merger, court restructuring, court unification, court simplification, or court consolidation. With all the major changes in the courts over the past 60 years, one feature has remained constant: New York's eleven separate trial courts. This large number has greatly complicated court management. The jurisdiction of these trial courts overlaps; their judges can be elected or appointed depending upon the court; judicial terms can vary dramatically, from four years to six years to nine years to ten years to fourteen years; and even though liberal use is now made of cross-court judicial assignments, there are significant turf issues that can frustrate the making of these assignments and can hobble administrative efforts to allocate budgetary resources to courts most in need. Maybe not surprisingly, then, court merger —the abolishing of many of the eleven courts and consolidation of their judges and resources into the State's major trial court, the Supreme Court—is seen by many to be a logical next step to modernizing New York's courts.

Accordingly, there have been many efforts, large and small, over the past four decades to give effect to merger. It requires a constitutional amendment, however, which as noted earlier is a difficult and time-consuming process. Absent a constitutional convention, something New Yorkers haven't had in over fifty years—and which the voters recently rejected—a constitutional amendment requires legislative approval, widespread publication, an intervening election of State legislators, a second legislative approval, and voter ratification on a statewide ballot. As history has repeatedly shown, this is a tough gauntlet to run.

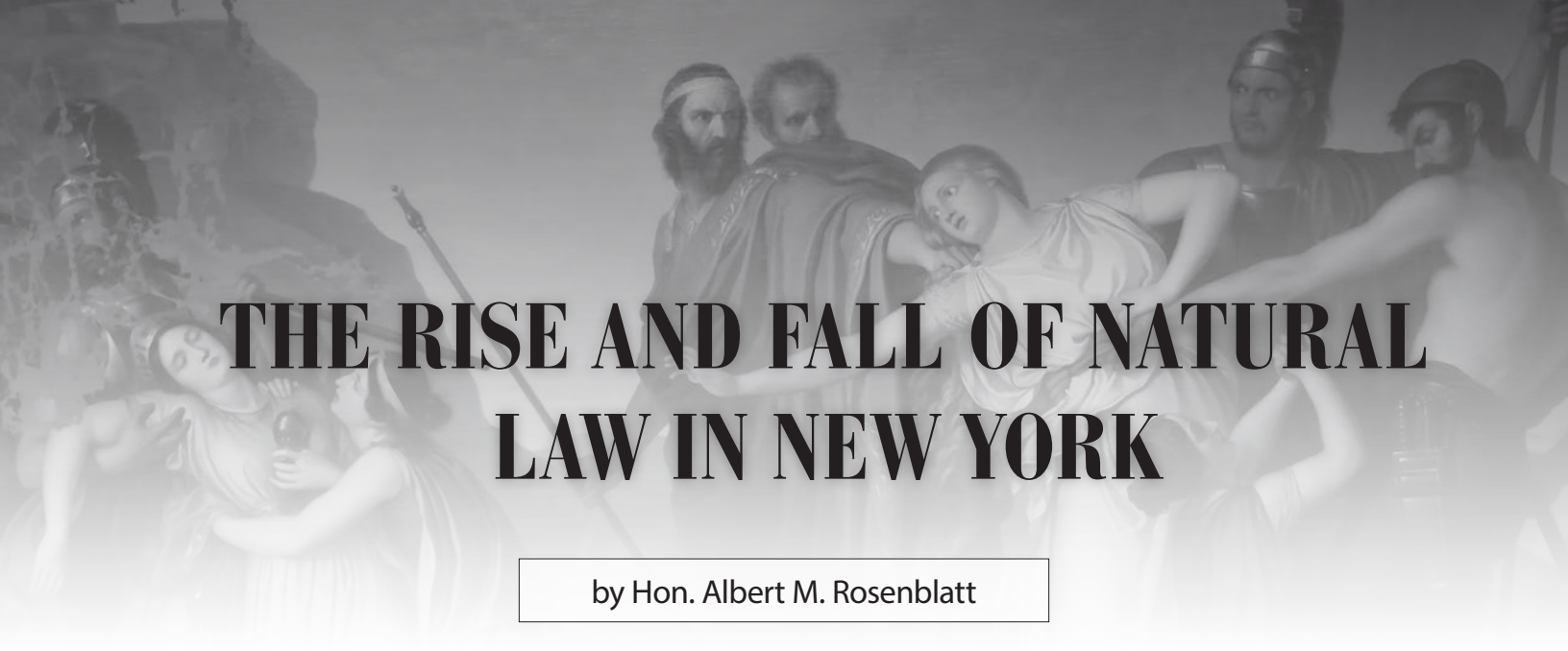
Since 1978, and in spite of professed support for court merger by most of the Governors and all of the Chief Judges between then and now, strong support from good government groups and editorial boards across the State, and a dozen or more proposals introduced in the Legislature, no constitutional amendment to accomplish it has achieved more than first legislative passage. And that only happened one time, in 1986.

Long-time court watchers see many reasons for this continuing failure. Some lay the blame upon parochial interests within the Judiciary itself. Others point to the interests of those having programmatic objections. Still others feel that merger's continuing failure can be attributed to public fears for its possible cost to the taxpayer.

Whatever the sources of opposition, court merger continues to be considered by many to be a quixotic challenge. But not by everyone. The State's present Chief Judge appears undaunted by the challenge. In her more than six years in office, she has issued several strong calls for court merger. In doing so, she has rekindled interest in court reform among many inside and outside of government. In fact, her calls have been enough to prompt the Legislature to hold public hearings on court reform issues—something not seen in years—and to inspire the last Governor to issue his own court merger proposal. There is a strong likelihood, therefore, that, over the next several years, court merger will be the subject of much study and public debate across the State. This may very well produce further reform in the way New York administers its courts.



***Portrait of John Locke* by Godfrey Kneller, oil painting on canvas, 1697.** Courtesy of The State Hermitage Museum, St. Petersburg, Russia.



THE RISE AND FALL OF NATURAL LAW IN NEW YORK

by Hon. Albert M. Rosenblatt

Hon. Albert M. Rosenblatt served as an Associate Judge on the New York Court of Appeals for seven years, from 2000-2007. Prior to his appointment by then-Governor Pataki to the Court of Appeals, Judge Rosenblatt served as a Justice of the Appellate Division of the New York State Supreme Court; as New York State's Chief Administrative Judge; as a Justice of the New York State Supreme Court; as a County Judge for Dutchess County; and as the District Attorney for Dutchess County. Judge Rosenblatt is presently of counsel to McCabe & Mack LLP, in Poughkeepsie, New York, and holds an appointment as a Judicial Fellow at the New York University School of Law. He received his B.A. from the University of Pennsylvania and his J.D. from Harvard Law School.

Intrigued by the phrase "natural law," I have more than once scouted around trying to find out how the concept has been used and understood—a journey that can take a researcher back to ancient Greece and even earlier. Along the way, one encounters the biblical Paul, Thomas Aquinas, John Locke, and a good many others, all of whom used the term, which has meant different things to different people at different times.

The term contrasts with "positive law," which Black's Law Dictionary defines as "[a] system of law promulgated and implemented within a particular political community … as distinct from moral law. . . . Positive law typically consists of enacted law - the codes, statutes, and regulations that are applied and enforced in the courts."[1]

As an example of positive law, we might imagine lawmakers (given a clean slate) deciding that a blue traffic light means stop and a yellow light, go. The choice of color has no moral basis. The lawmakers might have just as easily decided on orange and purple.

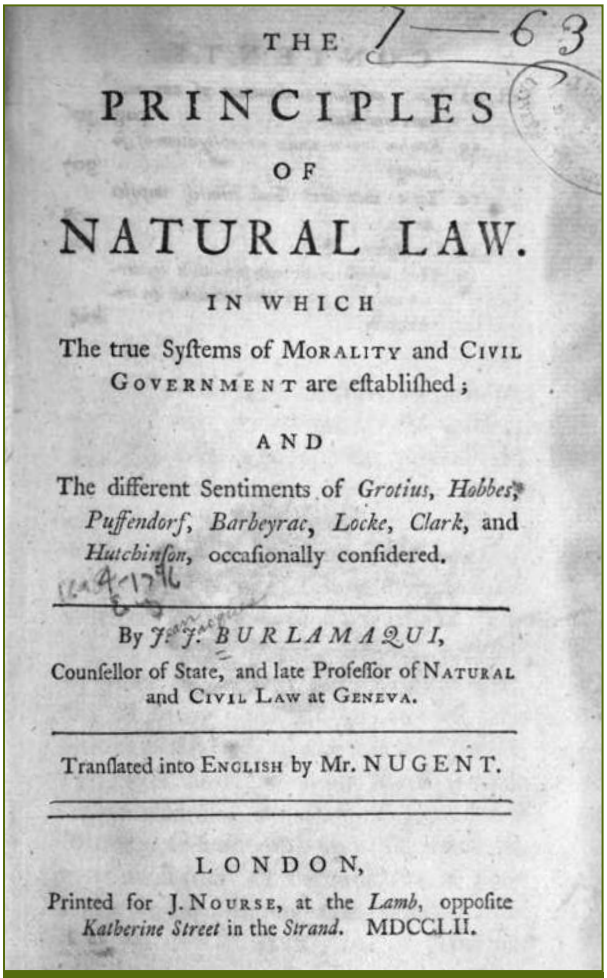
Compare this with statutes defining the degrees of homicide, in which the classifications abound in moral judgments. Plotting to kill someone is much more blameworthy, morally, than causing someone's death by negligently using a knife.

There are many definitions of natural law, but just for grounding, the one from an older edition of Black's Law Dictionary describes it as "a system of rules and principles for the guidance of human conduct which, independently of enacted law or of the systems peculiar to any one people," may be discovered by rational inquiry.[2]

"Natural law" has often included a theological dimension, as where Locke considered it "a universally obligatory moral law promulgated by the human reason as it reflects on God and His rights, on man's relation to God and on the fundamental equality of all men as rational creatures."[3] Others, without reference to divine endowment, see the term as embracing a generally agreed-upon set of moral tenets.

But things can get muddled, as people disagree on what is moral. Shockingly, we see that in a slaveholding society, some proslavery tracts invoked natural law to justify enslavement.[4]

In this essay I concentrate not on the various historical usages of natural law, but on a more modest goal: dealing with how the New York courts have employed the concept.



THE

PRINCIPLES

OF

NATURAL LAW.

IN WHICH

The true Syſtems of MORALITY and CIVIL GOVERNMENT are eſtabliſhed;

AND

The different Sentiments of *Grotius*, *Hobbes*, *Puffendorf*, *Barbeyrac*, *Locke*, *Clark*, and *Hutchinſon*, occaſionally conſidered.

By J. J. BURLAMAQUI,

Counſellor of State, and late Profeſſor of NATURAL and CIVIL LAW at GENEVA.

Tranſlated into ENGLISH by Mr. NUGENT.

LONDON,

Printed for J. NOURSE, at the *Lamb*, oppoſite *Katherine Street* in the *Strand*. MDCCLII.

Title page of *The Principles of Natural Law* by J.J. Burlamaqui, translated by Mr. Nugent, 1752. Courtesy of the University of Michigan.

Early Cases

Some of the earliest reported natural law cases dealt with marriage and the family—a recurrent theme. In 1809, New York's high court framed the parents' obligation to maintain their children as decreed by the "law of nature."[5]

Similarly, in the name of natural law, Chancellor Kent, in the early nineteenth century, condemned marriage between close relatives. He explained that the law of nature meant the rules of conduct prescribed by the Creator.[6]

[*From the Southern Literary Messenger, December*, 1858.]

IS SLAVERY CONSISTENT WITH NATURAL LAW?

AN ADDRESS DELIVERED BEFORE THE VIRGINIA STATE AGRICULTURAL SOCIETY, AT THE SIXTH ANNUAL EXHIBITION, AT PETERSBURG, 4TH NOVEMBER, 1858.

BY JAMES P. HOLCOMBE.

Mr. President, and
Gentlemen of the Agricultural Society:

It seems to me eminently proper, to connect with these imposing exhibitions of the trophies of your agricultural skill, a discussion of the whole bearings and relations, jural, moral, social, and economical, of that peculiar industrial system to which we are so largely indebted for the results that have awakened our pride and gratification. No class in the community has so many and such large interests gathered up in the safety and permanence of that system, as the Farmers of the State. The main-wheel and spring of your material prosperity, interwoven with the entire texture of your social life, underlying the very foundations of the public strength and renown, to lay upon it any rash hand would put in peril whatever you value; the security of your property, the peace of your society, the well-being—if not the existence of that dependent race which Providence has committed to your guardianship—the stability of your government, the preservation in your midst of union, liberty, and civilization. By the introduction of elements of such inexpressible magnitude, the politics of our country have been invested with the grandeur and significance which belong to those great struggles upon which depend the destinies of nations. The mad outbreaks of popular passion, the rapid spread of anarchical opinions, the mournful decay of ancient patriotism, the wide disruption of Christian unity, which have marked the progress, and disclosed the power, purpose and spirit of this agitation, come home to your business and bosoms with impressive emphasis of warning and instruction. No pause in a strife around which cluster all the hopes and fears of freemen, can give any earnest of enduring peace, until the principles of law and order which cover with sustaining sanction all the relations of our society, have obtained their rightful ascendency over the reason and conscience of the Christian world.

The most instructive chapters in history are those of opinions. The decisive battle-fields of the world, furnish but vulgar and deceptive indices of human progress. Its true eras are marked by transitions of sentiment and opinion. Those invisible moral forces that emanate from the minds of the great thinkers of the race, rule the courses of history. The recent awakening of our Southern mind upon the question of African Slavery, has been followed by a victory of peace, which we trust, will embrace within its beneficent influence generations and empires yet unborn. Such was the strength of anti-

***Is Slavery Consistent with Natural Law?* by James P. Holcomb, 1858.** Courtesy of the Library of Congress.

Other Applications of Natural Law

Some nineteenth century courts seem to have invoked natural law whenever it helped reach or justify a rightminded result. In an 1820 commercial case involving a promissory note, the New York Supreme Court of Judicature, quoting an English decision, said that "[i]t is undoubtedly true, that every man is, by the law of nature, bound to fulfill his engagements."[7] Two years later, the court invoked natural law as an ingredient for the meeting of the minds in a contract case.[8]

In 1849, also in a contract case, the Court of Appeals invoked natural law to prohibit enforcement of a voluntary promise lacking in consideration.[9]

Given this elasticity, it is not surprising that in the early century, courts had also cited natural law to condemn usury, saying that "[u]sury is not only

***Antigone Sentenced to Death by Creon* by Giuseppe Diotti, oil painting on canvas, 1845.** Courtesy of the Carrara Academy, Bergamo, Italy.

against the law of God, and the laws of the realm, but against the law of nature."[10]

In that era, natural law continued as a yardstick even in landlord-tenant cases. In 1834, Chancellor Walworth said: "It appears to be a principle of natural law, that a tenant who rents a house or other tenement for a short period … should not be compelled to pay rent any longer than the tenement is capable of being used."[11]

Three other applications are interesting, two minor and one significant. We might today explain self-defense by using words like "instinctive," but in 1848, New York's intermediate appellate court—the Supreme Court, General Term—called it a part of the natural law.[12]

For centuries, we've believed it wrong for people to be judges in their own cases. We now use labels like conflict-of-interest and recusal, but that too, had earlier fallen under the rule of "natural law."[13]

Antigone and Disobedience

The third deals with how individuals have related to their rulers. The question of obedience to the sovereign, in the face of an unconscionable command, takes us back to the ancients. In *Antigone*, King Creon decreed that no one—under pain of death—could give a proper burial to Polyneices, a proclaimed enemy of the state. His sister, Antigone, defied the decree and buried her brother, unable to bear the thought of his being left to the buzzards. Aristotle said her disobedience of the King's law was in keeping with *natural* law—which he called timeless:

> *Not of to-day or yesterday it is,*
> *But lives eternal: none can date its birth.*[14]

That was over 2,000 years ago. The New York Supreme Court of Judicature said something much like that in 1841:

> *It is a mistake to suppose that a soldier is bound to do any act contrary to the law of nature, at the bidding of his prince. … Suppose a prince should command a soldier to commit adultery, incest or perjury; the prince goes beyond his constitutional power, and has no more right to expect obedience than a corporal who should summarily issue his warrant for the execution of a soldier.*[15]

In the antebellum slavery era, New York courts drew on natural law in their antislavery decisions, saying that liberty is the natural condition, undone only by positive law.[16]

Natural Law and Due Process

A marker in the road appeared in 1856, in *People v. Toynbee*, a liquor prohibition case that involved both due process and natural law. Arrested and convicted, the defendant pointed out that he had gotten his liquor supply lawfully, before the statute went into effect. The Act, he argued, violated his rights under the New York State Constitution, which protects against the denial of life, liberty, or property without due process of law. By depriving him of the benefit of his property and forcing him to destroy what he had legally owned, the Act stripped him of his lawful property interest.

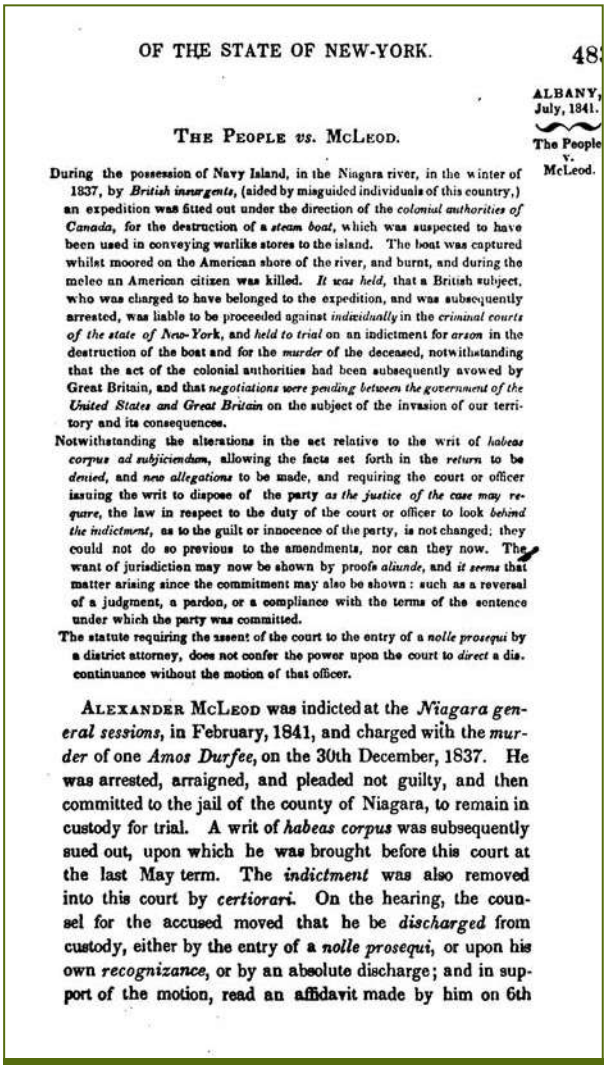
He also made a natural law type argument, urging that the Act infringed on his "natural, fundamental and obvious rights and principles, which are not derived from nor defined by any written constitution or laws, but which are recognized by and constitute the bases of both."[17]

The appellate court agreed, and reversed his conviction, ruling that the terms "life," "liberty," "property," and "due process of law," as they were used, were "of vital consequence in giving [the Act] a construction." The court went on to endow those terms with what sounded very much like natural law:

> *To be of any real value, [the phrases] must have a fixed, permanent signification—one that shall remain unchanged by circumstances, or time, or the caprice of those to whom the restraining words of the section may become offensive or troublesome.*[18]

The Court of Appeals agreed: "To say … that 'the law of the land,' or 'due process of law,' may mean the very act of legislation which deprives the citizen of his rights, privileges or property, leads to a simple absurdity."[19] Notably, the Court appreciated that the case turned on whether the act in question was void, "as against the fundamental principles of liberty, and against common reason and natural rights."[20]

The *Toynbee* case marked a bend in the road, after which the courts started talking more about due process and less about natural law. In 1918, Justice Oliver Wendell Holmes moved the ball further, in an influential article criticizing judges who invoked



OF THE STATE OF NEW-YORK. 48

ALBANY, July, 1841.

The People v. McLeod.

THE PEOPLE *vs.* MCLEOD.

During the possession of Navy Island, in the Niagara river, in the winter of 1837, by *British insurgents*, (aided by misguided individuals of this country,) an expedition was fitted out under the direction of the *colonial authorities of Canada*, for the destruction of a *steam boat*, which was suspected to have been used in conveying warlike stores to the island. The boat was captured whilst moored on the American shore of the river, and burnt, and during the melee an American citizen was killed. *It was held*, that a British subject, who was charged to have belonged to the expedition, and was subsequently arrested, was liable to be proceeded against *individually* in the *criminal courts of the state of New-York*, and *held to trial* on an indictment for *arson* in the destruction of the boat and for the *murder* of the deceased, notwithstanding that the act of the colonial authorities had been subsequently avowed by Great Britain, and that *negotiations were pending between the government of the United States and Great Britain* on the subject of the invasion of our territory and its consequences.

Notwithstanding the alterations in the act relative to the writ of *habeas corpus ad subjiciendum*, allowing the facts set forth in the *return* to be *denied*, and *new allegations* to be made, and requiring the court or officer issuing the writ to dispose of the party *as the justice of the case may require*, the law in respect to the duty of the court or officer to look *behind the indictment*, as to the guilt or innocence of the party, is not changed; they could not do so previous to the amendments, nor can they now. The want of jurisdiction may now be shown by proofs *aliunde*, and *it seems* that matter arising since the commitment may also be shown: such as a reversal of a judgment, a pardon, or a compliance with the terms of the sentence under which the party was committed.

The statute requiring the assent of the court to the entry of a *nolle prosequi* by a district attorney, does not confer the power upon the court to *direct* a discontinuance without the motion of that officer.

ALEXANDER MCLEOD was indicted at the *Niagara general sessions*, in February, 1841, and charged with the *murder* of one *Amos Durfee*, on the 30th December, 1837. He was arrested, arraigned, and pleaded not guilty, and then committed to the jail of the county of Niagara, to remain in custody for trial. A writ of *habeas corpus* was subsequently sued out, upon which he was brought before this court at the last May term. The *indictment* was also removed into this court by *certiorari*. On the hearing, the counsel for the accused moved that he be *discharged* from custody, either by the entry of a *nolle prosequi*, or upon his own *recognizance*, or by an absolute discharge; and in support of the motion, read an affidavit made by him on 6th

***People v. McLeod*, 1 Hill 377, 427 (N.Y. Sup. Ct. 1841).**
Published in *Reports of Cases Argued and Determined in the Supreme Court of Judicature*, Vol. 25, 1842.

natural law. Holmes was irked by the notion that judges could proclaim a theme universally accepted, merely because they and their neighbors believed in it. It is unworthy of jurists, he said, "to be in that naïve state of mind that accepts what has been familiar and accepted by them and their neighbors as something that must be accepted by all men everywhere."[21]

So what has been left of natural law in our decisions? By and large, it has been limited to marriage and the family. In 1946, a Brooklyn judge invoked

natural law to expound his own conception of right and wrong, stating that:

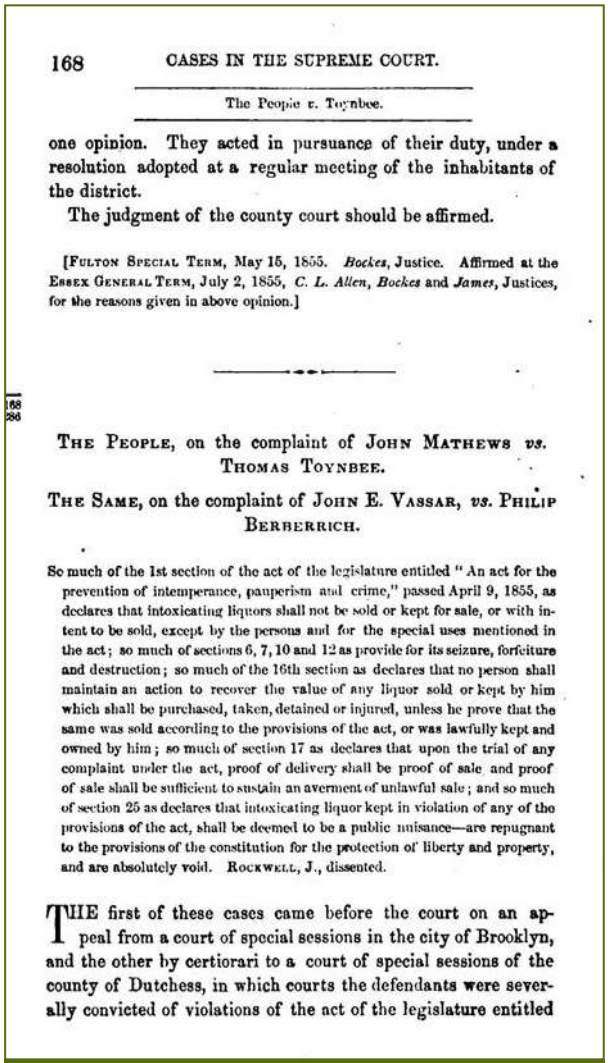
> *The primary end of marriage by the law of nature is the propagation of children. It is the plan of nature and of nature's God for the perpetuation of the human family. Each spouse has a right to expect that the other will accept the obligations as well as the privileges and rights of marriage. … [S]ometimes both spouses enter marriage intending not to have children. They use devices to prevent the birth of children. Most people know, but some apparently do not know, that these practices are contrary to the natural law.*[22]

Under former Penal Law, Sec. 1142, it was a crime, the judge noted, to sell, lend or give away contraceptives.[23]

In 1952, the Court of Appeals cited natural law as a foundation for child rearing.[24] As recently as 2020, a judge of the Court quoted that 1952 decision (albeit in dissent): "[T]he right of a parent, under natural law, to establish a home and bring up children is a fundamental one and beyond the reach of any court."[25]

As for marriage, in 2009, Judge Ciparick of the Court of Appeals drew on earlier cases and referred to "[t]he natural law exception" in not recognizing marriages involving polygamy or incest.[26]

Times change. Judges commonly look beyond statutes or procedures that do not sit right. In today's judicial universe the courts will often turn to the clauses of the state and federal constitutions, which provide that no person may be denied life, liberty, or property without due process of law. The phrase "due process" has appeared in New York decisions over 4000 times in the first ten years of the twenty-first century, and over 6000 times in the decade after that (2010–2020), giving judges a more solid, constitutionally grounded, and less amorphous platform than "natural law." Contrastingly, New York courts have cited natural law less than a dozen times over the last 20 years. And so the phrase has faded in current jurisprudence, but many of its components appear in other forms, and likely will, for a long time to come.



168 CASES IN THE SUPREME COURT.

The People v. Toynbee.

one opinion. They acted in pursuance of their duty, under a resolution adopted at a regular meeting of the inhabitants of the district.

The judgment of the county court should be affirmed.

[Fulton Special Term, May 15, 1855. *Bockes*, Justice. Affirmed at the Essex General Term, July 2, 1855, *C. L. Allen*, *Bockes* and *James*, Justices, for the reasons given in above opinion.]

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168

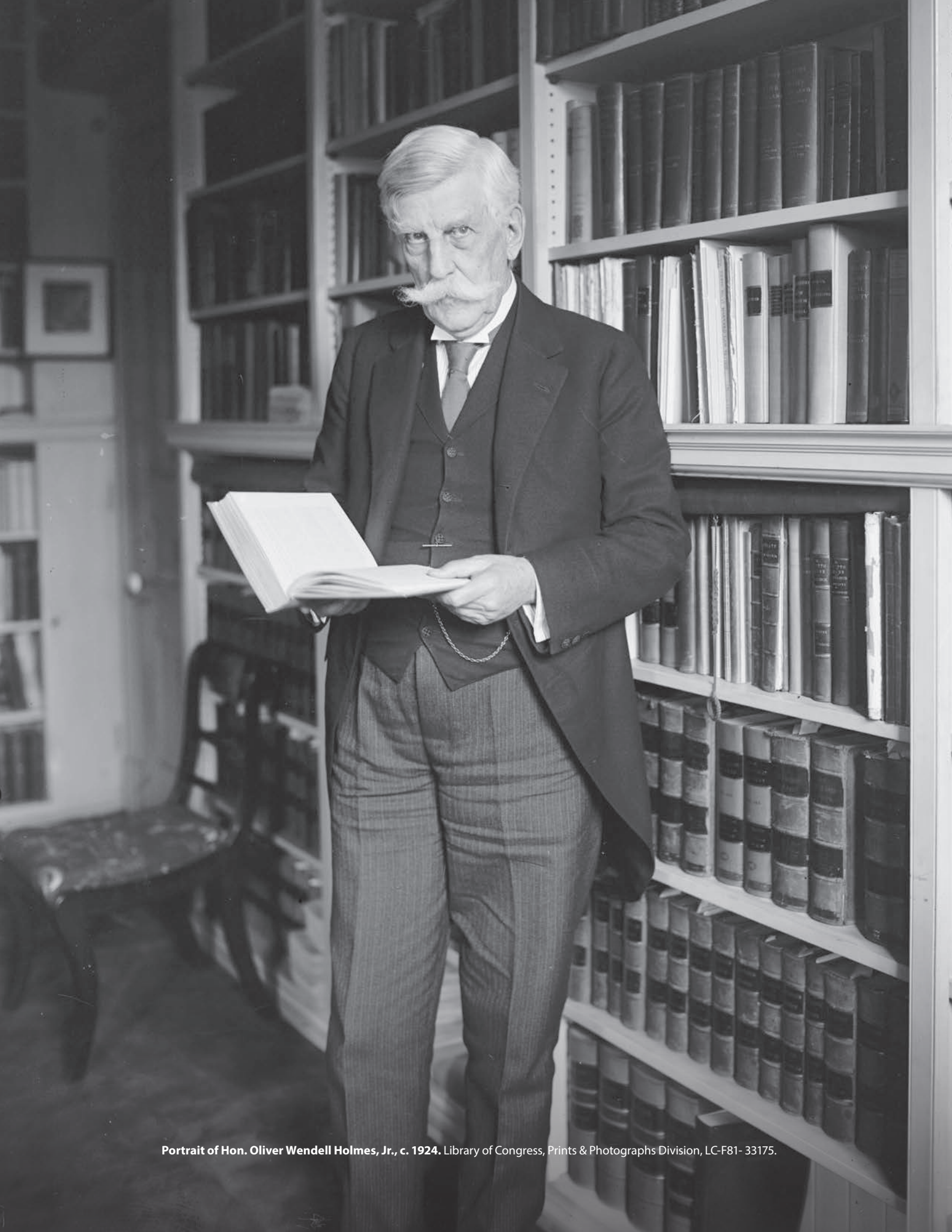
THE PEOPLE, on the complaint of JOHN MATHEWS *vs.* THOMAS TOYNBEE.

THE SAME, on the complaint of JOHN E. VASSAR, *vs.* PHILIP BERBERRICH.

So much of the 1st section of the act of the legislature entitled "An act for the prevention of intemperance, pauperism and crime," passed April 9, 1855, as declares that intoxicating liquors shall not be sold or kept for sale, or with intent to be sold, except by the persons and for the special uses mentioned in the act; so much of sections 6, 7, 10 and 12 as provide for its seizure, forfeiture and destruction; so much of the 16th section as declares that no person shall maintain an action to recover the value of any liquor sold or kept by him which shall be purchased, taken, detained or injured, unless he prove that the same was sold according to the provisions of the act, or was lawfully kept and owned by him; so much of section 17 as declares that upon the trial of any complaint under the act, proof of delivery shall be proof of sale and proof of sale shall be sufficient to sustain an averment of unlawful sale; and so much of section 25 as declares that intoxicating liquor kept in violation of any of the provisions of the act, shall be deemed to be a public nuisance—are repugnant to the provisions of the constitution for the protection of liberty and property, and are absolutely void. ROCKWELL, J., dissented.

THE first of these cases came before the court on an appeal from a court of special sessions in the city of Brooklyn, and the other by certiorari to a court of special sessions of the county of Dutchess, in which courts the defendants were severally convicted of violations of the act of the legislature entitled

***People v. Toynbee*, 20 Barb. 168, 170 (N.Y. Gen. Term. 1855).** Published in *Reports of Cases in Law and Equity in the Supreme Court of the State of New York* Vol. 20, 1858.



Portrait of Hon. Oliver Wendell Holmes, Jr., c. 1924. Library of Congress, Prints & Photographs Division, LC-F81- 33175.

ENDNOTES

1. Black's Law Dictionary (11th ed. 2009); *see also* John Finnis, *Natural Law and Natural Rights* 103, 280 (1980).
2. Black's Law Dictionary 1026 (6th ed. 1990).
3. Frederick Copleston, *Modern Philosophy: The British Philosophers from Hobbes to Hume* 128–29 (1959), *available at* http://dhspriory.org/kenny/PhilTexts/Copleston/HistoryPhilosophy5.pdf.
4. *See* Thomas R.R. Cobb, *An Inquiry into the Law of Negro Slavery in the United States of America* 8–43 (1858), *available at* https://archive.org/details/inquiryintolawof01cobbiala; see *generally* James P. Holcombe, "Is Slavery Consistent with Natural Law?" (1858), *available at* https://archive.org/details/isslaveryconsist00holc/page/n2/mode/2up.
5. *Wilkes v. Rogers*, 6 Johns. 566, 586 (N.Y. 1810); *see Hutcheson v. Peck,* 5 Johns. 196, 208 (N.Y. Sup. Ct. 1809).
6. *Wightman v. Wightman*, 4 Johns. Ch. 343, 348–50 (N.Y. Ch. 1820).
7. *Schoonmaker v. Roosa*, 17 Johns. 301, 304–05 (N.Y. Sup. Ct. 1820) (quoting *Rann v. Hughes*, 4 Brown 27, 2 Eng. Rep. 18 (1778)).
8. *Swett v. Colgate*, 20 Johns. 196, 204 (N.Y. Sup. Ct. 1822).
9. *Harris v. Clark*, 3 N.Y. 93, 110 (N.Y. 1849).
10. *Early v. Mahon*, 19 Johns. 147, 148 n.a (N.Y. Sup. Ct. 1821); *see also President, Dirs. & Co. of the Bank of Utica v. Wager,* 2 Cow. 712, 765–66 (N.Y. Sup. Ct. 1824).
11. *Gates v. Green*, 4 Paige Ch. 355, 357 (N.Y. Ch. 1834).
12. *People v. Shorter*, 4 Barb. 460, 476–77 (N.Y. Gen. Term. 1848).
13. *In re Kip*, 1 Paige Ch. 601, 613 (N.Y. Ch. 1829).
14. *Aristotle, Rhetoric* 1373b1-19, 1375a27-1377b11; *see also* Albert M. Rosenblatt, "The Fifty-Fifth Annual Cardozo Memorial Lecture: The Law's Evolution: Long Night's Journey into Day," 24 Cardozo L. Rev. 2119, 2131 (2003).
15. *People v. McLeod*, 1 Hill 377, 427 (N.Y. Sup. Ct. 1841).
16. *Lemmon v. People ex rel. Napoleon*, 26 Barb. 270, 287 (N.Y. Gen. Term 1857); *Lemmon v. People*, 20 N.Y. 562, 617 (1860).
17. *People v. Toynbee*, 20 Barb. 168, 170–71 (N.Y. Gen. Term. 1855), *available at* https://books.google.com/books?id=ijwEAAAAYAAJ.
18. *Id.* at 195 (1855).
19. *Wynehamer v. People*, 13 N.Y. 378, 392–93 (1856).
20. *Id.* at 390. *See generally* Edward S. Corwin, "The 'Higher Law' Background of American Constitutional Law," 42 Harv. L. Rev 149 (Part I) & 42 Harv. L. Rev. 365 (Part II) (1928–29).
21. Oliver Wendell Holmes, "Natural Law," 32 Harv. L. Rev. 40, 41 (1918).
22. *Hafner v. Hafner*, 66 N.Y.S.2d 442, 443–44 (Sup. Ct. 1946).
23. *Id.* at 444; *see also Ramon v. Ramon,* 34 N.Y.S.2d 100, 108 (Dom. Rel. Ct. 1942) ("The procreation of off-spring under the natural law being the object of marriage, its permanency is the foundation of the social order."); *Schmidt v. Schmidt,* 195 Misc. 366, 368 (Dom. Rel. Ct. 1949) ("[I]n the light of human experience there is nothing stronger than natural law—and natural law requires him who gives life to continue to maintain that life."); Charles S. Desmond, "Natural Law and the Constitution," 22 Fordham L. Rev. 235 (1953).
24. *People ex rel. Portnoy v. Strasser*, 303 N.Y. 539, 542 (1952).
25. *People ex rel. Johnson v. Superintendent, Adirondack Corr. Facility*, 36 N.Y.3d 187, 223 (2020) (Rivera, J., dissenting).
26. *Godfrey v. Spano*, 13 N.Y.3d 358, 379 (2009) (Ciparick, J., concurring); *see also In re Estate of May*, 305 N.Y. 486, 493 (1953) (referring to marriages "offensive to the public sense of morality to a degree regarded generally with abhorrence"); *Matter of Kelly S. v. Farah M.,* 139 A.D.3d 90, 97 (2d Dept. 2016).

Practical Proceedings in the Supreme Court of the State of New York. — By Alex^r Hamilton

By Alex^r Hamilton

Process.

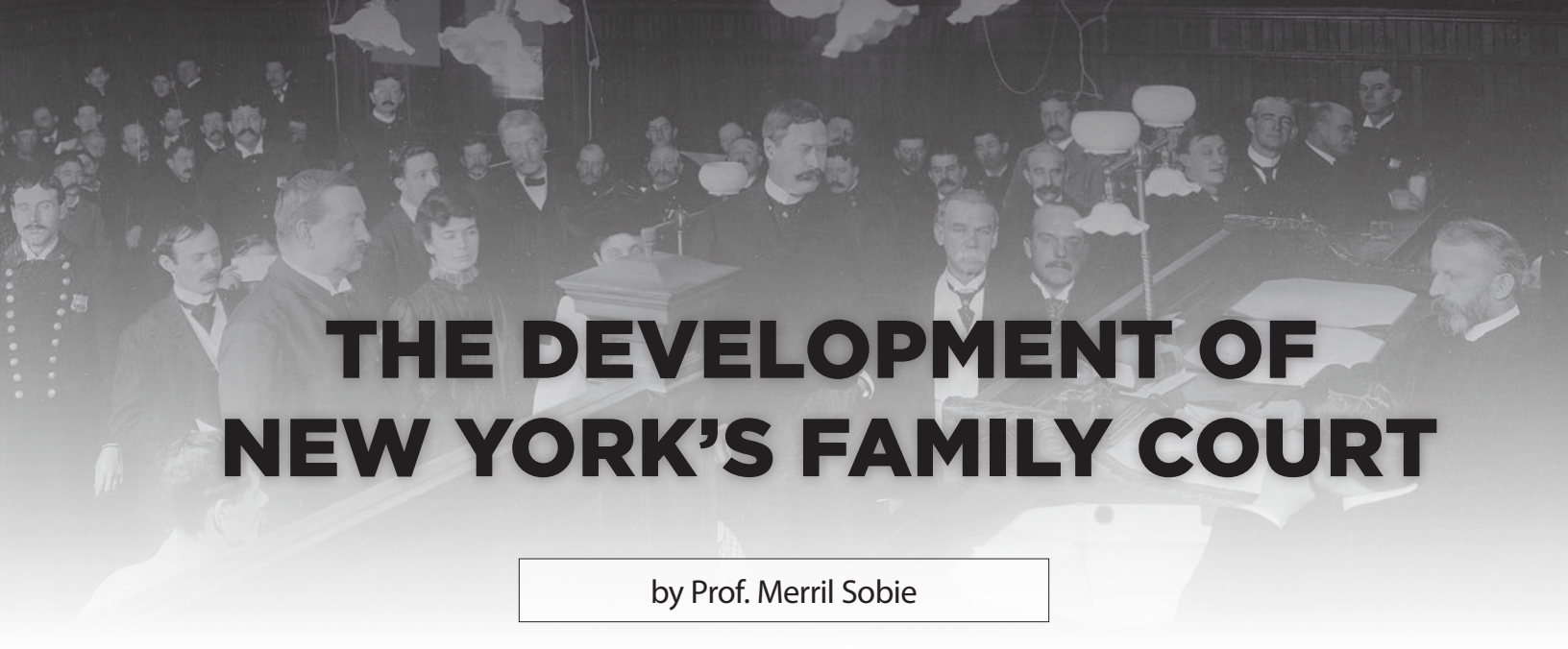
If the Person against whom you intend to bring your action lives in the County in which the Supreme Court usually sits the first Process is a Bill of that County at present a Bill of Albany in Imitation of the Bill of Middlesex —

If the Person resides in a different County your first Process must be a Capias which is a Writ compounded of the Capias of Common Pleas and the Bill of Middlesex of the Kings Bench —

If the Person is not found in the County in which your first Writ issues in the first Case you must sue out a Latitat in the second a Testatum Capias

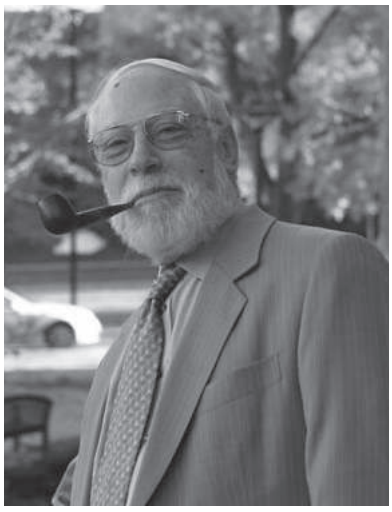
If the Person is not found on the first Writ on which you expect afterwards to take him in the same

***Practical Proceedings in the Supreme Court of the State of New York,* written by Alexander Hamilton, c. 1798.**
From the collection of the New York City Bar Association.



THE DEVELOPMENT OF NEW YORK'S FAMILY COURT

by Prof. Merril Sobie



Professor Merril Sobie is Emeritus Professor of Law at Pace University's Haub Law School. Professor Sobie has authored two books *The Creation of Juvenile Justice: A History of New York's Children's Laws* and *New York Family Court Practice*. He is the McKinney Commentator for the Family Court Act and portions of the Domestic Relations Law and has published numerous articles.

In 1782, Alexander Hamilton, commencing his post-Revolutionary War legal career, drafted a manuscript entitled "Practical Proceedings in the Supreme Court of the State of New York." Hamilton practiced law for several decades thereafter, but never published the manuscript, although the volume was periodically updated and probably shared with the then-small band of New York lawyers. A 1798 edition, possessed by the New York City Bar Association, was finally published by the New York Law Journal in 2004.[1]

Beyond its historical value, Hamilton's manuscript reveals just how several aspects of the New York courts have changed little in the intervening two-and-a-half centuries. The New York Supreme Court, circa 1782, was remarkably similar to the contemporary Supreme Court. Then, as now, the statewide court was endowed with general trial jurisdiction; proceedings encompassed, among other things, property, contract, and tort disputes. Jurisdiction as well as procedural rules have largely remained stable over a course spanning more than two centuries. Astonishingly, many of Hamilton's guidelines remain valid today. If a contemporary attorney applied a specific "Practical Proceedings" guideline, the odds are that it would prove useful.

The Family Court—the topic of this paper—simply did not exist in 1782. Of greater significance, the causes of action which collectively comprise the court's jurisdiction were then unknown. Juvenile delinquency, child protective proceedings, status offenses, adoption, and domestic violence proceedings were established sequentially in eras that followed. The only significant family law topic that did exist, divorce, was exceedingly restrictive, while paternity jurisdiction was vested, at the time, in the criminal courts (an indication of how society viewed illicit relationships). Unlike historic legal actions, such as property law, inherently social-oriented family proceedings have mutated, changing continually and quickly. Supreme Court may indeed be viewed as a rock of stability. Family Court is for good reason quite the opposite: an unstable tribunal, which ceaselessly progresses to reflect ever shifting societal norms. This article provides an overview of the court's historical development.

New York's first Children's Court part in Manhattan, c. 1902. Courtesy of the author.

The Modern New York Family Court

The present-day Family Court is enshrined in New York's Constitution,[2] its contemporary jurisdiction includes civil and quasi-criminal cases that affect families and society. Crimes committed by persons under the age of eighteen (juvenile delinquency), domestic violence cases which involve persons who have an "intimate relationship" (married or unmarried, sexual or non-sexual), and children who are accused of non-criminal prohibited conduct (such as truancy) comprise the quasi-criminal docket. The civil component encompasses child support, spousal support, child custody, child protective actions (child neglect or abuse and termination of parental rights), adoption, and the determination of legal and biological parenthood (paternity, maternity, surrogacy, and artificial reproductive technology). Several jurisdictional grants are compounded by concurrent jurisdiction, *i.e.*, jurisdiction shared by more than one court; examples include child custody, adoption, surrogacy, and domestic violence.

Unlike virtually every other American Family Court, the New York Family Court has not been granted jurisdiction to determine divorce, although several aspects, such as custody, may be litigated in Family Court. The historical roots of each type of proceeding are, as will be explained, deep and frequently complex.

The Beginnings: The 1824 Juvenile Delinquency Law

The initial Family Court predecessor statute was an 1824 law which established the concept and name "juvenile delinquency:"

> *[T]he managers of the [Society for the Reformation of Juvenile Delinquents] . . . shall receive and take in the house of refuge, established by them in the City of New York, all such children as shall be convicted of criminal offenses, in any city or county of this state, and as may in the judgment of the court, before whom any such offender shall be tried, be deemed proper objects . . . .*[3]

The initial discretionary commitment power became mandatory through an 1846 statute providing that the courts "shall sentence to such house of refuge every male under the age of eighteen years, and every female under the age of seventeen years, who shall be convicted before such court of any felony."[4]

The original statute's scope is unmatched to this day. The maximum jurisdictional age was 18 (for boys), an achievement later reduced to age 16 until finally restored in 2018. The statute applied to every felony conviction, including murder and other violent felonies (as contrasted to recent "raise the age" legisla-

Children's court in session, c. 1902. Library of Congress, Prints & Photographs Division, LC-B2-454-7.

tion). Although children under the age of 14 had been largely protected from conviction by the common law infancy presumption, the complete 1846 separation of every child who had allegedly committed a serious crime from the adult justice system had no precedent.[5] Jurisdiction remained in the criminal courts; it would be a century before the advent of a separate children's or family court.

Interestingly, another precedent inaugurated by the 1824 legislation mandated that children, unlike adults, be sentenced exclusively to a private non-profit agency. The Society for the Reformation of Juvenile Delinquents, which operated houses of refuge, became the granddaddy childcare agency (although the independent Society was largely state funded). The principle of private agency care was subsequently expanded to encompass neglected and abandoned children and remains rooted in modern children's law. Today a consortium of private and public agencies co-exists. A delinquent youngster may be placed in a private residential facility. Neglected children are frequently placed with private religious or secular institutions. The unique and somewhat awkward inter-relationship between governmental and private agencies is woven into the Family Court fabric.

The Civil-War-Era Child Saver Movement

The next development on the path to a Family Court was the progressive "child saver" movement, which originated and flourished in the aftermath of the Civil War. In 1865, the Legislature enacted the "disorderly child" act,[6] a direct predecessor of contemporary Person in Need of Supervision proceedings.[7] The Act required a court, upon parental petition, to commit a "disorderly child" to a House of Refuge, forging a strong link between delinquent and status offense youngsters; the link was not severed until the late twentieth century.

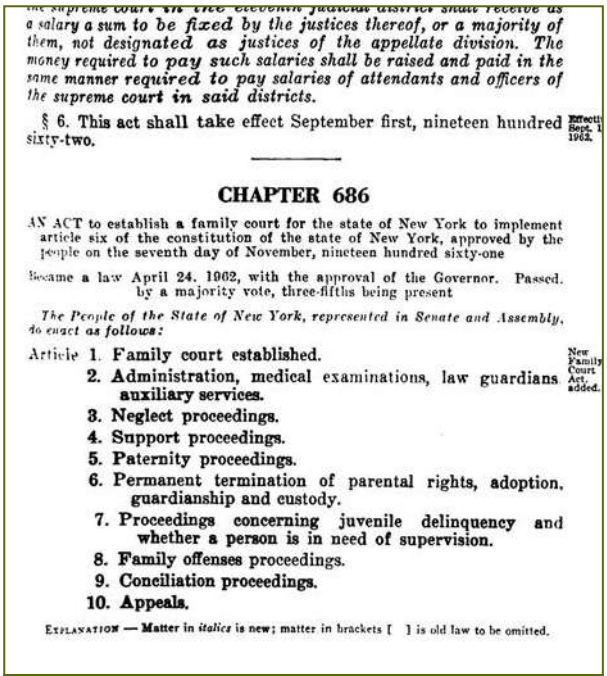
Of greater significance, in 1877 the Legislature enacted a comprehensive Act for Protecting Children, a measure which may be fairly characterized as the initial child protective law.[8] The lengthy list of proscribed conduct by minors included begging, the lack of proper guardianship, or having a "vicious" or incarcerated parent. Such supposedly egregious juvenile conduct or environment could result in the loss of parental custody. (Oddly, the action was predicated on the status of the child, or the child's conduct; parental malfeasance or misfeasance was initially irrelevant.)

The Act for Protecting Children was enacted almost immediately following the state's first adoption law.[9] Accordingly, children could be permanently removed from dysfunctional families and quickly adopted by presumably "good" parents. The "child

saver" legislation continued the unique private agency system of prosecution and childcare, largely through the 1875 authorization of societies for the prevention of cruelty to children[10] and the burgeoning network of religious and secular childcare agencies. The foreseeable result was an exponential growth of child related cases and the permanent separation of many children from their parents.

The child saver movement was unfortunately in part fueled by prejudice against immigrants. Immigration had surged in the late nineteenth century; most "saved" children were offspring of immigrant parents. In later generations, immigrant prejudice was replaced by racial prejudice.

Although the triad of "signature" causes of action, encompassing juvenile delinquency, child protective, and status offense proceedings, had been established by 1880, jurisdiction remained vested in the criminal courts. The criminal court's increasing caseload burden was manifest.



a salary a sum to be fixed by the justices thereof, or a majority of them, not designated as justices of the appellate division. The money required to pay such salaries shall be raised and paid in the same manner required to pay salaries of attendants and officers of the supreme court in said districts.

§ 6. This act shall take effect September first, nineteen hundred sixty-two. Effect Sept. 1 1962.

CHAPTER 686

AN ACT to establish a family court for the state of New York to implement article six of the constitution of the state of New York, approved by the people on the seventh day of November, nineteen hundred sixty-one

Became a law April 24, 1962, with the approval of the Governor. Passed by a majority vote, three-fifths being present

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Article 1. Family court established. New Family Court Act added.
2. Administration, medical examinations, law guardians, auxiliary services.
3. Neglect proceedings.
4. Support proceedings.
5. Paternity proceedings.
6. Permanent termination of parental rights, adoption, guardianship and custody.
7. Proceedings concerning juvenile delinquency and whether a person is in need of supervision.
8. Family offenses proceedings.
9. Conciliation proceedings.
10. Appeals.

EXPLANATION — Matter in *italics* is new; matter in brackets [ ] is old law to be omitted.

***Laws of the State of New York Passed at the One Hundred and Forty-Seventh Session of the Legislature*, Chapter 686, establishing the Family Court, 1962.** Retrieved from Google Books, courtesy of the University of California.

Challenges to Summary Proceedings

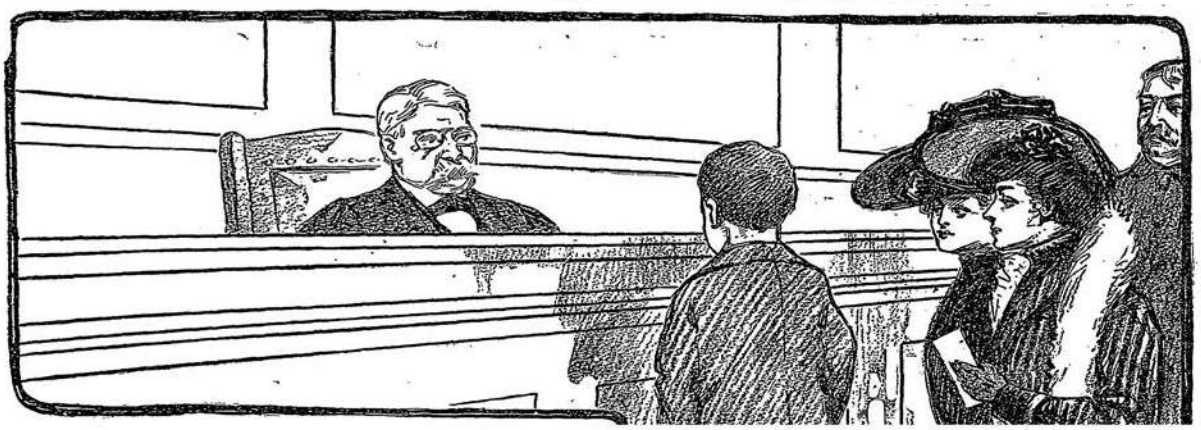
However, the burden was largely alleviated by the fact that the proceedings were deemed to be "summary." In 1876, for instance, a New York County Supreme Court case held that "the courts of the state may, by virtue of their general powers, interfere for the protection and care of children . . . in which children shall be removed from their custodians and a mode provided over their summary disposition."[11] Hence, judges simply signed summary orders prepared by the private agencies, and procedural due process was non-existent. Hearings were brief and *ad hoc*. Appeals were precluded by statute, and once the child was committed there was no possibility of family reunification.

Litigation nevertheless ensued, grounded on the ancient writ of *habeas corpus*. Of several cases, two Court of Appeals decisions were particularly decisive.

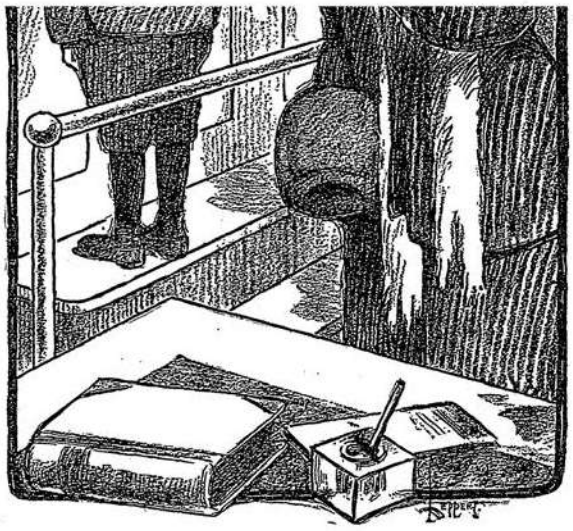
The first case, *People ex rel. Van Riper v. New York Catholic Protectory*,[12] involved a young girl who, while seeking her way home, had become lost in Union Square Park—understandable when confronting the multiple streets and avenues which radiate from the park. She solicited directions from a woman who then helpfully led her in the correct direction. However, the woman was apparently a prostitute, a seemingly irrelevant fact which the child could not have known. Because the child protective act stipulated unequivocally that a child who was found in the company of a reputed prostitute could be arrested and committed, the woman's benign assistance led to the arrest of the child. Following the youngster's summary placement, her father filed a *habeas* petition. The upshot was a blistering intermediate appellate decision in the father's favor,[13] followed by the Court of Appeals decision holding conclusively that "it must appear that the child was abandoned and neglected by the fault of its parents, to justify taking it from their custody."[14] Henceforth, actual parental malfeasance had to be proven to substantiate a placement (at least when a summary commitment was challenged).

A decade later, the statutory irreversible loss of custody was successfully challenged in the Court of Appeals case of *Matter of Knowack*.[15] Four children had been placed summarily. Two years later, citing a common law equity doctrine, their parents brought suit for their return based on parental rehabilitation.

CHILDREN'S COURT SCENE OF NOBLEST OF CHARITIES.



What Has Been Accomplished by the Big-hearted Philanthropic Women Who Devote Their Leisure Hours To Aiding in the Rescue of the Unfortunate Boys and Girls Arraigned Before This Tribunal.



IF it were possible for the atmosphere of the Children's Court, at Eleventh Street and Third Avenue, to resolve itself into luminous expression, the words that probably would blaze forth upon the wall would be:

"Faith! Hope! Charity!"

It is down in this quiet little court, in this poor neighborhood, that one of the grandest works of charity is being carried on by the city, in behalf of the children of the metropolis, assisted by a committee of wealthy ladies whose charity is guiltless of hobbyism or ostentation. Here, in this the headquarters of those who are devoted to the welfare and protection of poor children, charity reigns supreme, but a charity born of hope for the coming generation and nurtured by faith in the results of its ministering. The greatest of all charities is this.

The story of the Children's Court in this big city has been written scores of times—the quaint or pathetic or amusing tale of the wayward girl, the mischievous boy, and the "outlaw" band seeking the Rocky Mountains, only to find the rooms of the Society for the Prevention of Cruelty to Children; but up to the present, it does not seem as if sufficient justice has been done and deserved credit awarded to the committee whose work is directly responsible for the fact that, out of every 100 children paroled from the Children's Court, 85 turn out well. That percentage speaks for itself, and also for the work of the organization known as the Association of Catholic Charities, the moderator of which is the Rev. Dr. D. G. McMahon.

+ + +

Directly under the supervision of the moderator is this Children's Court Committee, composed of a number of ladies who have voluntarily given a large part of their time and services to helping poor children to better themselves, teaching the parents or guardians of little unfortunates the necessity for awakening self-respect in the children by example in themselves, and, that which is the charity hand in hand with faith and hope, rescuing children from the first pitfalls of poverty and rough environment, at an age where it is easy to impress them for good or for evil.

The Chairman of this committee is Mrs. John G. O'Keefe, wife of a prominent broker; Mrs. Thomas G. Patten, Mrs. W. R. Knapp, Miss Alice E. Hughes, Miss Laura I. Mohr, Mrs. Charles H. Irish, Miss May Buderis, and several others whose names cannot be obtained, make up the committee. Each of these ladies has her own day at the Children's Court, when she makes it her business to speak to all the children who are arraigned, either for an offense or a misfortune of guardianship, and, having learned and jotted down on her tablets all possible information with regard to the little unfortunate, the committee lady spends her days off from court looking into his or her domestic and social environment and doing in an unostentatious way that which she thinks best for the child. Sometimes it is monetary help for the parents, sometimes a little wholesome, stirring truth and advice to the guardians where they have been guilty of negligence, and again it may be that the Samaritan, with the assistance of the parish priest, gathers in the little ones to the night schools and gymnasiums which are in existence on the east side.

+ + +

Fully to realize the grandeur of the work of charity performed by this committee, one would have to spend many, many days beside the Judge who tries the average of

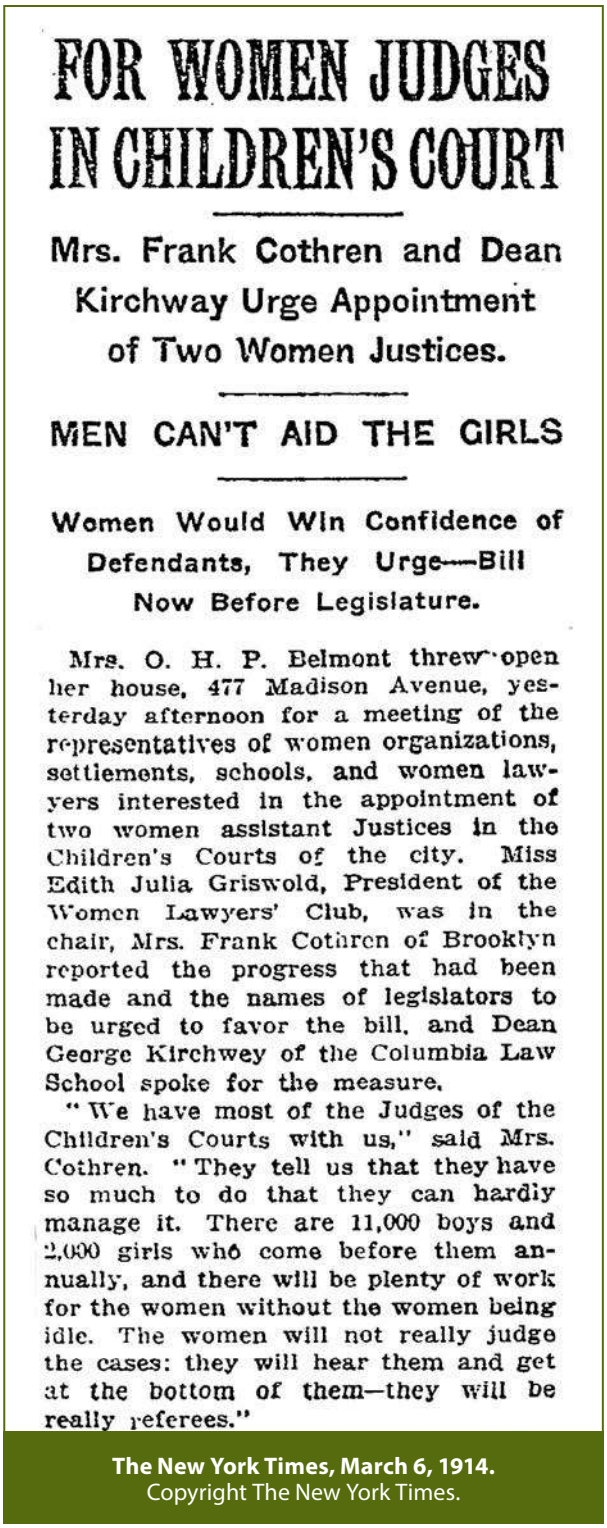
thirty-five new cases brought into the Children's Court every day; but, as few have the time to do this, the next best thing is a study of the reports of the First Division (Children's Court) of the Court of Special Sessions. One of the biggest surprises that one receives after inquiry into the affairs of the First Division is that, during the two years of its existence, the Children's Court has arraigned little ones who have committed every crime on the calendar, with the exception of libel. We speak of the children collectively, of course, and the crimes collectively: one would never credit the existence of an infant reprobate who in less than the age limit of sixteen years could have committed every crime from petit larceny to murder! But it is a fact that the Children's Court of Manhattan has seen some "little terrors" at the rail. This year, although the report has not yet been issued, there have been no less than five homicide cases. Last year there were two boys remanded to the Coroner for the same offense.

+ + +

One of the extraordinary and unlooked-for features of the court records is the prevalence of attempted suicide among children, especially girls. From the observation of the court officials and the committee workers, nearly all of the 150 cases of attempted suicide arraigned last year were the result of domestic differences and childish grievances, real or fancied. Here and there one may find a case of attempted self-destruction where "Tommy" had lost at crap shooting 25 cents which belonged to his mother. He contemplated death with the despair of a ruined gambler. There are also a few cases where little girls with quite an extensive education in trashy literature have longed to die for the love of some infant Lothario.

Reference to a "ruined gambler" brings

The New York Times, December 4, 1904. Copyright The New York Times.



FOR WOMEN JUDGES IN CHILDREN'S COURT

Mrs. Frank Cothren and Dean Kirchway Urge Appointment of Two Women Justices.

MEN CAN'T AID THE GIRLS

Women Would Win Confidence of Defendants, They Urge—Bill Now Before Legislature.

Mrs. O. H. P. Belmont threw open her house, 477 Madison Avenue, yesterday afternoon for a meeting of the representatives of women organizations, settlements, schools, and women lawyers interested in the appointment of two women assistant Justices in the Children's Courts of the city. Miss Edith Julia Griswold, President of the Women Lawyers' Club, was in the chair, Mrs. Frank Cothren of Brooklyn reported the progress that had been made and the names of legislators to be urged to favor the bill, and Dean George Kirchwey of the Columbia Law School spoke for the measure.

"We have most of the Judges of the Children's Courts with us," said Mrs. Cothren. "They tell us that they have so much to do that they can hardly manage it. There are 11,000 boys and 2,000 girls who come before them annually, and there will be plenty of work for the women without the women being idle. The women will not really judge the cases: they will hear them and get at the bottom of them—they will be really referees."

The New York Times, March 6, 1914.

Finding that the parents were indeed rehabilitated, the Court of Appeals ordered the children's return: "It seems self[-]evident that public policy and every consideration of humanity demand the restoration of these children to parental control."[16] A loss of parental custody could therefore be challenged at any future time, a Family Court bedrock doctrine we now call "continuing jurisdiction."

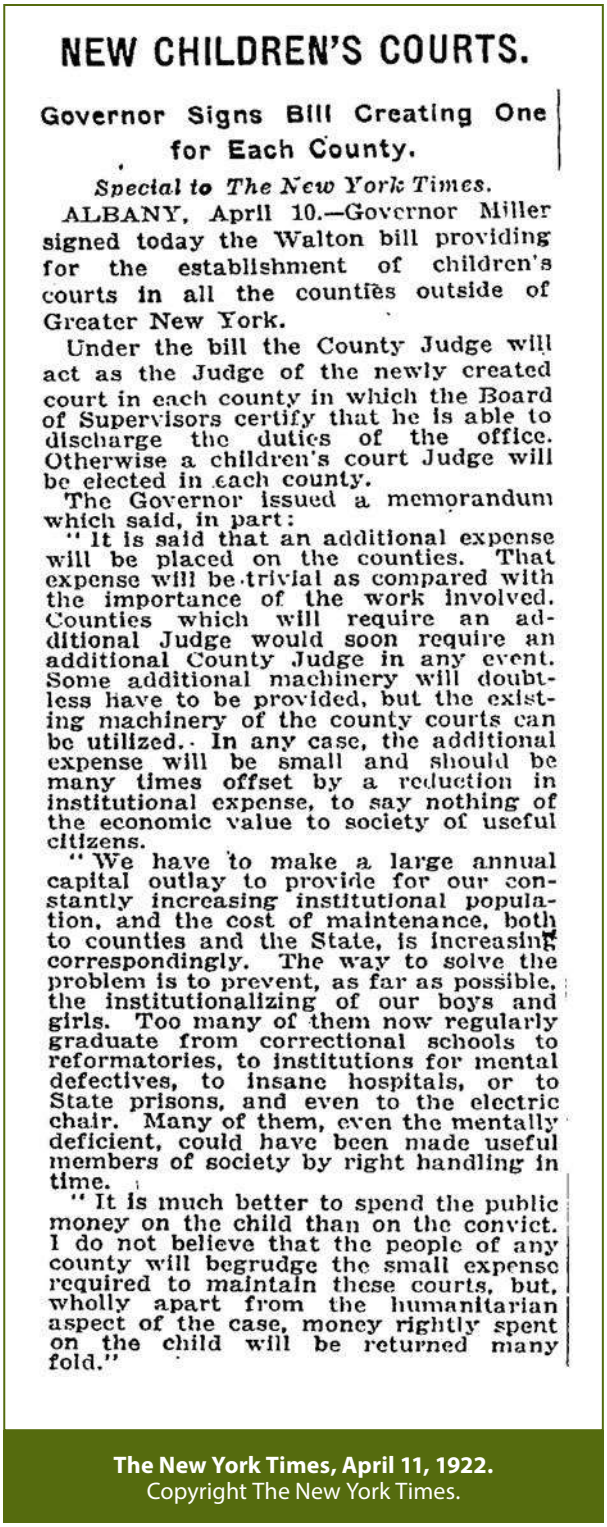
A Move Towards Specialized Courts

The "child saver" ferment, leading to the enactment and expansion of novel child and parental "child saver" jurisdiction, was a national phenomenon; New York was far from unique in enacting child-protective laws. The next logical step was to cleave jurisdiction from the criminal tribunals and, to a lesser extent, the civil courts by establishing a "Juvenile Court" dedicated to youths. The inaugural Juvenile Court in Chicago in 1900 was quickly replicated.

But New York initially resisted. The state instead opted for "children's court parts"—in essence, specialized criminal court parts—that were first mandated in 1903.

Finally, in 1922, New York established a statewide Children's Court except in New York City, and in 1924 enacted the virtually identical New York City Children's Court Act (the reason for two similar acts remains a mystery, at least to this writer). In 1933, the Legislature established the New York City Domestic Relations Court, adding child custody and support jurisdiction, the initial (albeit tentative) step toward a Family Court.

Criticism of the limited Children's Court jurisdiction emerged within one generation. As but one module of a highly fragmented court system, the children's courts, with an increasing caseload, could not offer holistic remedies. For example, an unmarried woman with a child who resided with the child's abusive father would confront the labyrinth of seeking an order of protection in the criminal court, a filiation order in the New York City Court of Special Sessions, and a child support and custody order in the Children's Court—three separate lawsuits before three independent courts housed at different locations.



NEW CHILDREN'S COURTS.

Governor Signs Bill Creating One for Each County.

Special to The New York Times.

ALBANY, April 10.—Governor Miller signed today the Walton bill providing for the establishment of children's courts in all the counties outside of Greater New York.

Under the bill the County Judge will act as the Judge of the newly created court in each county in which the Board of Supervisors certify that he is able to discharge the duties of the office. Otherwise a children's court Judge will be elected in each county.

The Governor issued a memorandum which said, in part:

"It is said that an additional expense will be placed on the counties. That expense will be trivial as compared with the importance of the work involved. Counties which will require an additional Judge would soon require an additional County Judge in any event. Some additional machinery will doubtless have to be provided, but the existing machinery of the county courts can be utilized. In any case, the additional expense will be small and should be many times offset by a reduction in institutional expense, to say nothing of the economic value to society of useful citizens.

"We have to make a large annual capital outlay to provide for our constantly increasing institutional population, and the cost of maintenance, both to counties and the State, is increasing correspondingly. The way to solve the problem is to prevent, as far as possible, the institutionalizing of our boys and girls. Too many of them now regularly graduate from correctional schools to reformatories, to institutions for mental defectives, to insane hospitals, or to State prisons, and even to the electric chair. Many of them, even the mentally deficient, could have been made useful members of society by right handling in time.

"It is much better to spend the public money on the child than on the convict. I do not believe that the people of any county will begrudge the small expense required to maintain these courts, but, wholly apart from the humanitarian aspect of the case, money rightly spent on the child will be returned many fold."

The New York Times, April 11, 1922.

The Establishment of Family Court

In an influential report and book published in 1954, Walter Gellhorn, a Columbia Law School professor, cogently outlined the deficiencies and advocated for the establishment of a unified Family Court.[17] The court was finally established by a 1961 constitutional amendment, part of a comprehensive judicial realignment. The constitutional amendment authorized somewhat compromised jurisdiction, leaving divorce jurisdiction solely in the Supreme Court and, as noted earlier, granted the Family Court only concurrent jurisdiction over several other causes of action.

However, a contemporary judge or attorney would barely have recognized the Family Court in its formative years. Although children involved in juvenile delinquency and child protective cases were granted state paid representation, implementation was gradual. Indigent adults gained representation later.[18] Prosecutors were absent, a fact now unimaginable in a court served by county attorney offices or the New York City Law Department (judges or probation officers acted as *de facto* prosecutors). Proceedings continued to be largely summary. Trials were rare events, as one would expect in a lawyer-less court. Child protective jurisdiction was very limited; children were instead placed in foster care through largely unregulated "voluntary" public and private social agency agreements which were never judicially reviewed (the court lacked the necessary jurisdiction).

Evolution in Procedure and Doctrine

Procedurally, through an evolution spanning several post-1962 decades, Family Court has matured to a tribunal which is very similar to its brethren courts, including the Supreme Court. Hamilton's Practice Manual, totally alien to Family Court procedures in 1970, is now at least partially applicable.

Given the underlying nature of family and children's law, the doctrinal principles have been equally revolutionary. Science and social science advances have profoundly shaped legal principles. For example, during the first half of the Family Court's existence, genetic testing was unknown. Today, DNA testing is

a daily occurrence. Ergo, paternity determinations (and to a lesser extent maternity determinations) are mathematically definitive. The occasional inequitable result has been checked by the judicial development and codification of the equitable estoppel rule.[19] Legal parenthood and biological parenthood, formerly synonymous (except in the case of adoption) are now distinguishable. Non-biological parties routinely seek legal parenthood. The decreasing number of marriages and concomitant increasing number of out-of-wedlock births have resulted in a Family Court case surge. The advent of artificial reproductive technology and surrogacy arrangements has engendered further changes.[20]

To cite one additional historical revolution (amongst many), in recent years the child protective laws have been modified virtually annually. In 1962, the protective caseload was minimal (placements were ostensibly "voluntary" and without judicial review); today child protection is the dominant caseload. Permanency hearings, kinship foster care, the rights of the non-respondent parent (the parent not charged with abuse or neglect), the independent rights of the child (unheard until recent years), and individualistic disposition and post-disposition remedies have proliferated.

The avalanche of procedural and substantive reforms, which converted the era of virtual summary determinations in the absence of counsel into a truly adversarial system, in itself required a huge resource increase. Adding new causes of action and hearings, such as permanency, as well as post-dispositional remedies, such as the sealing and expungement of records, exacerbated the resource problem. Increasing complexities in determining more historic proceedings also contributed; for example, determining child support is today far more detailed and complicated.

Growth Outpacing Resources, and the Judicial Response

Family Court resources have expanded, but at a rate far below the need. The number of judgeships has increased incrementally,[21] while the sheer number of actions and the maturing procedural due process requirements has increased exponentially.

One aspect of an independent children's or family court has been increasing judicial gender equality or, more accurately, less gender inequality. From the commencement of a new court for families in the early twentieth century, women judges were viewed as acceptable in light of the court's unique jurisdiction—as were, eventually, women of color. In the mid-1930s, the first female judge in New York, Justine Wise Polier, was appointed to the New York City Children's Court (another pioneer, Anna Kross, had earlier been appointed as a criminal court magistrate). New York City's Domestic Relations Court was home to Jane M. Bolin, who became the country's first African American woman judge in 1939. And in 1967, Judge Nanette Dembitz was appointed to the Family Court bench, where she pioneered modern approaches to child custody determinations and adoption. By 1970, seven of the Family Court's complement of 36 judges, including the Administrative Judge, were women. On the other hand, in 1970 only two of the Supreme Court justices in the First Department were women.

A large part of the resource deficiency has been met through the growth of non-judge adjudicators. In 1962, every petition or complaint was assigned to a judge or judicial part (as in the predecessor tribunals). That was modified in 1978 when, through a largely federal funded program and mandate, the position of "Hearing Examiner" was established to adjudicate most child support cases (the title was subsequently changed to "Support Magistrate").[22] The non-judge component was further expanded through the increasing employment of referees, commonly referred to as "court attorney referee" pursuant to CPLR Article 43, who preside over mainly child custody and permanency hearings. Further augmentation was achieved through the appointment of retired judges as judicial hearing officers. By the turn of the twenty-first century, a large majority of the New York City caseload was assigned to the "new" adjudicators, and a significant number of cases in the rest of the state were similarly processed—quite a leap from the original "judge only" paradigm.

Another innovation worth noting is the establishment of multi-court integrated parts. Examples include the integrated domestic violence parts, and the more recent adolescent offender juvenile parts (part of "raise the age" legislation). Integrated parts resolve jurisdictional problems which are inherent in New York's still-fragmented judicial system.[23] Holistic determinations to meet the multiple needs of a specific family are now frequently possible.

The twenty-first century has already brought important new initiatives. One is the development of ameliorative alternatives to formerly strict adversarial litigation. Mediation is one alternative which is gaining acceptance throughout the case spectrum. An as yet unheralded reform of "raise the age" has been expanded diversion or "adjustment" provisions designed to avoid the formal prosecution of most misdemeanor and non-violent felony cases.[24] The recognition of parenthood when couples conceive a child through agreement regardless of biological ties is one additional example of a legal rule intended to address changing family concepts.[25] These and other trends are likely to mature in the near future. Additional societal family needs will undoubtedly be addressed well into this century, although identifying those norms would be an exercise in sheer speculation.

Conclusion: How Far We've Come

In conclusion, Family Court developed over the course of many generations. Reactive to ever changing and accelerating societal social needs, the court has evolved continuously and rapidly. One overarching fact is that the evolution will continue in future decades.

Alexander Hamilton's Practice Manual proves that the New York Supreme Court remains stable, evolving at a glacial pace as a tribunal imbedded in centuries of largely common law causes of action. Family Court jurisdiction and procedure, inherently based on societal developments, is by necessity a very different institution. A Family Court practice manual is likely to become outdated not long after the ink has dried. Viewed historically, the court has adapted well, and will in all probability continue to progress successfully into the largely unforeseeable Family Law future.

ENDNOTES

1. The facts in this paragraph were distilled from the introduction to the 2004 publication.
2. *See* N.Y. Const. art. VI, § 13.
3. L. 1824, c. 126; as amended in 1826.
4. L. 1846, c. 134, § 16.
5. Children who were convicted of a misdemeanor offense could, until later that century, be briefly incarcerated in a local jail.
6. L. 1865, c. 172, § 5.
7. F.C.A. Art. 7.
8. L. 1877, c. 428.
9. L. 1873, c. 830, § 1.
10. L. 1875, c. 130.
11. *Matter of Donohue*, 1 Abb. N. Cas. 1, 10 (Sup. Ct., N.Y. Co. 1876). The original volume of Abbott's New Cases is available at archive.org, https://archive.org/download/newcasesselecte05smitgoog/newcasesselecte05smitgoog.pdf.
12. 106 N.Y. 604 (1887).
13. 51 N.Y. Sup. Ct. 526 (Gen. Term. 1st Dept. 1887). The Supreme Court noted that the statute "would render the child of the worthiest citizen, who happened to lose her way in the public streets and sought guidance from the first women she met, liable to arrest and incarceration." *Id.* at 529. The original reporter is available here: https://books.google.com/books?id=U5lDAQAAMAAJ.
14. 106 N.Y. at 609; *see also People ex rel. Heck v. The Catholic Protectory*, 38 N.Y. Sup. Ct. 126 (Gen. Term. 1st Dept. 1885), *available at* https://babel.hathitrust.org/cgi/pt?id=coo.31924066130208&view=1up&seq=174.
15. 158 N.Y. 482 (1899).
16. *Id.* at 487–88.
17. Walter Gellhorn, *Children and Families in the Courts of New York City* (1954).
18. *See* F.C.A. § 262, which in part codified the 1972 *Ella B.* decision, *In re Ella B.*, 30 N.Y.2d 352 (1972).
19. *See* F.C.A. § 532.
20. See, for example, recently enacted Family Court Act Article 5-C.
21. An historical anomaly which still exists is the selection of judges. In New York City, the Mayor appoints Family Court judges (with the assistance of a screening committee). The rest of the State Family Court judges are elected. The dichotomy originated when the separate children's court acts were enacted (and may be the result of a 1922 political decision).
22. L. 1978, c. 456.
23. The fragmentation includes divorce. Only the Supreme Court may issue a divorce decree. However, the consequential issues which result, including child custody or visitation, support, and orders of protection are frequently litigated in Family Court. Jurisdictional divisions are very complex, and parties may be sequentially or concurrently litigating in both Supreme and Family courts.
24. *See* amended F.C.A. § 308.1.
25. *See, e.g., Matter of Brooke S.B. v. Elizabeth A.C.C.*, 28 N.Y.3d 1 (2016).

The Appellate Term, First Department is located in rooms 401 (Clerk's Office) and 408 (Courtroom) inside the New York County Supreme Court building at 60 Centre Street. Courtesy of the Historical Society of the New York Courts.

THE APPELLATE TERM: A CHERISHED KNOWN "UNKNOWN" COURT

by Clara Flebus

Clara Flebus is a Court Attorney at New York Supreme Court, where she resolves appeals in all types of civil cases, including commercial disputes, commercial and residential landlord-tenant proceedings, and negligence actions. She holds an LL.M. in International Business Regulation, Litigation and Arbitration and frequently writes and lectures on topics related to international business disputes. She serves as Chair of the Foreign and International Law Committee of the New York County Lawyers Association (NYCLA), is the Co-chair of the International Litigation Committee of the Commercial and Federal Litigation Section of the New York State Bar Association (NYSBA), and is a board member of the Columbian Lawyers Association.

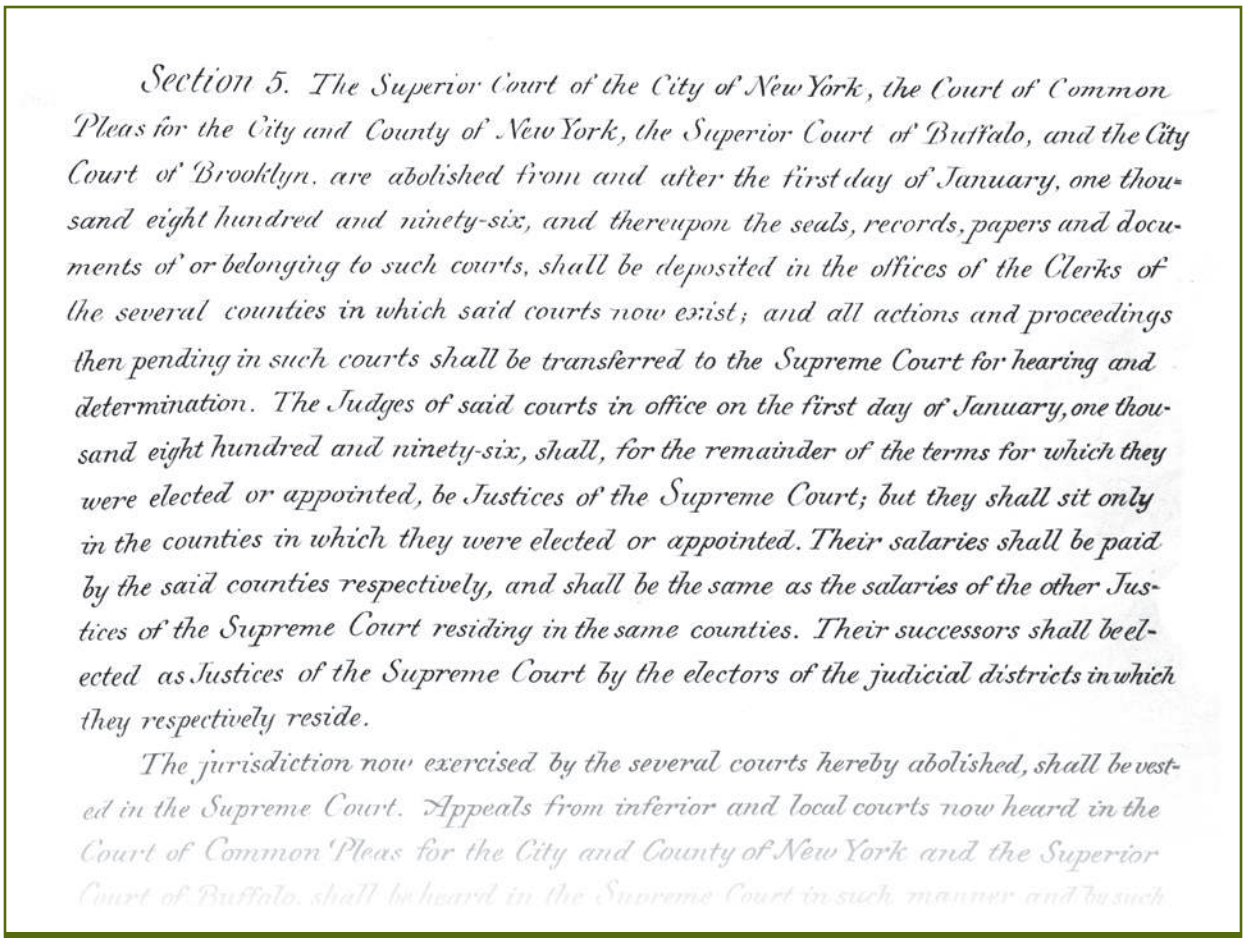
Introduction

Most litigators in New York State have heard of the Appellate Term. Far fewer, however, are actually knowledgeable about the court's jurisdiction and operations. The general lack of familiarity with the court is due, in part, to its limited presence "downstate" in only the First and Second Departments, where it hears appeals from decisions rendered by a variety of lower local courts that are spread over twelve counties and serve urban, suburban, and rural environments. The Appellate Term is frequently referred to as the "people's" appellate court, because the type of disputes that fall within the court's peculiar subject matter jurisdiction are relatable to one's everyday life; appropriately, the court is mindful of the limitations encountered by *pro se* litigants and affords helpful guidance through the process of submitting an appeal. The bench consists of Supreme Court justices, many of whom, while sitting on the Appellate Term, continue to try cases—a role that one former Appellate Term Presiding Justice calls the "the best of both worlds," increasing the judges' effectiveness as both trial judges and appellate judges.[1]

Establishment of the Appellate Term and Jurisdiction

The Appellate Terms in the First Department and Second Department are completely separate courts. Their genesis can be traced back to the New York Constitution of 1894, which established an Appellate Division of the Supreme Court in each of the four Departments.[2] That Constitution also provided in Article VI, section 5, that the Appellate Division would hear appeals from certain lower courts:

> *Appeals from inferior and local courts now heard in the Court of Common Pleas for the City and County of New York and the Superior Court of Buffalo, shall be heard in the Supreme Court in such manner and by such Justice or Justices as the Appellate Divisions in the respective departments which include New York and Buffalo shall direct, unless otherwise provided by the Legislature.*[3]



Section 5. The Superior Court of the City of New York, the Court of Common Pleas for the City and County of New York, the Superior Court of Buffalo, and the City Court of Brooklyn, are abolished from and after the first day of January, one thousand eight hundred and ninety-six, and thereupon the seals, records, papers and documents of or belonging to such courts, shall be deposited in the offices of the Clerks of the several counties in which said courts now exist; and all actions and proceedings then pending in such courts shall be transferred to the Supreme Court for hearing and determination. The Judges of said courts in office on the first day of January, one thousand eight hundred and ninety-six, shall, for the remainder of the terms for which they were elected or appointed, be Justices of the Supreme Court; but they shall sit only in the counties in which they were elected or appointed. Their salaries shall be paid by the said counties respectively, and shall be the same as the salaries of the other Justices of the Supreme Court residing in the same counties. Their successors shall be elected as Justices of the Supreme Court by the electors of the judicial districts in which they respectively reside.

The jurisdiction now exercised by the several courts hereby abolished, shall be vested in the Supreme Court. Appeals from inferior and local courts now heard in the Court of Common Pleas for the City and County of New York and the Superior Court of Buffalo, shall be heard in the Supreme Court in such manner and by such

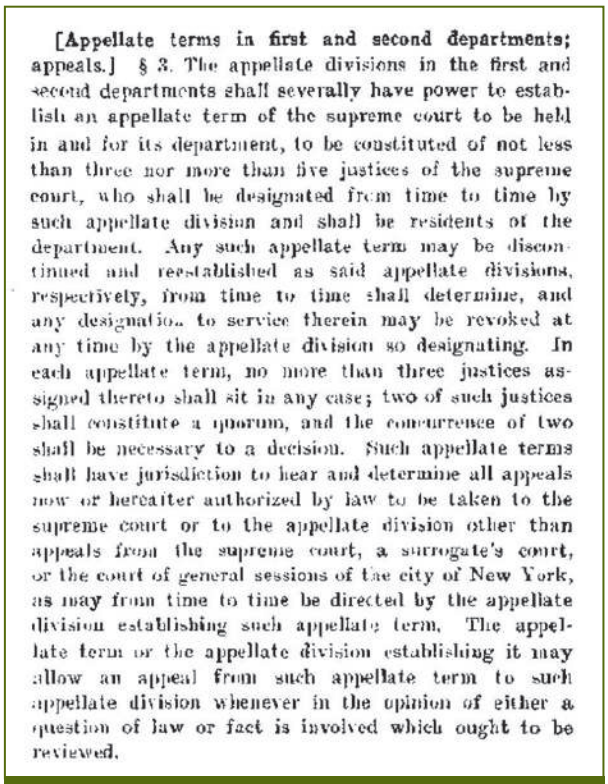
Article VI, Sec. 5 of New York State Constitution (1894).
Courtesy of New York State Archives, NYSA_A1807-78.

Shortly thereafter, the New York Legislature enacted section 1344 of the Code of Civil Procedure in 1895, which created the appellate terms by providing that:

> *Appeals from judgments or orders of the Municipal Court of the city of New York or from judgments or orders of the City Court of the city of New York may be heard either by the Appellate Division of the Supreme Court or by not less than three justices of the Supreme Court in each of the First and Second judicial departments, who shall be designated for that purpose by the justices of the Appellate Division sitting in said departments and who shall be known as the Appellate Term of the Supreme Court in the First and Second Departments, respectively.*[4]

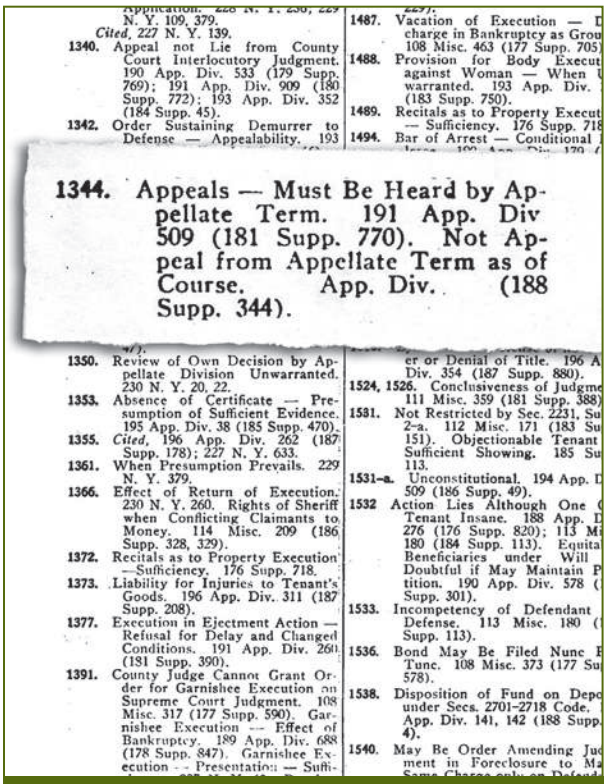
The first decisions rendered by the Appellate Term, First Department are dated as early as 1896.[5] Initially, the Appellate Division would assign three justices from the Supreme Court to sit on the appellate terms "from month to month."[6] After two decades, the consensus was that the appellate terms had functioned well and were considered a "fixed institution."[7] A 1922 report to the New York Legislature noted that "[t]hese tribunals are in largest measure the only appellate tribunal known to the majority of the residents of the Greater City of New York."[8]

Given the appellate terms' growing success, the Fifth New York State Constitution, which became effective in 1939, gave the respective Appellate



[Appellate terms in first and second departments; appeals.] § 3. The appellate divisions in the first and second departments shall severally have power to establish an appellate term of the supreme court to be held in and for its department, to be constituted of not less than three nor more than five justices of the supreme court, who shall be designated from time to time by such appellate division and shall be residents of the department. Any such appellate term may be discontinued and reestablished as said appellate divisions, respectively, from time to time shall determine, and any designation to service therein may be revoked at any time by the appellate division so designating. In each appellate term, no more than three justices assigned thereto shall sit in any case; two of such justices shall constitute a quorum, and the concurrence of two shall be necessary to a decision. Such appellate terms shall have jurisdiction to hear and determine all appeals now or hereafter authorized by law to be taken to the supreme court or to the appellate division other than appeals from the supreme court, a surrogate's court, or the court of general sessions of the city of New York, as may from time to time be directed by the appellate division establishing such appellate term. The appellate term or the appellate division establishing it may allow an appeal from such appellate term to such appellate division whenever in the opinion of either a question of law or fact is involved which ought to be reviewed.

Article VI, Sec. 3 of New York State's Constitution (1939), providing the authority of the Appellate Divisions to establish Appellate Terms. Courtesy of the Historical Society of the New York Courts.



1344. Appeals — Must Be Heard by Appellate Term. 191 App. Div 509 (181 Supp. 770). Not Appeal from Appellate Term as of Course. App. Div. (188 Supp. 344).

Section 1344 of the Code of Civil Procedure, which created the Appellate Terms. Originally published in *Analyzed New York Decisions and Citations* Vol. 7 by Charles Ray Kreidler, 1922.

Divisions authority to establish an appellate term in Article VI, section 3:

> *The appellate divisions in the first and second departments shall severally have the power to establish an appellate term of the supreme court to be held in and for its department, to be constituted by no less than three no more than five justices of the supreme court, who shall be designated from time to time by such appellate division and shall be residents of the department.*[9]

Pursuant to this constitutional provision, the appellate terms were authorized in the First and Second Departments by their respective Appellate Divisions. Notably, the Appellate Divisions in the Third and Fourth Departments chose not to create appellate terms.

Today, the New York State Constitution provides in Article 6, section 8(a), that:

> *The appellate division of the supreme court in each judicial department may establish an appellate term in and for such department or in and for a judicial district or districts or in and for a county or counties within such department. Such an appellate term shall be composed of not less than three nor more than five justices of the supreme court….*

The Appellate Term in the First Department hears appeals from the New York City Civil Court and Criminal Court in New York County (1st Judicial District) and Bronx County (12th Judicial District).[10] The rules of practice before this court are found in 22 N.Y.C.R.R. § 640 *et seq.* (Rules for the Appellate Term, First Department). There is no automatic right to appeal the Appellate Term's determinations. In criminal cases, an aggrieved party must seek leave

to appeal to the Court of Appeals. In civil cases, the aggrieved party must seek permission to appeal from the Appellate Term, or if it is denied, from the Appellate Division.[11]

In January 1968, the Appellate Division, Second Department divided its Appellate Term into two courts. Currently, one court covers the 2nd, 11th and 13th Judicial Districts, which consist of Kings, Queens, and Richmond Counties.[12] This court hears appeals from Civil and Criminal Courts in those counties, all of which are part of New York City.[13] The other Appellate Term in the Second Department serves the 9th and 10th Judicial Districts, encompassing Nassau, Suffolk, Westchester, Rockland, Orange, Putnam, and Dutchess Counties.[14] It hears appeals from City and Justice Courts located in those judicial districts, and from District Courts in Nassau and Suffolk Counties.[15] Additionally, it determines civil appeals from County Courts in its districts, except for Sex Offender Registration Act cases. Practice before both courts is governed by the Rules for the Appellate Term, Second Department, as codified in 22 N.Y.C.R.R. Parts 730 and 731.[16]

Each of the Appellate Term benches in the First and Second Departments consists of five Supreme Court justices appointed by the Chief Administrative Judge of the State of New York with the approval of the Presiding Justice of the respective Appellate Division.[17] More specifically, the two Appellate Term courts in the Second Department have separate 5-judge benches and separate Presiding Justices, but share one Chief Clerk of the Court and a common non-judicial staff.[18] The Appellate Term in the First Department has its own Presiding Justice, law department, and administrative staff. In each Appellate Term, Justices sit in panels of three; two are sufficient for a quorum, and two justices must concur for a decision.[19] The justices must reside in the territory of the jurisdictions of the court over which they preside.

Readers may be pleasantly surprised to learn that many prominent jurists deeply respected by bench and bar sat on the Appellate Term. A 1973 report of the Temporary Commission on the State Court System states that "service in the appellate term has included the assignments of such great justices and public servants" as Benjamin N. Cardozo, future Judge of the New York Court of Appeals and United States Supreme Court; Irving Lehman, future Judge of the New York Court of Appeals; and Robert F. Wagner, future United States Senator.[20]

Appeals and Case Types

Similar to the Appellate Division, the Appellate Term reviews both questions of law and fact,[21] as well as the exercise of discretion by the court below.[22] The bulk of the appeals in civil matters arise in the context of commercial and residential landlord-tenant litigation, first-party no-fault benefits cases, and small claims. Previously, the civil jurisdiction monetary limit in New York City lower courts, other than in landlord-tenant cases and with respect to counterclaims, was $25,000. In this regard, New York City voters recently approved a ballot proposal to increase the monetary cap of the Civil Court to $50,000.[23] The measure went into effect on January 1, 2022. This change is poised to increase the number of filings in New York City Civil Court, and most likely the number of appeals filed in the Appellate Terms that cover the city's five counties, too.

Furthermore, the Civil Court has jurisdiction in matters transferred from the Supreme Court pursuant to CPLR § 325(d), even where the amount of damages sought exceeds the cap. Appeals in those cases will be heard in the Appellate Terms. Generally, in civil cases, appeals are taken at various stages of litigation in the lower courts, provided that an order or judgment was entered and a notice of appeal was timely filed. In criminal matters, which include misdemeanors and violations, most appeals involve the sufficiency of an accusatory instrument, a plea, or a verdict. In general, a judgment of conviction must be rendered before a defendant can take an appeal, and the People cannot appeal a verdict of acquittal.[24]

In addition to appeals, the court reviews a substantial number of applications seeking, pursuant to CPLR § 5704(b), to vacate or modify an *ex parte* order granted by a lower court or the grant of an *ex parte* order refused by the court below. Most of these applications are emergency in nature and require immediate disposition. For example, if a Civil Court judge declines to sign an order to show cause containing a stay of eviction, an aggrieved tenant can apply to the Appellate Term, pursuant to CPLR § 5704(b). If the application is granted, the Appellate Term will issue

Figure 24 RELATIVE CASELOADS OF APPELLATE TERMS AND APPELLATE DIVISIONS

	First Department Total Dispositions			Second Department Total Dispositions		
	Appellate Term	Appellate Division	% of Total	Appellate Term	Appellate Division	% of Total
1965-66	753	1427	35	1128	1609	41
1966-67	729	1539	32	1205	1852	39
1967-68	776	1613	32	1101	1902	37
1968-69	639	1611	28	1180	1860	39
1969-70	539	1721	24	1187	2042	37
1970-71	631	1898	30	1410	1965	42

CASEFLOW OF THE APPELLATE TERMS

	First Department		Second Department	
	Total Intake*	Total Dispositions	Total Intake*	Total Dispositions
1965-66	756	753	1146	1128
1966-67	735	729	1217	1205
1967-68	966	776	895	1101
1968-69	689	639	1144	1180
1969-70	542	539	1228	1187
1970-71	669	631	1370	1410

* Excluding motions heard or submitted.

The Temporary Commission on the New York State Courts documented the caseloads and caseflows of the Appellate Terms in its 1973 report. Courtesy of the New York State Library.

an order making the order to show cause returnable in Civil Court.

Importance of Appellate Term Jurisprudence

Former New York County Supreme Court Chief Clerk John F. Werner, whose over fifty-year-long career in the court system includes serving as Chief Court Attorney (1978–1983) and Chief Clerk of the Appellate Term, First Department (1983–1989), explains that the court's jurisprudence came to the forefront in the '70s and '80s, after New York City enacted its rent stabilization laws in 1969, and litigation involving "controlled" apartments became increasingly contentious. From his special vantage point in the Appellate Term, he recalls the emergence of new claims and defenses in landlord-tenant law. For example, he remembers that the court recognized in the '70s the defense of violation of the implied warranty of habitability in nonpayment proceeding. The right to sublet rent-stabilized apartments was first recognized in the '80s, as were succession rights to rent-controlled and rent-stabilized apartments. Litigation over succession rights resulted in a broadening of the definition of "family" to include "non-traditional" families with all the additional "family rights" that have been subsequently created. Disputes over "primary residence" as a prerequisite to remaining in occupancy of rent-controlled and rent-stabilized apartments became prevalent. Later on, the enactment of the NYC Loft Law generated a large number of cases. And more litigation is to be expected in the future over the interpretation and application of the recently enacted Housing Stability and Tenant Protection Act of 2019.[25]

An old Appellate Term sign on the fifth floor of the courthouse at 60 Centre Street; the court currently sits on the fourth floor, 2022. Courtesy of the author.

In remarking upon the nature, scope, and significance of Appellate Term jurisprudence, Mr. Werner said:

> *Just as Small Claims Court, Housing Court, Civil Court, Summons Parts and the Criminal Court are inextricably intertwined with the social dynamic of our City, so too is the Appellate Term to which appeals from all of those trial courts are taken. Few courts have such an important, direct impact on the lives of so many of our citizens as do all of these trial courts of limited jurisdiction and as does the Appellate Term which is generally a court of "last appellate resort" in appeals from those trial courts. Continuity and predictability are essential to promoting the rule of law, and the Appellate Term, with its experienced judges and staff, has a very long, impressive tradition of providing exactly that: continuity and predictability in maintaining the rule of law in our City.*[26]

Significantly, the Appellate Term continues to play a critical role in establishing important jurisprudence in criminal matters. The New York Court of Appeals recently affirmed the Appellate Term, First Department's determination in *People v. Torres* on a *prima facie* challenge to the constitutionality of Administrative Code of the City of New York § 19-190, known as the "Right of Way Law."[27] The City enacted the administrative statute in 2014 as a component of its "Vision Zero" initiative to reduce pedestrian injuries and fatalities. The challenged statutory provision imposed misdemeanor criminal penalties upon drivers who do not exercise due care, by failing to yield to pedestrians and bicyclists, striking them, and causing physical injuries.[28] The Appellate Term held that the statute was constitutional, and rejected the argument that it violated due process because it criminalized an act committed without "due care," a civil negligence standard, without requiring a traditional category of criminal *mens rea*.[29]

The Appellate Terms' determinations guide lower local courts on a wide variety of issues. An Acting Supreme Court Justice who previously served in the New York City Housing Court, Criminal Court, Small Claims Court, and Civil Court—and remains an avid reader of Appellate Term decisions—recalls that the Appellate Terms for the First and Second Departments reviewed his decisions: "All my judicial colleagues and I relied on the Appellate Terms' authoritative

The courtroom of the Appellate Term, First Department set up for safety protocols during COVID-19, 2022. Courtesy of the author.

jurisprudence as our primary source to learn critical areas of law that were rarely discussed in other appellate forums."[30]

An Insider Perspective

As far as time commitment and workload, the Appellate Term, First Department meets for ten terms from September through June on the first two Mondays of the month, with adjustments for holidays. The court has its own appellate courtroom equipped with a three-judge bench inside the building of the New York County Supreme Court at 60 Centre Street. On several occasions, the court has heard arguments also in the Bronx County Supreme Court. Mr. Frank Polizano, who is the Chief Clerk of the Appellate Term, First Department, says that before the pandemic, the court heard approximately 30 to 40 appeals per month. However, during the pandemic, and the resulting stay on evictions, the number of appeals has decreased to approximately 20 to 30 per month.[31]

Mr. Paul Kenny, the Chief Clerk of the Appellate Term, Second Department, explains that the Appellate Term for the 2nd, 11th and 13th Judicial Districts sits most of the time in a private building at 141 Livingston Street in Brooklyn.[32] The law department and clerk's office for both courts are also located there. Twice a year the court sits in Queens, and once a year in Staten Island. Prior to the pandemic, the court heard roughly 20 or more appeals per calendar twice a month. The Appellate Term for the 9th and 10th Judicial Districts alternates its sittings generally between three locations: Mineola, White Plains, and Central Islip. This court, which too sits twice a month, used to hear approximately 15 appeals per calendar before the pandemic. "After a brief decrease in filings due to COVID-19, the number of appeals per sitting is almost back to pre-pandemic levels in both courts," states Mr. Kenny, who spends a good deal of his time assessing and implementing ways to increase efficiency of court operations and ensure issuance of timely decisions, in a logistically complex and challenging jurisdiction that serves a diverse population of more than 10 million people and is presented with a wide spectrum of legal issues.[33]

One former Presiding Justice of the Appellate Term, currently sitting on the Appellate Division, affectionately calls the Appellate Term the "younger sibling" of the Appellate Division, because the two

intermediate appellate courts have similar operating procedures.[34] In preparation for a sitting, the justices are expected to review the appellate records and briefs submitted by the parties and are provided with memoranda of law and proposed decisions drafted by the court's law department. The memoranda of law are extensive confidential reports detailing the procedural history of the case, analyzing in-depth all the legal issues raised, and making a recommendation to the panel on the resolution of the appeal.

After hearing oral argument, the justices retire to discuss each case and craft a decision, focusing on reaching a fair and correct determination. In this phase, it is particularly useful to be collegial and collaborative, because the court's goal is to create a consensus for a unanimous decision which will ensure the strength of the decision as precedent. Unlike trial judges, who make decisions on their own, an appellate judge has to persuade fellow panel members, as one's opinion is only as good as it is shared by the panel—and newly appointed justices need to adjust to the role. If a justice feels strongly about an issue, that justice may write a concurrence with a more nuanced approach or a dissent.[35]

Sitting on the Appellate Term can lend a new perspective to those Supreme Court justices who "wear two hats" by maintaining an active trial court calendar. For the former Presiding Justice, sitting on the Appellate Term made him more "vigilant in ensuring that an accurate record was made for a potential appeal," with regard to noting objections, marking exhibits, and ensuring sufficiency of the papers accompanying motion practice.[36] In other words, experience on the Appellate Term's bench may help a trial judge recognize and avoid errors that could constitute the basis for an appeal from, and potentially a reversal of, that judge's own Supreme Court decisions. Some Appellate Term justices wearing these two hats elect to adjust or streamline their Supreme Court caseloads to make time to prepare for the appeals.

At the same time, trial judges learn the constraints of deciding appeals. For example, they can no longer evaluate the credibility of witness testimony, but have to defer to the determination made by the judge who presided over the proceeding—a change in prospective much like "changing the lens of a camera when one is looking at the papers in the record, because of the different roles and responsibilities."[37]

Parting Thoughts

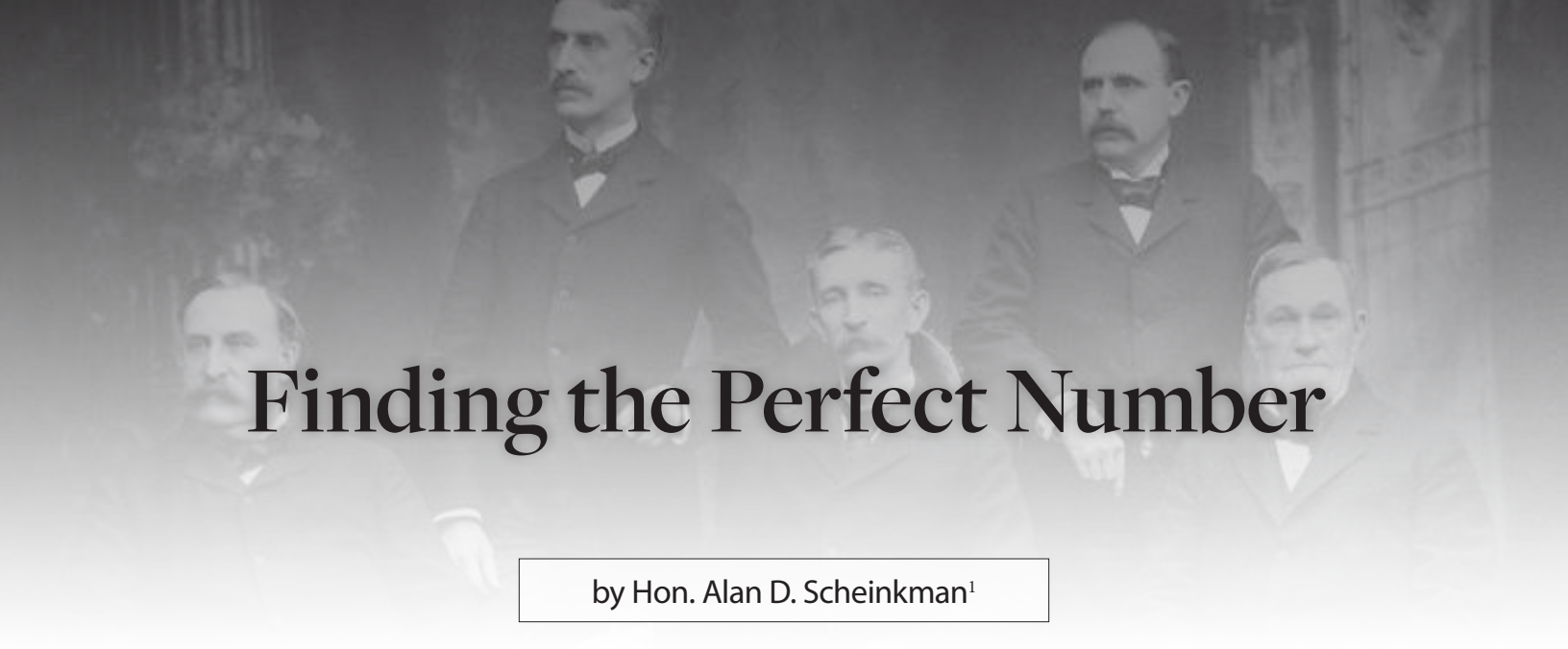
For most New Yorkers, the State's lower-level courts will be their initial and perhaps only interaction with the judicial system. It is through the windows of these tribunals that they view the courts. While some disputes litigated in local courts are less complicated than matters filed in Supreme Court, those disputes undoubtedly have a direct impact on the lives of litigants, many of whom are *pro se*, such as a tenant defending against an eviction proceeding, a worker suing for unpaid wages in Small Claims court, or a driver defending against a simplified traffic information. The Appellate Term is usually the court of last resort for these litigants, because of the selectivity of the appellate process and due to the litigants' limited resources.

The history of the Appellate Term in both Departments sheds light on its importance and purpose as does the testimony of those whose contributions, past and present, have been essential to its proper functioning and development. The court's evolving jurisprudence is, in many respects, a reflection of societal behaviors and values that shape everyday life in the most populous city of the United States and its close suburban and rural environments. Its "appeal" to both lawyers and non-lawyers makes the Appellate Term a widely cherished judicial institution.

ENDNOTES

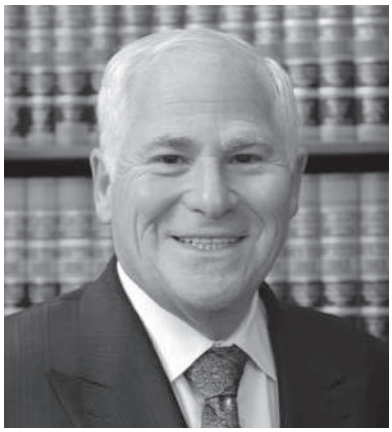
1. Author's interview with Hon. Martin Shulman of November 2, 2021.
2. *See* N.Y. Const. of 1894, art. VI, § 2, *available at* https://www.nycourts.gov/history/legal-history-new-york/documents/publications_1894-ny-constitution.pdf.
3. *See id.* art. VI, § 5.
4. *Katz v. Waneta Realty Co.*, 191 A.D. 509, 509–10 (1st Dept. 1920).
5. *See, e.g., Lynch v. Sauer,* 16 Misc. 362 (App. Term 1st Dept. 1896); *Burkhard v. Smith*, 19 Misc. 31 (App. Term 1st Dept. 1896). Both cases dealt with statutory interpretation of the powers of the court.
6. *See* History of the Appellate Term, Second Department, https://www.nycourts.gov/courts/ad2/pdf/Term/WEBSITE%202013%20History%20of%20the%20AT2.pdf.
7. *Id.*
8. *Id.*
9. The Fifth New York State Constitution (1939) is available at https://history.nycourts.gov/wp-content/uploads/2019/01/Publications_1938-NY-Constitution-compressed.pdf.
10. *See* N.Y. Const. art. VI, § 8(d); 22 N.Y.C.R.R. § 640.1.
11. *See* N.Y. Crim. Proc. §§ 450.90, 460.20, & 460.30; C.P.L.R. § 5703(a).
12. *See* 22 N.Y.C.R.R. § 730.1(a)(1).
13. *See* 22 N.Y.C.R.R. § 730.1(b)(1) & (2).
14. *See* 22 N.Y.C.R.R. § 730.1(c)(1).
15. The Appellate Term for the Ninth and Tenth Judicial Districts "shall have jurisdiction to hear and determine all appeals authorized by law to be taken to the County Court or to the Appellate Division from any court in any county within the Ninth Judicial District or the Tenth Judicial District other than appeals from the Supreme Court, the Surrogate's Court, the Family Court or criminal appeals from the County Court." 22 N.Y.C.R.R. § 730.1(d)(1).
16. The recently revised Rules of the Appellate Terms in the Second Department, effective January 1, 2020, are available at https://www.nycourts.gov/courts/ad2/pdf/Term/Appellate_Term_Rules_2020.pdf.
17. *See* N.Y. Const. art. VI, § 8(a).
18. *See* 22 N.Y.C.R.R. § 730.1(e).
19. *See* N.Y. Const. art. VI, §§ 8(a) & (c).
20. New York Supreme Court, Appellate Term-First Department, Clerk's Manual 2 (2d ed. 1977). In more recent times, Justices Helen E. Freedman (Ret.), Lizabeth González, Martin Shulman and John R. Higgitt were appointed to the Appellate Division, First Department after serving on the Appellate Term, and so was Justice Luis A. Gonzalez (Ret.), who went on to become Presiding Justice of the Appellate Division. Similarly, the Hon. Angela G. Iannacci, now at the Appellate Division, Second Department, previously served as Acting Presiding Justice of the Appellate Term for the 9th and 10th Judicial Districts.
21. *See* C.P.L.R. 5501(d).
22. *See* City Civ. Ct. Act. § 1702(d); *see generally* Uniform District Court Act, Uniform County Court Act, and Uniform Justice Court Act.
23. Jane Wester, "Voters Approve Raised Cap for NYC Civil Court Claims, But Lawyers Warn More Judges Will Be Needed," N.Y.L.J., Nov. 4, 2021 (online edition), *available at* https://www.law.com/newyorklawjournal/2021/11/03/voters-approve-raised-cap-for-nyc-civil-court-claims-but-lawyers-warn-more-judges-will-be-needed/.
24. New York State Bar Association, *New York's Appellate Terms, A Manual for Practitioners* 14 (2014), https://archive.nysba.org/WorkArea/DownloadAsset.aspx?id=51233.
25. *See, e.g., Matter of Regina Metro. Co., LLC v. N.Y. Div. of Hous. & Cmty. Renewal*, 35 N.Y.3d 332 (2020).
26. Author's interview with Hon. John F. Werner of November 8, 2021.
27. *See People v. Torres*, 37 N.Y.3d 256, 269 (2021).
28. *See* Admin. Code of City of N.Y. § 19-190(b) ("[A]ny driver of a motor vehicle … whose motor vehicle causes contact with a pedestrian or person riding a bicycle and thereby causes physical injury, shall be guilty of a misdemeanor, which shall be punishable by a fine of not more than two hundred fifty dollars, or imprisonment for not more than thirty days or both such fine and imprisonment…."); *People v. Torres*, 65 Misc. 3d 19 (App. Term 1st Dept. 2019).
29. *See Torres*, 65 Misc. 3d at 21.
30. Author's interview with Hon. Gerald Lebovits of November 9, 2021.
31. Author's interview with Hon. Frank Polizano of November 10, 2021.
32. During the pandemic the court has been hearing appeals in the Kings County courthouse at 320 Jay Street in Brooklyn due to health and safety concerns related to COVID-19, but it will probably transfer back to its original location.
33. Author's interview with Hon. Paul Kenny of November 8, 2021.
34. Author's interview with Hon. Martin Shulman of November 2, 2021.
35. *Id.*
36. *Id.*
37. *Id.*

The bench of the Appellate Division, Second Department in 1896 (above) and more recently in 2018, when the author of this piece served as Presiding Justice (below). Courtesy of the Appellate Division, Second Department.



Finding the Perfect Number

by Hon. Alan D. Scheinkman[1]



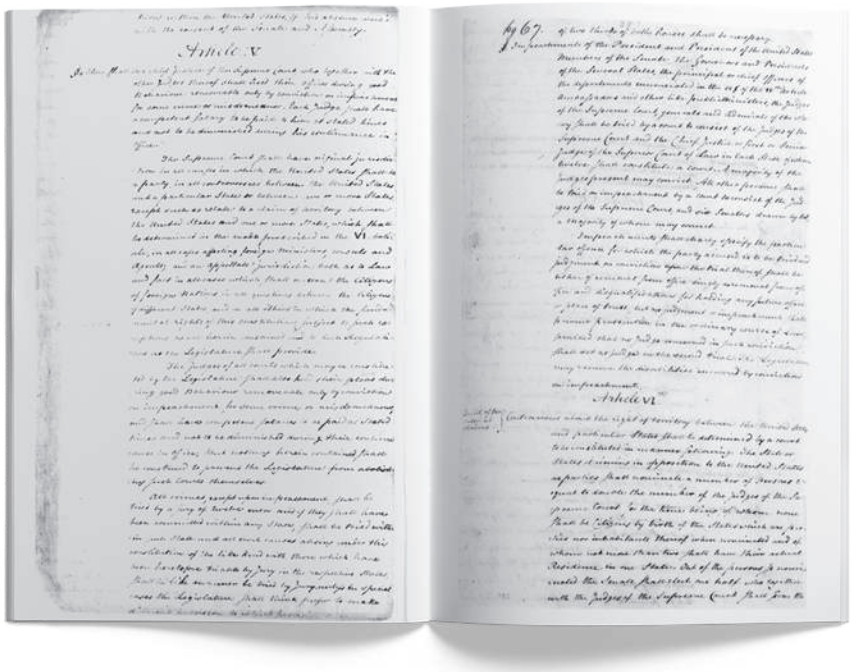
Alan D. Scheinkman served from January 1, 2018 to December 31, 2020 as Presiding Justice of the Appellate Division, Second Judicial Department. He was a member of the Administrative Board of the New York State Courts and served by designation on the New York State Court of Appeals. He is retired from judicial service and is affiliated with NAM as an arbitrator and mediator. He was elected to the Supreme Court, Ninth Judicial District in November, 2006. From June 2009 through December 2017, he was the Administrative Judge of the Ninth Judicial District and the Presiding Justice of the Commercial Division, Westchester County. He also served an Associate Justice of the Appellate Term, Ninth and Tenth Judicial Districts. He obtained his law degree in 1975 from St. John's University School of Law; from 1975 to 1977, he was law clerk to Hon. Matthew J. Jasen, Associate Judge, New York Court of Appeals.

The prospect, announced in March 2019,[2] that the Appellate Division, First Department, would sit in panels of four justices, rather than the customary five, sparked, or perhaps re-kindled, a discussion about the ideal number of judges to sit collectively to hear individual appeals. I say re-kindled because the Second Department has been sitting mainly in panels of four since 1978,[3] and while a 1990 task force report encouraged the Second Department to return to panels of five as soon as possible,[4] nearly 30 years have elapsed since then, and the *status quo* has gained at least grudging acceptance. That the First Department would join the Second in sitting in fours was not welcomed by some prominent bar leaders and leading appellate practitioners. Some cited the prospect of having an appeal re-argued because of a two-two tie;[5] others thought that a panel of four was inherently unfair to litigants since it is harder, if not impossible, in civil cases to gain the right to appeal a civil case to the Court of Appeals on the basis of a two-justice dissent.[6] So when I was asked to address the topic of panel numerosity, I jumped at the chance.

After having researched how we came to the panel numbers we have, I conclude that there is no ideal number. Our current system, both in the federal and New York State courts, is predicated upon compromises wrought in years past to address the problems of those long-ago times. But while the numerical composition of the United States Supreme Court once fluctuated because of partisan political interests, the New York State experience reflects that, for the most part, our predecessors debated and acted primarily, if not exclusively, for the betterment of the judicial system and the public interest.

There is no "right" number for an appellate bench. There is, instead, a balance to be struck between a court large enough to reflect diversity of experience and background and one so large as to be unwieldy. The minimum number of appellate judges is, of course, one. There are a surprising number of one-judge reviews, though some are not technically defined as appeals. Outside of the First and Second Departments, an appeal from a city, town, or village court is heard by a single county court judge.[7] In the federal system, initial review of decisions by a bankruptcy judge or magistrate judge is, in most instances, to the district judge,[8] a

The State's constitutional convention of 1867, where many proposals were advanced to increase the efficiency of the court system. The Miriam and Ira D. Wallach Division of Art Prints and Photographs: Figure Collection, The New York Public Library.



Alexander Hamilton's draft constitution, presented to the Constitutional Convention in 1787, concerning the judiciary. Library of Congress, Manuscript Division, Alexander Hamilton Papers, mss24612, box 23; reel 21.

panel of one. Recently, the State Legislature, as part of its changes to discovery in criminal cases, created a new procedure for expedited review of determinations granting or denying protective orders, to be conducted by an individual justice of the intermediate appellate court. On the other hand, the federal courts of appeal may sit *en banc* to rehear appeals previously decided by a three-judge panel—or, in rare cases, initially.[9] Since all of the judges in active service participate, and in some instances, senior judges may do so as well, the number of judges sitting *en banc* can be substantial, certainly approaching, if not exceeding, a dozen or more—although it is worth noting that in the Ninth Circuit, with its complement of 29 active judges, concerns about unwieldiness mean that *en banc* review involves only 11 judges of the full court.

During the Constitutional Convention, Alexander Hamilton, of Broadway fame, proposed that the United States Supreme Court have 12 members. The number was tied into his proposal to have impeachment trials of federal officials conducted by a tribunal consisting of the United States Supreme Court Justices and the Chief Judges of the States.[10] With 13 State Chief Judges, 12 Supreme Court Justices would mostly balance them out.

The Constitution ended up not specifying a number of Supreme Court Justices; under the Judiciary Act of 1789, it actually began with six Justices. This number arose from the fact that the country was divided into three judicial circuits, each to be visited twice a year by two Supreme Court Justices—hence, six justices,[11] just enough so that each justice would only have to cover one circuit. However, in 1801, the Federalists, having lost the election of 1800 to Thomas Jefferson, used their lame-duck majority to eliminate circuit-riding and to reduce the Supreme Court to five, upon the next vacancy, thus seeking to deny Jefferson an appointment. While the story of midnight judges is well known, leading eventually to *Marbury v. Madison*,[12] the attempted shrinking of the Supreme Court is less so. Perhaps this is because the Jeffersonians promptly reversed it, restoring the Supreme Court back to six. (For good measure, the Jeffersonians also canceled the 1802 term of the

THEIR NEW COURT OPENED

Justices of the Appellate Division of the Supreme Bench at Work.

LAWYERS PLEASED WITH THE GOWNS

Speeches Were Delivered by Joseph H. Choate, William Allen Butler, Elihu Root, and Justice Van Brunt.

The Appellate Division of the First Department of the Supreme Court sat yesterday for the first time in the temporary courtroom in the Constable Building, at Eighteenth Street and Fifth Avenue.

The Justices, robed in new silk gowns, entered the courtroom at 8 o'clock precisely. Justice Charles H. Van Brunt took the middle seat on the bench, Justices Barrett and Patterson taking the seats on his right, and Justices Williams and Morgan J. O'Brien the seats on his left. As the Justices entered the court all persons present stood up.

The large courtroom was well filled with members of the bar. Some women and a few of the general public also occupied seats. At the counsel table sat Joseph H. Choate, who was President of the Constitutional Convention of 1894, which established the new tribunal; Elihu Root, the Chairman of the Judiciary Committee of the convention, and William Allen Butler.

After the presiding Justice and his associates had bowed to those present, Mr. Choate arose and said:

In behalf of my brethren of the bar, I congratulate your Honors on this event in the history of the judiciary of the city and county. This is a great event in the history of the courts. I hope that the good-will that has always existed between the bench and the bar will continue.

It has been suggested that I, as a member of the Constitutional Convention that created the new system of the courts, should make a few remarks about the work and the creation of this court. I will leave that, however, to my learned brother, Elihu Root, Chairman of the Judiciary Committee of the Constitutional Convention. The chief thing accomplished under the new system was the absorbing of all the higher courts of the city and county into this one Appellate Division.

The New York Times, January 7, 1896.
Copyright The New York Times.

Court, in order to delay the argument of *Marbury v. Madison*.)[13]

The number of Supreme Court Justices was increased to seven in 1807, because of the growth of circuit-riding duties, and then increased to nine in 1837.[14] A tenth Justice was added in 1863 in the midst of the Civil War. However, Congress reduced the number of seats to seven in 1866 in order to prevent President Andrew Johnson from appointing justices who might share his views on the constitutionality of reconstruction legislation.[15] This was to be accomplished by not replacing the next three justices to retire. Within two years, two justices did retire, bringing the number of justices to eight. The Court was returned to nine members in 1869 and it has stayed at that number ever since.[16]

In 1937, President Franklin D. Roosevelt proposed what became known as a "court-packing plan," out of frustration from the treatment given to New Deal legislation by the Court. He sought legislation permitting him to appoint one new justice for every sitting justice over the age of 70, up to a maximum of 15.[17] In opposition to this legislation, some members of the Court expressed the concern that if "you make the Court a convention instead of a small body of experts", confusion would result which would cloud the work of the Court.[18] The Roosevelt plan was not adopted. And while the number of Justices has stayed at nine for 150 years, recent political history shows that the issue is not entirely a dead letter. In the past year or so, some Democrats, after Merrick Garland's nomination was not considered and after President Trump's appointments of Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett have urged that the number of Justices be increased in order to neutralize the effect of these developments.[19] In light of the public discussions on the proper role and size of the Supreme Court, President Biden appointed a study commission. In its final report, released in December 2021, the Presidential Commission on the Supreme Court discussed the history of the Court's composition and evaluated the reviewed the pros and cons of various proposals for change, such as an increase in the number of Justices, the adaption of a super-majority voting requirement, the imposition of term limits, and the use of panels and rotations of Justices. While the report makes for interesting reading, the

To protect New Deal legislation, Franklin Delano Roosevelt proposed adding additional justices to the U.S. Supreme Court. This cartoon depicts Roosevelt as six additional justices on the court, 1937.
Courtesy of Harvard Law Today.

Commission did not make any recommendations as to whether any changes should be made.[20] No proposals for change have thus far been advanced by President Biden and none have made it through either the House or the Senate.

The New York Court of Appeals came into being under the Constitution of 1846. Prior to the creation of the Court of Appeals, there was a Court for the Correction of Errors, which was modeled on the traditional English House of Lords. This Court consisted of the Lieutenant Governor and the entire State Senate, together with the Chancellor and the Justices of the Supreme Court. This was a rather large group (since there were 33 just from the Senate), made up mostly of non-lawyers.[21] Unsurprisingly, it also was disposed to uphold statutes against constitutional challenges. In its 70 years in existence, it declared only three statutes unconstitutional.[22] Unsurprisingly, commentators concluded that a court which included the entirety of one house of the Legislature, with only a small minority of members drawn from the judiciary, "was not the best form of a high judicial tribunal under our system of government and that the semipolitical and semijudicial tribunal so constituted could not be expected to work out the best results in the administration of justice."[23]

The new Court of Appeals consisted of eight judges, four elected state-wide for eight-year terms and the four Supreme Court Justices who had the shortest time left to serve on their terms. Six judges were required for a quorum and five votes were required for a decision. The Chief Judge was one of the state-wide elected judges—specifically, the one who had the shortest time left to serve.[24] So it is seen that the eight judges on the Court was derived from balancing the four state-wide permanent judges with the four short-term supreme court justices. While it was assumed that judges with the most judicial experience would be better qualified than others to sit on the Court of Appeals, it was also provided that one of the short-term judges had to leave every year.[25]

The new Court of Appeals started off with 1,500 cases and was four years behind by 1865.[26] By the time of the Convention of 1867, it was apparent that the 1846 framework was not working. The Court was backlogged. The constant turnover of judges deprived the Court of the elements of permanence and stability necessary to a court of last resort. The constant changes also made its decisions uncertain and conflicting. It was said that, in practice, it took almost six months for a Supreme Court Justice who just joined the Court of Appeals to get fully up to speed, but just as this efficiency was achieved, these Supreme Court Justices were obliged to retire in favor of new members recruited from the Supreme Court. A total of 123 judges cycled through the Court of Appeals within the first 23 years of its existence.[27]

To address these problems, a number of proposals were advanced: One suggestion was a court of nine members, another was for a court of seven, and yet

Interior of the Richardson Courtroom, where the Court of Appeals sat in the State Capitol, c. 1900.
New York State Archives, New York State. Education Dept. Division of Visual Instruction.
Instructional lantern slides, ca. 1856-1939. Series A3045-78, No. D47 AlS5.

another was for a court of ten judges. What emerged is what we have today: a Court of Appeals consisting of a Chief Judge and six associate judges.[28]

But this was not entirely the end of the matter. So that the reconstituted Court could start off with a clean slate, the four permanent, elected members of the old Court of Appeals, plus a fifth appointed by the Governor, were designated to serve as a Commission on Appeals to complete the work left behind by the old Court. It took them five years to do it, finally going out of business in 1875.[29] Thus, in effect, we had two highest courts in New York for a period of five years, one consisting of seven judges and another consisting of five judges, for a total of 12.

By 1890, there were again serious backlogs in the Court of Appeals, and measures were considered as to how best to deal with them. In 1888, a second division of the Court of Appeals was created, consisting of Supreme Court Justices designated by the Governor. The Second Division, consisting of seven judges (with one designated by the colleagues as chief judge), was in operation from 1889 to 1892, when it finished its allotted work.[30] During its tenure, the Second Division received and disposed of 1,593 cases.[31]

During this time, there were continuing efforts to address appellate structure in New York. In 1890, the Legislature created a special Commission to focus on reforms to the judiciary article and which was specifically limited to that purpose. While the Commission's recommendations were not wholly adopted, they did have a remarkable impact on later developments.

The Commission found that there were two functions of an appellate court: (a) to apply common and statutory law to a particular case and correct errors of the lower courts, and (b) to decide new questions of law and lay down rules to guide the court in future cases. Operating on the theory that the great majority of litigation should not proceed past an intermediate appellate court, the Commission opposed the creation of divisions or commissions of the Court of Appeals. Instead, it recommended limiting the jurisdiction of the Court of Appeals, a measure which would constrain the number of appeals and the growth of backlogs. It also urged enlarging the composition of the General Terms, which then served as an intermediate appellate court, from panels of three to panels of five.[32] With the Commission envisioning the General Terms as the final stopping point for most cases, it sought to assure that appeals to the General Term would receive full consideration from a sufficient number of justices.

The Legislature did not favor this approach. In 1890 and 1891, it adopted a resolution that called for a Court of Appeals to consist of a Chief Judge and 14 associate judges,[33] with the existing Chief Judge and associates to remain as well until their terms expired. This did not pass.

Another State Constitutional Convention was held in 1894. The leader in the Judiciary Committee of the Convention and of the Convention as a whole was Elihu Root. Root was a leading lawyer of the era; his law practice evolved into the Winthrop Stimson law firm. Root had a distinguished public career, serving variously as U.S. Attorney for the Southern District of New York, as Secretary of War, Secretary of State, and as United States Senator. He became the President of the Carnegie Endowment for International Peace in 1910 and was awarded the Nobel Peace Prize in 1912.[34]

With skill, finesse, and tact, Root guided the reforms to the Court of Appeals and the birth of the Appellate Division, overcoming objections to what seemed to some to be radical changes he was proposing for New York's appellate courts.[35] Because of the history of backlogs, there was a proposal to have a Court of Appeals of 14 judges, with two divisions of seven sitting simultaneously. Root successfully argued that these proposals would destroy the unity of the Court and prevent it from being the expounder of a consistent and harmonious system of law.[36] Instead of having the Court of Appeals sit in divisions or with a supplemental commission, the 1894 Convention decided to control the docket of the Court of Appeals by limiting its jurisdiction, while simultaneously augmenting the provisions for an intermediate appellate court.[37]

The issue of the numerical composition of the Court of Appeals was revisited in 1899 by the adoption of a constitutional amendment which permits the Governor, upon certification of the Court of Appeals that it is unable to hear and dispose of its cases with reasonable speed, to designate up to four Supreme Court Justices to sit as associate judges of the Court of Appeals until the Court certifies that these additional

judges are no longer needed.[38] This provision continues today [39] but has not been used since 1921.[40] When it was used, shortly after it was adopted, no more than three additional judges were ever appointed, though the Court fell slowly behind it in its work. It may be that the Court perceived it could dispose of as much business with 10 judges as it could with 11.[41]

With the limitation on the Court of Appeals' jurisdiction came the advent of a strong intermediate appellate court. From New York's first state constitution, Supreme Court Justices acted as both trial judges and as a court of review. By the 1821 Constitution, there was a Chief Justice and two associate justices, and eight circuits with a circuit judge in each. Appeals from the circuit courts went to the Chancellor in equity cases and to the Supreme Court or the Court for the Correction of Errors in other cases.[42] The 1846 Constitution provided for eight General Terms of the Supreme Court, one for each of the eight judicial districts. Each General Term consisted of a presiding justice and two associate justices. Based on the theory that the judges should remain close to the people, the General Term Justices did trial as well as appellate work, including appellate review of their own decisions.

There is no positive evidence as to why the General Term sat in panels of three. One answer could be that the early constitutions provided for only three Supreme Court Justices. Another possible answer is that by 1846 there were 32 Justices for the entire state, then comprising a population of 3 million.[43] Since there were eight General Terms of three justices each, 24 out of the 32 justices (75%) of the Justices sat on the General Term. If panels of four had been chosen, every Justice would have sat on the General Term. Panels of five would have been a numerical impossibility.

The existence of eight intermediate appellate courts, with judges sitting in review of their own decisions, posed "distinct evils" to the administration of justice.[44] In 1869, the Constitution was amended for the purpose of streamlining the intermediate appellate courts. Four Departments were created, each with a General Term consisting of a presiding justice and not more than four associate justices. Justices could do other judicial work, such as serve on the trial courts, but could no longer sit in review of their own decisions. While the number of General Terms was cut in half, sittings of General Term were still required be held in each of the eight judicial districts.[45] Further, Justices of one General Term were permitted to serve on the other three General Terms. Of some interest, a proposal to allow periodic meetings of the four presiding justices to review conflicting procedural decisions did not make its way into the 1869 Constitution.[46] A Fifth Department was created by constitutional amendment in 1881.[47]

In addition to the five Supreme Court General Terms, there were four General Terms with appellate functions in the New York County Court of Common Pleas and three superior city courts, for a total of nine intermediate appellate courts, which had overlapping jurisdiction and often had diverse legal opinions.[48]

The 1894 Constitution attacked this problem by creating a stronger, unified intermediate appellate court, to be called the Appellate Division, as General Term had become a meaningless expression. The Appellate Division was conceived of a single-statewide court, albeit sitting in four geographic departments. The Appellate Division's decisions were to be final in a greater range of cases; its members were to have fixed terms; to our present purpose, it was to be "large enough to insure full discussion and the correction of individual opinions by the process of reaching a consensus of opinion"; and, lastly, the members of the Appellate Division were to be relieved of all other judicial duties so that "there shall be the fullest opportunity for consultation and deliberation" undisturbed by the demands of circuit and special term assignments, and so no litigant shall be obligated to argue his appeal before a court of which the judge from whom he appeals is a member".[49] As a result of these changes, the Appellate Division would (some hoped) be less frequently reversed than the General Term had been and there would be fewer appeals to the Court of Appeals.[50] But the more Justices taken out of the Supreme Court for Appellate Division work, which would now be full-time, fewer would be left to handle the trial court work.[51]

The 1894 Constitution adopted Root's design for the Appellate Division to be a unit, with not more than five justices to sit on any one case in a given Department. It was the Appellate Division sitting in a given department, not an independent Appellate

Division in each Department, just as there is one Supreme Court sitting in many counties.[52]

Similarly, the 1894 Constitution accepted Root's proposal of having seven justices in the First Department and five in the rest. As for the five, that was an increase over the three in the General Term and Root proposed it on the theory that five would have to consult. He said that "though five judges will not do any more work than three, they will do better work and better-respected work".[53] Seven were warranted in the First due to the press of business there. Root explained:

> *The idea is, that the court sitting in the first department shall be just the same kind of a court, with just the same number as the courts in each other department. But in the first department, the court is obliged to sit continuously from the first of October until the end of June, for nine solid months, and it is not within human power to do effective judicial work sitting all that time. The object of the addition of two justices is that they may serve in relays, relieving each other, and having all the time a court of the same size, an expedient, which we thought unobjectionable in a court, the prime object of which was to pass upon the particular rights of litigants, although very objectionable in a court which was designed to maintain a harmonious and consistent system of law.*[54]

As is evident, it was not intended that the seven judges in the First Department sit together as one panel; rather the extra two judges were provided in order to enable the court to handle its docket, sitting in panels of five. While there appears to have been little discussion about it, the quorum requirement of four was designed to allow for a justice to be absent, whether due to illness or travel or other cause. And while provision was made for a temporary appointment in case of illness or absence, the quorum of four was protection against the prospect—particularly likely to happen in the Second, Third and Fourth Departments, where there were only five justices to begin with—of a sudden and unanticipated illness or absence on the part of one justice.

There were some who thought the prohibition against Appellate Division justices doing trial court work was unwise because "it was very doubtful whether four general terms of five justices each would find enough work to do if they were limited to appellate work."[55] That concern has certainly proven to be ill-founded. There also was a perceived danger that a court devoted only to hearing appeals would get out of touch with trial work and become theoretical. These concerns about appellate judges becoming theorists were addressed by pointing to the five-year term, after which judges would return to the trial bench.[56]

Further provision was made for the transfer of cases from one Appellate Division to another.[57] This provision continues today. A majority of the presiding justices, at a meeting called by the presiding justice of the department in arrears, may transfer appeals from one department to another.[58] The Constitution also permits the temporary assignment of a justice from his or her home department to another department, upon the agreement of the presiding justices of the affected departments.[59]

Following the 1984 Convention, a couple of changes of significance occurred. In 1899, a constitutional amendment gave the Governor the ability to designate, upon a certificate of need, additional justices to the Appellate Division.[60] While there had been a provision for such appointments in the case of absence or inability, the 1899 amendment permitted additional justices due to calendar conditions. A 1905 amendment allowed Appellate Division justices to be used as trial justices outside of their home Department when their services were needed.[61] In 1925, the composition of the Second Department was enlarged to seven, to match that of the First Department; the number of permanent positions in the Third and Fourth Departments stayed at five.[62]

These provisions have remained essentially unchanged ever since. The First Department was originally the department with the heaviest caseload. According to a report from the Judiciary Committee to the 1921 Constitutional Convention, in 1920, the First Department had decided more than 1,500 cases, and 840 motions; the other Departments had caseloads of less than one-half of that. The 1921 Constitutional Convention recommended a provision that would

Portrait of Elihu Root, who served as a leader of the Judiciary Committee of the 1894 Constitutional Convention.
Library of Congress, Prints & Photographs Division, photograph by Harris & Ewing, LC-H25-6657-B.

have allowed, but not required the First Department to sit in two parts.[63] This was not enacted.

So that is how we got here. From this history, some conclusions can be drawn. The Court of Appeals was set at seven, as a reduction from the original eight, and while there have been efforts to expand the Court's membership, there never was any interest in having more than seven sit at one time. The Appellate Division's five was set as an increase above the General Term's three, precisely to provide for more collaboration. In 1973, the Temporary Commission on the State Court System suggested that the presiding justices have the authority to use three-judge panels in designated cases.[64] On the other hand, a few years later, in 1981, a study advised against reduction in Appellate Division panels to three out of concerns with regard to structure, stability and public perception.[65]

The 1899 constitutional amendment allowing for designation of "additional" justices where necessary to address calendar conditions has proven to be an essential lifeline for both the First and Second Departments. Between 1962 and 1967, the caseload in the Second Department grew larger than that of the First Department. In 1971, the First Department had four additional justices, the Second Department had five, and the Third and Fourth Departments had three each.[66] Today, in the First and Second Departments there are more "additional justices" than constitutional justices. The Second Department, with a constitutional compliment of seven judges, now has 15 authorized additional justice positions, while the First Department has 13.

This is the direct result of the caseload. The caseload that was so crushing 100 years ago—1,500 cases and 840 motions—is greatly exceeded by today's First Department, which in 2018 decided 2,641 appeals[67] and 5,638 motions.[68] And this is topped by the Second Department, which in 2018 decided 3,755 appeals[69] and 10,383 motions. The Third Department decided 1,457 appeals[70] and 6,231 motions, and the Fourth Department decided 1,378 appeals[71] and 5,138 motions. These figures exclude, of course, the bar admission and attorney disciplinary matters that the Appellate Division handles each year.

In 1973, the Temporary Commission on the New York State Court System criticized the Presiding Justices for requesting additional justices and the Governor for appointing them. "By involving the gubernatorial authority to make temporary appointments in the event of overwork, the appellate divisions have preempted the constitutionally permissible redistribution of appellate workload by redrawing departmental boundaries."[72] This criticism seems unfair. Reform of the New York State court system, including restructuring of the Appellate Division, has been studied and studied and studied for decades, with little forward movement. It would be irresponsible for court leaders not to have used a readily available constitutional relief valve to deal with crushing calendars while still awaiting permanent reform.

In 1982, some thought that a reduction in panel size in the Appellate Division would make for a "less harried pace of justice."[73] I would submit that even sitting in panels of four we have a harried pace of justice; if the Second Department were to return to sitting in panels of five, the existing problems of delay would only get worse.

I would now turn to the issue that members of the Bar raised in response to the First Department's announcement that it may sit in panels of four, in particular that litigants would be deprived of the ability to appeal their cases to the Court of Appeals on the basis of a double dissent. The two-judge dissent rule applies only in civil cases. In criminal cases, appeal is by permission of either an Appellate Division justice or Court of Appeals judge[74] and it is well known that if there is a dissent in the Appellate Division, the party seeking to appeal is likely to seek leave from the Appellate Division dissenter.

The requirement for a double dissent was instituted in 1985; prior to that, a single justice dissent would suffice.[75] Moreover, a double dissent triggers an appeal as of right only in cases involving final determinations.[76] Thus, if three Appellate Division justices voted to deny summary judgment, and two dissent to grant summary judgment, the two-justice dissent does not result in an appeal as of right.

Dissents in the Appellate Division are relatively rare. In 2018, with the First Department deciding 2,641 appeals, there were, by our somewhat rough calculations,[77] some 16 single dissents and 16 double dissents. Three of the single dissents were in criminal cases and two of the double dissents were in criminal cases. Thus, assuming that the First Department sat

in fours, and assuming that one of the dissenters was excluded from the panel, 14 cases would be affected at most (assuming that all of these cases were final determinations). In the Second Department, in 2018, there were 26 single dissents and only four double dissents. But of the 26 single dissents, 10 were in criminal cases and one of the double dissents was in a criminal case. Since it is obvious that one can't have a two-judge dissent unless there was at least one dissenter to begin with, and assuming that all of the one-judge dissents would have been two-judge dissents if a fifth judge had been added, only 16 cases could possibly be deprived of the right to appeal to the Court of Appeals out of 2,763 civil appeals. The Third Department had 19 single dissents and 15 double dissents. Five of the single dissents were in criminal cases; three of the double dissents were in criminal cases. Thus, the maximum number of appeals of right triggered in the Third Department was 12, out of 925 civil cases. In the Fourth Department, there were nine single dissents and 25 double dissents. One of the single dissents and 10 of the double dissents were in criminal cases. The maximum number of appeals of right triggered by a double dissent in the Fourth Department was 15 out of 841 civil cases.

No litigant or lawyer knows in advance of an appeal argument whether the court will divide and, if so, by one judge or two. The possibility of a fifth judge being brought in to break a 2-2 tie always exists. The Second Department long had a rule (and now we have a uniform Appellate Division rule) pursuant to which counsel are deemed to have consented to a fifth justice being vouched in, absent objection stated at the time of argument or submission.[78] Scheduling a further or second argument in such cases is not strictly necessary since, in this modern age in which oral arguments are live-streamed and video-recorded, the additional justice will have access to the video of the oral argument in addition to the briefs and record. Of course, if the fifth justice has questions, an oral argument can be scheduled and obviously counsel would doubtless prefer to have argument before a fifth judge if they knew that there was a bench split.

In sum, the concern that panels of four prejudice the opportunity for an appeal as of right to the Court of Appeals in civil cases, in my view, pales in comparison to the efficiency achieved by using panels of four so that more cases can be heard. It is obvious that sittings in groups of four can cover more cases than sittings in groups of five. At least in the Second Department, to utilize a panel of five would further slow our calendar, exposing many litigants to additional delay. The additional discernable delay in appellate justice resulting from a shift from four justice to five justice panels seems, at least to me, to be a greater evil that the possible loss of a two-judge dissent and a concomitant civil appeal as of right to the Court of Appeals. Moreover, even in the absence of an appeal as of right, parties and counsel have the right to seek leave to appeal to the Court of Appeals in cases involving final civil judgments. It may be supposed that counsel would prefer to have an absolute right to appeal, as opposed to having to ask for permission. But, given that it only takes two judges of the Court of Appeals to grant leave,[79] the loss of as-of-right appeal may not be significant if the putative appeal could not even gain two votes out of seven to be heard in full.

Of some interest, in the recent discussions, the Bar did not point to the prospect that sitting in fours, rather than fives, deprives the Appellate Division of benefits of a fuller consultation, which, of course, was the reason why Elihu Root designed panels of five, rather than panels of three. The fact is that much of what we do in reviewing the work of the trial courts, while vitally important to the parties and their counsel, does not involve ground-breaking or precedent setting work. In the Appellate Division, we are constrained by the precedent of the United States Supreme Court on federal constitutional issues and by our Court of Appeals on everything. We are generally obliged to apply statutory provisions, either those of Congress, our State Legislature or local enactments. We give deference to administrative determinations. And, while not necessarily required to do so, we in practice give deference to discretionary determinations made by the trial courts and to the facts found by the judges who had the opportunity to see the witnesses first-hand. These considerations may be factors in the high-rate of intracourt agreement.[80] Further, at least in the Second Department, we strive for consensus, recognizing that, unlike a trial court whose decision is signed solely by the one judge, all but a small number of appeals are decided by memorandum decision signed by the clerk on behalf of the

panel and do not necessarily reflect the exact view of each panel member.

On the other hand, given the large number of justices who serve in the First and Second Departments, the prospect does exist that, on occasion, a majority on a particular panel may have a view on a legal question which is a minority view among the bench as a whole. In other words, three, four, or even five judges may agree on a proposition of law, while a majority of the entire Court have a different view. It would seem that the smaller the panel, the greater the risk that this could occur. This circumstance can result in divergent, or seemingly divergent, decisions being rendered by a particular Department. There is merit to a constitutional amendment, such as that proposed by the Association of the Bar of the City of New York, Committee on State Courts of Superior Jurisdiction, to expressly permit formal *en banc* sittings of the Appellate Division. In the Second Department, we have had informal *en banc* consultations for the purpose of unifying our precedent and avoiding intra-court decisional conflicts.

Is there a way to avoid the use of panels of four? While the situation in the First Department may be temporary due to the number of vacancies now existing in that Department,[81] the filling of vacancies alone would not avoid the use of four-judge panels in the Second Department, however. Additional "additional" justices are needed in the Second Department just to grapple with the backlog we already have, long before we could even consider panels of five. Transferring appeals to the Third and Fourth Departments from the Second Department in the early 1990s succeeded in reducing the extant backlog. However, the transfer program, used only this once since it was created some 100 years earlier, created issues with respect to the precedent to be applied by the transferee court and the value of the precedent created by the transferee court.[82] This was not a popular solution at the time and doubtless would not be popular today.

Another interim solution may be to utilize the constitutional provision allowing temporary transfers of justices between Appellate Divisions. While this has seldom been used at the appellate level, trial judges are periodically assigned outside their judicial districts in order to address caseload imbalances.[83] With very busy Departments, this may not be feasible and may not provide enough resources to make a real difference.

Because the backlog has reappeared and the caseload has had an upward trajectory, the issues may be structural in nature. The creation, or shall I say the re-creation, of a Fifth Department may be a solution, but, for it to work, a simultaneous and significant increase in the number of Supreme Court Justices would be required. The reconstituted Second and the new Fifth Department would need more Justices than just the 22 now authorized in the present Second; otherwise, to use a well-worn metaphor, we would just be re-arranging the deck chairs on the Titanic. But if more Justices are designated to sit in the Appellate Division, the corresponding loss to the trial courts must be offset through the creation of additional justices to do the trial work.[84]

Another structural approach would be to find some acceptable way to curtail the civil jurisdiction of the Appellate Division. Unlike with criminal cases, where the right to appeal attaches only to the final judgment, almost any order made on notice in the Supreme Court can be appealed as of right to the Appellate Division. Interlocutory civil appeals are not inherently less meritorious as a whole than appeals from final judgments. We are in an age in which fewer cases are tried, with the result that judicial determinations on interlocutory questions are more important than ever. The ready availability of appellate recourse is sometimes cited as a benefit to practice in the New York Courts. And we should bear in mind that our famed 1896 framers limited the jurisdiction of the Court of Appeals because they had confidence in the availability of robust Appellate Division review. But appellate recourse is not really ready when it takes a year or even two for an appeal to be heard and decided.

While this is painful to contemplate, something has to give someplace as there should be near universal agreement that the current circumstances are not acceptable and to allow the situation to continue to deteriorate will not serve the cause of appellate justice to which we are all committed.

ENDNOTES

1. This article is an adaption of an oral presentation given at the 2019 New York State Appellate Judges Seminar on July 9, 2019. It was subsequently printed in the New York Law Journal and is reprinted with permission from the August 26, 2019 & August 27, 2019 editions of the New York Law Journal © 2020 ALM Media Properties, LLC. All rights reserved. Further duplication without permission is prohibited; contact 877-257-3382 or reprints@alm.com for permission. This adaptation adds citations and updates to the original article.
2. *See* Susan DeSantis, "First Department Introduces Four-Judge Panels, Upsetting NY Bar Associations," NYLJ (March 5, 2019), *available behind paywall at* https://www.law.com/newyorklawjournal/2019/03/05/first-department-introduces-four-judge-panels-upsetting-ny-bar-associations.
3. *Id.; see also* Luke Bierman, "Are Five Heads Better than Three?: A Case for Three Judge Panels for the New York Supreme Court, Appellate Division," 56 Albany L. Rev. 147, 149 (1992). The Second Department does sit in panels of five for certain categories of submitted cases, such as attorney disciplinary matters and criminal cases where the only issue raised on appeal is the severity of the sentence.
4. *See* Bierman, *supra* note 3, at 148, 151 & n.2 (*citing* New York Appellate Division Task Force 35 (1990) (N.Y. State Libr. No 91-26229)).
5. *See* DeSantis, *supra* note 2.
6. Norman A. Olch, "Four-Judge Panels Reduce Chances of Cases Going to Court of Appeals," NYLJ (March 11, 2019), *available behind paywall at* https://www.law.com/newyorklawjournal/2019/03/11/four-judge-panels-reduce-chances-of-cases-going-to-court-of-appeals/.
7. *See* Uniform Justice Court Act § 1701; Uniform City Court Act § 1701; Criminal Procedure Law § 450.60(3).
8. *See* 28 U.S.C. § 158, 636; Fed. R. Civ. P. 72(a), (b)(3); Fed. R. Crim. P. 59(a), (b)(3); Fed. R. Bankr. P. 8003(a).
9. *See* 28 U.S.C. § 46(c); Fed. R. App. P. 35.
10. Peter Nicolas, "'Nine, of Course': A Dialogue on Congressional Power to Set by Statute the Number of Justices on the Supreme Court," 2 NYU J.L. & Liberty 86, 88 (2006).
11. John V. Orth, "How Many Judges Does it Take to Make a Supreme Court?," 19 Const. Comment. 681, 683 (2002
12. 5 U.S. 137 (1803).
13. Orth, *supra* note 11, at 685. Note that *Marbury* was decided in February 1803 and the opinion refers to a motion made to compel James Madison, the Secretary of State, to show cause why commissions should be issued to several judges nominated by John Adams and confirmed by the Senate. That motion was said to have been made "[a]t the last term, viz December term, 1801." 5 U.S. at 137.
14. Angela Onwuachi-Willig, "Representative Government, Representative Court? The Supreme Court as a Representative Body," 90 Minn. L. Rev. 1252, 1269 (2006).
15. *Id.* at 1269; Orth, *supra* note 11, at 686.
16. *Id.* at 1269; Nicholas, *supra* note 10, at 89 n.10.
17. Orth, *supra* note 11, at 682.
18. Onwuachi-Willig, *supra* note 14, at 1270.
19. *See* Dylan Matthews, "Court-packing, Democrats' nuclear option for the Supreme Court, explained," Vox (updated Sept. 5, 2020). https://www.vox.com/2018/7/2/17513520/court-packing-explained-fdr-roosevelt-new-deal-democrats-supreme-court (last visited July 8, 2019).
20. The Commission's report is available at: www.whitehouse.gov/wp-content/uploads/2021/12/SCOTUS-Report-Final-12.8.21-1.pdf.
21. 1 Alden Chester, *Legal and Judicial History of New York* 381 (1911), *available at* https://archive.org/details/legaljudicialhis01ches.
22. *New York State Constitutional Convention; Problems Relating to Judicial Administration and Organization* 118–19 (1938) [hereinafter "Problems"].
23. 2 Charles Z. Lincoln, *The Constitutional History of New York* 145 (1906), *available at* https://archive.org/details/cu31924032657623.
24. 1 Chester, *supra* note 21, at 381; 2 J. Hampden Dougherty, *Legal and Judicial History of New York* 155 (1911), *available at* https://books.google.com/books/about/Legal_and_Judicial_History_of_New_York.html?id=0304AAAAIAAJ.
25. 2 Dougherty, *supra* note 24, at 155–56.
26. Robert MacCrate, James D. Hopkins, & Maurice Rosenberg, *Appellate Justice in New York* 20 (1982).
27. *Id.* at 21.
28. 2 Dougherty, *supra* note 24, at 179–80. Today's Court of Appeals Judges, while still selected from the State at-large, are appointed, rather than elected—a change made by constitutional amendment in 1977. *See* N.Y. Const. art. VI, § 2.
29. 1 Chester, *supra* note 21, at 382.
30. *Id.* at 383; Problems, *supra* note 22, at 9.
31. 2 Lincoln, *supra* note 23, at 586.
32. 2 Dougherty, *supra* note 24, at 318.
33. 2 Lincoln, *supra* note 23, at 586; *see also* Problems, *supra* note 22, at 138–139.
34. Francis Bergan, "The Appellate Division at Age 90: Its Conception and Birth, 1984," at 7–8, N.Y. State Bar J. (1985).
35. *Id.* at 8.
36. Problems, *supra* note 22, at 139.
37. *Id.* at 12.
38. 3 Lincoln, *supra* note 23, at 679–80, *available at* https://archive.org/details/constitutionalh03lincgoog.
39. N.Y. Const. art. VI, § 2(b).
40. Problems, *supra* note 22, at 9.

41. *Id.* at 143.
42. 3 Lincoln, *supra* note 23, at 354.
43. Problems, *supra* note 22, at 5.
44. *Id.*
45. *Id.* at 8; 2 Lincoln, *supra* note 23, at 284–86.
46. Problems, *supra* note 22, at 73, 75; 2 Lincoln, *supra* note 23, at 270.
47. 3 Lincoln, *supra* note 23, at 587.
48. 2 Dougherty, *supra* note 24, at 320.
49. 3 Lincoln, *supra* note 23, at 356–57.
50. *Id.*
51. Problems, *supra* note 22, at 56.
52. *Id.* at 358.
53. 2 Revised Record of the Constitutional Convention of the State of New York, May 8, 1894 to September 29, 1894 at 896, quoted in Bierman, *supra* note 3, at 150–51.
54. Problems, *supra* note 22, at 84.
55. *Id.* at 82–83.
56. *Id.* at 86–87. The five-year term only applies to constitutional justices and, at least over the past several decades, the appointing authority has almost always reappointed eligible justices who wished to continue serving on the Appellate Division. Those justices who serve as "additional justices" do not have a set term; rather, they serve as long as they are needed. However, when an additional justice serves long enough to be appointed a constitutional justice, then that justice is subject to the five-year term.
57. *Id.* at 82.
58. N.Y. Const. art. VI, § 4(g).
59. N.Y. Const. art. VI, § 4 (h).
60. Problems, *supra* note 22, at 87.
61. *Id.* at 88.
62. *Id.* at 93–95.
63. *Id.* at 90–91.
64. ...And Justice For All, Report of the Temporary Commission on the New York State Court System (1973), Part I at 12. This Commission was created by statute in mid-1970 to study and make recommendations concerning the state court system.
65. Bierman, *supra* note 3, at 151.
66. ...And Justice for All, Report of the Temporary Commission on the New York State Court System (1973), Part II at 42–43.
67. This number includes only those appeals counted by the Court as calendared dispositions. It does not include 386 cases recorded as non-calendared dispositions, i.e., withdrawn, transferred or abated. It also does not include 118 appeals withdrawn prior to argument.
68. The number of motions cited from each Department is taken from the 2018 Annual Report of the Chief Administrative Judge (Table 2: Caseload Activity in the Appellate Division – 2018).
69. This figure does not include 4,550 appeals disposed before argument or submission, i.e., dismissed, withdrawn, settled, etc.
70. This excludes 240 cases disposed of prior to argument.
71. *See* 2018 Annual Report of the Chief Administrative Judge (Table 2: Caseload Activity in the Appellate Division – 2018).
72. ...And Justice for All, Report of the Temporary Commission on the New York State Court System, Part II at 41.
73. MacCrate et al., *supra* note 26, at 101.
74. N.Y. Crim. Proc. Law § 460.20(1), (2)(a).
75. CPLR § 5601(a), as amended by L. 1985, ch. 300.
76. *Id.*
77. The calculations were done by my principal law clerk, Brian Damiano, Esq., and by Jennifer Hopkins, a St. John's Law School student who interned with my chambers in 2019.
78. 22 N.Y.C.R.R. § 1250.1(b).
79. CPLR § 5602(a).
80. Bierman, *supra* note 3, at 154–56.
81. Note that since the original preparation of these materials, appointments have been made so that the circumstances then existing in the First Department have been obviated.
82. *See* Bierman, *supra* note 3, at 149.
83. ...And Justice for All, Report of the Temporary Commission on the New York State Court System (1973), Part II at 41.
84. Note that while proposals by Chief Judge DiFiore to restructure the New York courts have focused primarily on the trial courts, her proposed constitutional amendment would grant the Legislature the authority to change the number of Appellate Division Departments once every ten years. *See* Alan Scheinkman, "Constitutional Change Will Advance Appellate Reform," NYLJ (January 24, 2020).

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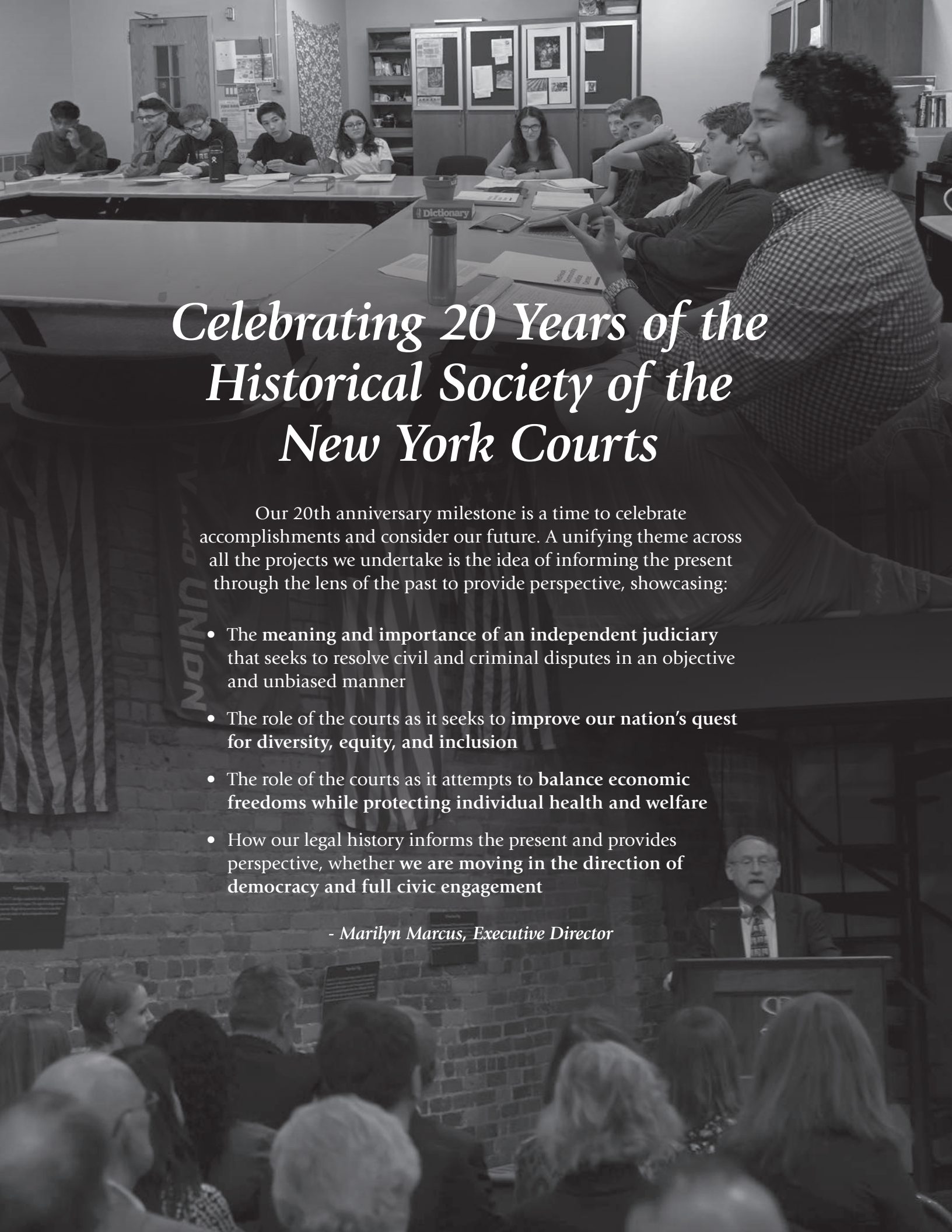

Celebrating 20 Years of the Historical Society of the New York Courts

Our 20th anniversary milestone is a time to celebrate accomplishments and consider our future. A unifying theme across all the projects we undertake is the idea of informing the present through the lens of the past to provide perspective, showcasing:

- The **meaning and importance of an independent judiciary** that seeks to resolve civil and criminal disputes in an objective and unbiased manner
- The role of the courts as it seeks to **improve our nation's quest for diversity, equity, and inclusion**
- The role of the courts as it attempts to **balance economic freedoms while protecting individual health and welfare**
- How our legal history informs the present and provides perspective, whether **we are moving in the direction of democracy and full civic engagement**

- Marilyn Marcus, Executive Director

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Our focus is on the role of the courts in improving the lives of its citizens, including the most vulnerable, and building a more equitable society.

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Through traveling exhibits, interview series, and new publications, our new projects highlight the role of New York's courts in providing justice to citizens from all walks of life, from the centuries-old past to the present-day COVID-19 pandemic.

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