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STATE COURTS AT THE DAWN OF A NEW CENTURY: COMMON LAW COURTS READING STATUTES AND CONSTITUTIONS

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The Justice William J. Brennan, Jr. Lecture on State Courts and Social Justice will be an annual occasion to recognize the central role of the state judiciary in the justice system. Judith S. Kaye, a graduate of New York University School of Law, was appointed to the New York Court of Appeals in 1983 and was named Chief Judge in 1993. In this inaugural Brennan Lecture originally delivered at the New York University School of Law on March 31, 1995, the Chief Judge discusses the important role state court judges play in defining social policy that affects our daily lives and provides an insightful look into the interactions between the judiciary and the legislature. She argues that development of the common law—judicial lawmaking and policymaking—is at times necessary both to construe state constitutions and to resolve the ambiguities in statutes. After describing the important role state constitutions play in protecting individual rights and the judiciary's role in interpreting them, Chief Judge Kaye discusses the dialogue between the judiciary and the legislature in creating law.

INTRODUCTION: JUSTICE BRENNAN'S MARVELOUS CONTRIBUTION

To begin with what is uppermost in my mind, I have to tell you how pleased I am to be a participant, with all of you, in this wonderful tribute to Justice Brennan. As the first of what I am confident will be an illustrious tradition of convocations centering on the comparatively neglected subject of our nation's state courts, these proceedings also

* I am enormously grateful to my law clerk Roberta A. Kaplan for her unflagging enthusiasm, which, in addition to her innumerable other contributions to this lecture, has made the project so pleasurable.

honor my alma mater, the New York University School of Law, and its Dean, John Sexton.

At the outset, I would like to touch on Justice Brennan's marvelous contribution, beginning with what I believe to be his most profound teaching—that as judges we can and must bring the full measure of our human capacities to bear in resolving the cases before us. That has proven a beacon to me in my own years on the bench, as I know it has to so many of my colleagues.[1]

As he underscored most recently when writing of his friend Justice Harry Blackmun, Justice Brennan has always believed that humanity and dignity are no strangers to reason.[2] In his view, passion, which he defines—as only a lawyer could—as "the range of emotional and intuitive responses to a given set of facts or arguments, responses which often speed into our consciousness far ahead of the lumbering syllogism of reason," does not taint the judicial process but is instead central to its vitality.[3] Thus, Justice Brennan has been a tenacious opponent of those who would have us believe in the concept of "rational certainty"[4]—that there is "no room for compassion in the cold calculus of judging."[5]

This process of deciding each case with its own parties, facts, and issues, according to Justice Brennan, involves a Jeffersonian dialogue between head and heart, a dialogue legitimated by the inarguable fact that judges "are flesh-and-blood human beings, not demi-gods to whom objective truth has been revealed."[6]

In his thirty-four terms on the Supreme Court, Justice Brennan left us with a precious inheritance of deep humanity and principled decisionmaking—a true dialogue of heart and head—that will live long beyond us. Given the volumes that have been written about his federal constitutional jurisprudence, as well as the fact that we are here today to celebrate our state court heritage, I will linger not on his landmark Supreme Court opinions, but on his equally significant contribution to the way we have come to think about our state courts.

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[1] See generally Judith S. Kaye, The Human Dimension in Appellate Judging: A Brief Reflection on a Timeless Concern, 73 Cornell L. Rev. 1004 (1988).

[2] William J. Brennan, Jr., A Tribute to Justice Harry A. Blackmun, 108 Harv. L. Rev. 1, 1 (1994).

[3] William J. Brennan, Jr., Reason, Passion, and "The Progress of the Law," 42 The Rec. of the Ass'n of the Bar of the City of N.Y. 948, 958 (1987) (forty-second annual Benjamin N. Cardozo Lecture).

[4] Id. at 974.

[5] Brennan, supra note 2, at 1.

[6] Brennan, supra note 3, at 953.

I

THE "TOPOGRAPHY"[7] OF STATE COURTS TODAY

Justice Brennan is of course most often associated with his distinguished tenure on the Supreme Court of the United States, but prior to that appointment he served seven years as a state court judge, the last four as a member of the New Jersey Supreme Court. Remarkably, at the time of his confirmation, he was only the third state judge appointed to the Supreme Court this century. And what a magnificent trio it was: Holmes, Cardozo, and Brennan!

A decade into his tenure on the Supreme Court, Justice Brennan delivered a lecture at the University of Florida in which he reflected on how both the kinds of cases and the manner in which he decided them had changed fundamentally, noting that this change was the inevitable result of the very different roles of the federal and state courts in our justice system.[8] As he wrote:

> Our states are not mere provinces of an all powerful central government. They are political units with hard-core constitutional status and with plenary governmental responsibility for much that goes on within their borders. . . . [T]he composite work of the courts of the fifty states probably has greater significance in measuring how well America attains the ideal of equal justice for all. . . . We should remind ourselves that it is state court decisions which finally determine the overwhelming aggregate of all legal controversies in this nation.[9]

Justice Brennan's description of the influence and importance of state courts rings even truer today.[10] Overwhelmingly, our nation's legal disputes are centered in the state courts, which handle more than ninety-seven percent of the litigation—tens of millions of new filings each year compared to some 250,000 in the federal courts.[11] Given

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[7] Abner Mikva, The Shifting Sands of Legal Topography, 96 Harv. L. Rev. 534, 540 (1982) (reviewing Guido Calabresi, A Common Law for the Age of Statutes (1982)).

[8] See generally William J. Brennan, Jr., State Supreme Court Judge Versus United States Supreme Court Justice: A Change In Function and Perspective, 19 Univ. Fla. L. Rev. 225, 225-37 (1966) (explaining different roles of federal and state courts in constitutional interpretive theory and practice).

[9] Id. at 227, 236.

[10] For example, in 1976, a decade after Justice Brennan's lecture, there were approximately twenty-three million civil and criminal cases filed in the state courts. National Center for State Courts, State Court Caseload Statistics: Annual Report 1981, at 157-58 (1985). In 1992, the number exceeded thirty-three million. National Center for State Courts, State Court Caseload Statistics: Annual Report 1992, at 3 (1994) [hereinafter 1992 State Court Caseload Statistics Report].

[11] While the total United States population increased approximately eight percent during the seven years from 1985 to 1992, the number of federal filings increased approximately twenty-three percent, and the number of cases initiated in the state courts increased

these numbers, it is no surprise that the top courtroom dramas to flicker across the nation's television screens—the trials of Joel Steinberg, William Kennedy Smith, the Menendez brothers, Lorena Bobbitt, O.J. Simpson—have unfolded in state courts.

Not only the number but also the nature of state court cases has changed dramatically. As society has evolved in ways our grandparents could hardly have dreamed, so have our cases, which present an inexhaustible array of novel issues. Today's state court dockets comprise the battlefields of first resort in social revolutions of a distinctly modern vintage: whether frozen embryos are marital property to be distributed equitably upon divorce;[12] whether it is a crime to assist a terminally ill patient in committing suicide;[13] whether DNA evidence should be admitted to establish a defendant's guilt.[14]

In addition, whole categories of cases affecting the day-to-day circumstances, indeed survival, of our citizens are largely if not exclusively adjudicated in the state courts. As societal reception centers, we confront daily the very crises—AIDS, homelessness, drugs, juvenile violence—that continue to frustrate so many others in and out of government.[15] In Chief Justice Ellen Peters's words, state "courts are not ivory towers, sheltered from the vicissitudes of everyday life and controversy. Working in an adversarial context, facing a relentless

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approximately thirty percent. 1992 State Court Caseload Statistics Report, supra note 10, at xii, 43-45.

[12] See, e.g., Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992); see also Hecht v. Superior Court, 20 Cal. Rptr. 2d 275 (2d Dist. 1993) (holding that no public policy forbade posthumous artificial insemination with cryogenically preserved sperm).

[13] People v. Kevorkian, 527 N.W.2d 714 (Mich. 1994); see also Kane v. Kulongoski, 871 P.2d 993 (Or. 1994) (considering constitutionality of assisted suicide ballot provision).

[14] See, e.g., People v. Wesley, 633 N.E.2d 451 (N.Y. 1994); see also Ex parte Perry, 586 So. 2d 242 (Ala. 1991) (putting forth three-pronged test for analyzing admissibility of DNA matching or population frequency statistical evidence); State v. Bible, 858 P.2d 1152 (Ariz. 1993) (applying *Frye* test for admissibility of DNA evidence), cert. denied, 114 S. Ct. 1578 (1994); Prater v. State, 820 S.W.2d 429 (Ark. 1991) (using "relevancy approach" to determine admissibility of DNA evidence); State v. Brown, 470 N.W.2d 30 (Iowa 1991) (holding that DNA evidence must be both established as reliable and meet general test of expert testimony admissibility); State v. Carter, 524 N.W.2d 763 (Neb. 1994) (considering different approaches to testing admissibility of DNA evidence); State v. Cauthron, 846 P.2d 502 (Wash. 1993) (applying *Frye* test to determine admissibility of different types of DNA evidence).

[15] Between 1989 and 1992, for example, the number of domestic relations and juvenile filings in the state courts rose 38 percent and 33 percent, respectively. 1992 State Court Caseload Statistics Report, supra note 10, at 26, 30. Not only has there been an alarming growth in this area, "but these cases often remain in the courts for long periods of time and require ongoing court supervision." Id. at 24. Similarly, although criminal cases increased 22 percent in the federal courts from 1985 to 1992, they increased by nearly twice that amount in the state courts during the same period. Id. at 44.

tide of new cases, [state court] judges . . . devote their learning and their energies and their compassion to the search for just solutions."[16]

As the courts both literally and figuratively closest to the people, it is beyond question that state courts continue to play a vital role in shaping the lives of our citizenry. Plainly Justice Brennan had much more in mind than mere statistics when he equated the work of state courts with how well this nation attains its ideal of equal justice. I think he had in mind as well the common law, that "golden and sacred rule of reason"[17] and the process by which state courts fundamentally address their dockets.

II
THE COMMON LAW AS THE CORE ELEMENT

The common law is, of course, lawmaking and policymaking by judges.[18] It is law derived not from authoritative texts such as constitutions and statutes, but from human wisdom collected case by case over countless generations to form a stable body of rules that not only determine immediate controversies but also guide future conduct.[19] While it is durable, certain, and predictable at its core, the common law is not static. It proceeds and grows incrementally, in restrained[20] and principled fashion, to fit into a changing society.

Policymaking under the common law is not, however, a free-wheeling exercise. Cases are themselves limits; courts do not render advisory opinions but instead resolve live disputes on the facts and law before them. Appellate decisions, moreover, are the product of a system that requires the agreement of several judges, values stability and faithful adherence to precedent, and safeguards those values by the

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16 The Hon. Ellen Ash Peters, Remarks at the State of the Judiciary, State of Connecticut (March 8, 1995) (transcript on file with author).

17 See Charles F. Mullett, Fundamental Law and the American Revolution, 1760-1776, at 48 (1966) (describing intellectual origins of the common law).

18 See generally Benjamin N. Cardozo, The Nature of the Judicial Process 10 (1921); Oliver W. Holmes, Jr., The Common Law 35 (1881); Roscoe Pound, The Spirit of the Common Law 116 (1921).

19 See Janet Reno, Address Delivered at the Celebration of the Seventy-Fifth Anniversary of Women at Fordham Law School, 63 Fordham L. Rev. 5, 7 (1994) ("There is on the wall of the east side of the building that houses the Justice Department in Washington, D.C., a statement that reads, 'The Common Law is the Will of Mankind Issuing From the Life of the People Framed Through Mutual Confidence Sanctioned by the Light of Reason.'").

20 See People v. Hobson, 348 N.E.2d 896, 900 (N.Y. 1976) ("[S]tare decisis does not spring full-grown from a 'precedent' but from precedents which reflect principle and doctrine rationally evolved. . . . [I]t . . . would be foolhardy not to recognize that there is potential for jurisprudential scandal in a court which decides one way one day and another way the next . . . .").

requirement of written opinions publicly explaining the results reached.

That state courts—not federal courts—are the keepers of the common law has long been American orthodoxy.[21] Even in today's legal landscape, dominated by statutes, the common-law process remains the core element in state court decisionmaking.

Every day, for example, state courts delineate the limits of tort liability, thereby defining socially acceptable conduct: which members of the general public can recover against a utility for damages incurred during a New York City black-out;[22] whether a victim of rape in an urban apartment building can recover against the landlord;[23] whether the State is liable to a murdered student's family for failure to disclose a former inmate's extensive psychiatric history to the school;[24] whether the Transit Authority is responsible when a young student waiting for a subway train is beaten to death.[25] Not unlike other state tribunals, my court has set the standard of care owed to baseball spectators,[26] baseball players,[27] jockeys,[28] firefighters,[29] swimmers and divers,[30]

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[21] See generally 1 Charles Z. Lincoln, Constitutional History of New York 37 (1906); Thomas C. Grey, Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought, 30 Stan. L. Rev. 843, 849; Burt Neuborne, Foreword: State Constitutions and the Evolution of Positive Rights, 20 Rutgers L.J. 881, 896-97 (1989).

[22] See, e.g., Milliken & Co. v. Consol. Edison Co., 644 N.E.2d 268 (N.Y. 1994); Strauss v. Belle Realty Co., 482 N.E.2d 34 (N.Y. 1985); Koch v. Consol. Edison Co., 468 N.E.2d 1 (N.Y. 1984); Food Pageant v. Consol. Edison Co., 429 N.E.2d 738 (N.Y. 1981).

[23] See Jacqueline S. v. City of New York, 614 N.E.2d 723 (N.Y. 1993); Waters v. New York City Housing Auth., 505 N.E.2d 922 (N.Y. 1987).

[24] See Eiseman v. State, 511 N.E.2d 1128 (N.Y. 1987).

[25] See Crosland v. New York City Transit Auth., 498 N.E.2d 143 (N.Y. 1986).

[26] See Davidoff v. Metro. Baseball Club, Inc., 463 N.E.2d 1219, 1220 (N.Y. 1984) (requiring that only seating area behind home plate be screened); Akins v. Glens Falls City School Dist., 424 N.E.2d 531, 533-34 (N.Y. 1981) (same).

[27] See Maddox v. City of New York, 487 N.E.2d 553, 555 (N.Y. 1985) (holding "assumption of risk to be implied from plaintiff's continued participation in the game with the knowledge and appreciation of the risk").

[28] See Turcotte v. Fell, 502 N.E.2d 964, 967 (N.Y. 1986) (holding that duty of care owed to plaintiff by defendant "was no more than a duty to avoid reckless or intentionally harmful conduct").

[29] See, e.g., Kenavan v. City of New York, 517 N.E.2d 872, 875 (N.Y. 1987) (holding that duty of care to firefighters "engaged in extinguishing a fire" only extends insofar as "the owner or other person in control [of the premises] negligently failed to comply with . . . [some] rule respecting the maintenance and safety of such premises").

[30] See Heard v. City of New York, 623 N.E.2d 541, 544 (N.Y. 1993) (holding that municipality's duty to plaintiff was satisfied once lifeguard "made clear that diving from the jetty was to cease"); Amatulli v. Delhi Constr. Corp., 571 N.E.2d 645, 649-50 (N.Y. 1991) (holding as matter of law that manufacturer is not liable for "injuries resulting from substantial alterations . . . of the product . . . which render [it] . . . unsafe," but liability of retailer and pool installer is question of fact for jury).

trespassers,[31] and fetuses.[32] Though the facts of each case are different and the answers vary, the court's function is always the same—to weigh and balance the relation of the parties, the nature of the risk, and of course the public interest.

Time and again, state courts have openly and explicitly balanced considerations of social welfare and have fashioned new causes of action where common sense justice required, most recently in the area of "cancerphobia"[33] and emotional distress suffered by persons exposed to the HIV virus.[34] Conversely, state courts have refused to enlarge the boundaries of the common law by declining to recognize new torts. Only this year, our court refused to allow a cause of action for a third-party's intentional interference with the attorney-client relationship, noting that while the creation of new tort liability is unquestionably a part of our common-law responsibility, we "exercise that responsibility with care, mindful that a new cause of action will have foreseeable and unforeseeable consequences, most especially the potential for vast, uncircumscribed liability."[35]

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[31] See Sega v. State, 456 N.E.2d 1174, 1175 (N.Y. 1983) (finding landowners of property that is open to the public "are not liable for injuries unless caused by [owners'] willful or malicious acts or omissions"); Basso v. Miller, 352 N.E.2d 868, 872 (N.Y. 1976) (holding landowners to a "single standard of reasonable care [for invitees, licensees, and trespassers] whereby foreseeability shall be a measure of liability").

[32] See Martinez v. Long Island Jewish Hillside Medical Ctr., 512 N.E.2d 538, 539 (N.Y. 1987) (finding that doctor owes patient a duty not to give "erroneous advice" concerning the need for an abortion); Tebbutt v. Virostek, 483 N.E.2d 1142, 1144 (N.Y. 1985) ("den[ying] damages for emotional distress to parents of children . . . injured [in utero] but born alive"); see also Woods v. Lancet, 102 N.E.2d 691, 694 (N.Y. 1951) (recognizing right of infant to recover against doctor for injuries sustained in utero and stating "[w]e act in the finest common-law tradition when we adapt and alter decisional law to produce common-sense justice").

[33] See Criscuola v. Power Auth., 621 N.E.2d 1195, 1196-97 (N.Y. 1993) (discussing level of proof required of landowners claiming "cancerphobia"-related damages due to power lines).

[34] See Tischler v. Dimenna, 609 N.Y.S.2d 1002, 1009 (Sup. Ct. 1994) (allowing claim of "emotional distress for the fear of contracting AIDS" made by plaintiff against boyfriend's estate); Castro v. New York Life Ins. Co., 588 N.Y.S.2d 695, 696 (Sup. Ct. 1991) (holding that "fear of developing AIDS in the future" is a legitimate cause of action). But see Kaufman v. Physical Measurements, Inc., 207 A.D.2d 595, 596 (N.Y. App. Div. 1994) (holding that emotional distress claim was too remote and too speculative to permit recovery, absent proof of likelihood of contracting AIDS); Hare v. State, 570 N.Y.S.2d 125, 127 (App. Div. 1991) (denying damages for emotional distress resulting from a fear of contracting AIDS); Petri v. Bank of New York Co., 582 N.Y.S.2d 608, 610 (Sup. Ct. 1992) (denying claim of intentional infliction of emotional distress where employer is alleged to have undertaken "a campaign to terminate plaintiff before he developed AIDS in order to save money").

[35] Madden v. Creative Servs., Inc., 84 N.Y.2d 738, 746 (1995) (citations omitted).

Whole categories of what can best be described as "gateway" issues like standing,[36] choice of law,[37] and admissibility of evidence[38] are decided every day by state courts as a matter of pure policy. Applying the common law, the New York Court of Appeals even decided the 1988 America's Cup match between New Zealand and San Diego.[39]

Yet despite the continued vitality of the common law, it is clear that "common law judging" now takes place in a "world of statutes."[40] In my court, like other state courts, the ratio of strictly common-law cases unquestionably has declined, and even in traditional common-law fields like torts, contracts, and property we often confront statutes that affect our decisionmaking.[41] This ubiquitous web of statutes, combined with more political concerns about "judicial activism,"[42] may in fact have caused state judges to feel that our role as common-law judges, cautiously and creatively developing the law in ways appropriate to a changing society, has been circumscribed.[43]

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[36] See In re Schulz, 615 N.E.2d 953, 955-56 (N.Y. 1993) (discussing standing to sue); Society of Plastics Indus. v. County of Suffolk, 573 N.E.2d 1034, 1040-42 (N.Y. 1991) (discussing development of state standing law in public interest cases); People v. Wesley, 538 N.E.2d 76, 77-84 (N.Y. 1989) (discussing standing in criminal law constructive possession cases).

[37] See In re Allstate Ins. Co., 613 N.E.2d 936, 938-40 (N.Y. 1993) (discussing choice of law issue); Cooney v. Osgood Mach., Inc., 612 N.E.2d 277, 279-85 (N.Y. 1993) (same).

[38] In New York, unlike in the federal system, rules for the admissibility of evidence are developed by the courts largely as a matter of common law. The New York legislature has for many years considered proposals for a comprehensive evidence code analogous to the Federal Rules of Evidence but has to date failed to enact such legislation. See Barbara C. Salken, To Codify or Not to Codify—That is the Question: A Study of New York's Efforts to Enact an Evidence Code, 58 Brook. L. Rev. 641, 641 (1992).

[39] Mercury Bay Boating Club, Inc. v. San Diego Yacht Club, 577 N.E.2d 87 (N.Y. 1990).

[40] Ellen A. Peters, Common Law Judging in a Statutory World: An Address, 43 U. Pitt. L. Rev. 995, 995-96 (1982).

[41] Farnham v. Kittinger, 634 N.E.2d 162 (N.Y. 1994) (applying recreational use statute, N.Y. Gen. Oblig. Law § 9-103(1)(a) (Consol. 1977 & Supp. 1993) (granting special immunity to landowners from liability in negligence in connection with injuries sustained by individuals who enter or use property in pursuit of certain recreational activities)); Iannotti v. Consolidated Rail Corp., 542 N.E.2d 621 (N.Y. 1989) (same).

[42] See, e.g., Abner J. Mikva, Statutory Interpretation: Getting the Law to Be Less Common, 50 Ohio St. L.J. 979, 979 (1990); see also Cass R. Sunstein, After the Rights Revolution 157-59 (1990).

[43] See Allan C. Hutchinson & Derek Morgan, Calabresian Sunset: Statute in the Shade, 82 Colum. L. Rev. 1752, 1753 (1982) (reviewing Guido Calabresi, A Common Law for the Age of Statutes (1982)) ("The distinguishing feature of twentieth-century legal history has been the shift from the common law to statutes as the major source of law."); Peters, supra note 40, at 997 ("Even in cases to which no statute presently applies, the fact that the legislature is always, or virtually always, in session casts a considerable shadow on innovation in common law growth and development.").

Increasingly, judicial opinions reflect the notion that, in the absence of a statute, courts should not make law.[44] In 1889, the New York Court of Appeals held, as a matter of common law, that a defendant who poisoned his grandfather could not inherit under the grandfather's will, and the court did so even though no such exception existed in the probate statute.[45] One hundred years later, we would more likely say—as we in fact did in refusing to recognize a tort of wrongful discharge[46] and in refusing to expand "dram shop" liability[47]—that "such a significant change in our law is best left to the Legislature."[48]

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[44] See Donaca v. Curry County, 734 P.2d 1339, 1342 (Or. 1987) (stating that the court has not "embraced freewheeling judicial 'policy declarations'"); Kenneth J. O'Connell, Oregon's Common Law Tradition: An Endangered Species, 27 Willamette L. Rev. 197, 197 (1991) ("In the course of the last decade, the Oregon Supreme Court has formulated a methodology of appellate adjudication which seriously limits the scope of the judicial decisionmaking process. The limits are set by the court's pronouncement that, in the absence of statutory sources of public policy, courts do not have the authority to articulate and justify rules of law . . . ."); Patricia K. Fenske, Note, Oregon's Hostility to Policy Arguments, 68 Or. L. Rev. 197, 206-07 (1989) (discussing *Donaca*).

[45] Riggs v. Palmer, 22 N.E. 188, 190 (N.Y. 1889) ("[A]ll laws . . . may be controlled in their operation and effect by general, fundamental maxims of the common law. . . . These maxims are dictated by public policy, have their foundation in universal law administered in all civilized countries, and have nowhere been superseded by statutes."); see also Barker v. Kallash, 468 N.E.2d 39, 41, 43 (N.Y. 1984) (applying principle established by *Riggs* that one may not profit from his own wrong); Reed Dickerson, Statutory Interpretation: Dipping Into Legislative History, 11 Hofstra L. Rev. 1125, 1153-56 (1983) (discussing *Riggs*).

Although we continue to construe statutes in derogation of the common law strictly, see, e.g., Morris v. Snappy Car Rental, Inc., 84 N.Y.2d 21, 28 (1994) (stating that "legislative enactments . . . are deemed to abrogate the common law only to the extent required by the clear import of the statutory language" (citations omitted)), would any among us today be willing to suggest that a statute be modified or ignored because it is in derogation of the common law? I doubt that law students even hear of the now obsolete doctrine of "the equity of the statute," which once permitted common law judges to write exceptions into statutes based on concepts of fundamental fairness. See, e.g., Roger J. Traynor, Statutes Revolving in Common-Law Orbits, 17 Cath. U. L. Rev. 401, 403-04 (1968) (discussing history of the doctrine); Peters, supra note 40, at 1005 (observing that "the equity of the statute" doctrine has "fallen into disrepute"). For a discussion of the canons of statutory interpretation and their relationship to the common law, see David L. Shapiro, Continuity and Change in Statutory Interpretation, 67 N.Y.U. L. Rev. 921, 936-40 (1992).

[46] Murphy v. American Home Prods. Corp., 448 N.E.2d 86, 89-90 (N.Y. 1983); see also Sabetay v. Sterling Drug, Inc., 506 N.E.2d 919, 923 (N.Y. 1987) (following *Murphy* and reiterating that "significant alteration of employment relationships . . . is best left to the Legislature"). But see Wieder v. Skala, 609 N.E.2d 105, 107-10 (N.Y. 1992) (distinguishing *Murphy* and *Sabetay* and allowing claim for wrongful discharge by attorney who reported ethical wrongdoing by law firm).

[47] Sherman v. Robinson, 606 N.E.2d 1365, 1368 (N.Y. 1992); D'Amico v. Christie, 518 N.E.2d 896, 899 (N.Y. 1987); see N.Y. Gen. Oblig. Law §§ 11-100 to 11-101 (Consol. 1977 & Supp. 1993) ("Dram Shop Act").

[48] *Murphy*, 448 N.E.2d at 89. For an early example of this type of deference to the legislature, see Agar v. Orda, 190 N.E. 479, 480 (N.Y. 1934), where the court reasoned that

In spite of the anxiety surrounding the legitimacy of judicial lawmaking, I believe that the inherent, yet principled flexibility of the common law remains the defining feature of the state court judicial process today.[49] As our former Chief Judge Benjamin Cardozo observed more than seventy years ago, though the "fissures in the common law are wider than the fissures in a statute," the resulting "gaps" must still "be filled, whether their size be great or small."[50]

In keeping with that sentiment, former Chief Judge Mikva more recently defined "judicial activism" as "the decisional process by which judges fill in the gaps that they perceive in a statute or the ambiguities that they find in a constitutional phrase."[51] Given the inevitability of this process, he continued, "*all* judges are activists."[52] Thus, "[t]he 'judicial activism' . . . so criticized by today's conservatives (and yesterday's liberals) is really judicial 'naturalism'—judges doing what comes naturally—what most of them were taught to do."[53]

Today, as in the past, in applying the law declared by others (whether a constitution or a statute) there is little doubt that state judges are frequently left to choose among competing policies—to fill the gaps—thereby narrowing or broadening the reach of the law. The choices state judges make are based on a consideration of the "social welfare" which Cardozo described as "public policy, the good of the collective body"[54] which may mean "expediency or prudence"[55] or "the standards of right conduct, which find expression in the *mores* of the community."[56]

No one disputes our role—indeed our responsibility—to draw and redraw the bounds of socially tolerable conduct by explicitly adapting established principles to changing circumstances, not by simply picking a result out of a hat but by reference to our precedents and our perceptions of the common good.[57] Few would complain that state court decisions defining the scope of foreseeability, for example,

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by passing a statute, the legislature had "shattered or destroyed general common-law rules inconsistent with the statutory code."

49 See Mikva, supra note 42, at 979 ("Our judicial system, indeed our entire legal system, was forged in the age of the common law. Most judges still function in the mold of their common law predecessors.").

50 Cardozo, supra note 18, at 71.

51 Mikva, supra note 42, at 979.

52 Id.

53 Id. at 979.

54 Cardozo, supra note 18, at 72.

55 Id.

56 Id.

57 See, e.g., O'Connell, supra note 44, at 225 (stating that "judges . . . mak[ing] policy decisions" is a "function which most members of the legal community have assumed was an inherent feature of the common-law system").

were an arrogation of power. One might disagree with particular policy choices we make,[58] but no one questions our authority to make them. Yet when it comes to constitutional and statutory adjudication—where we engage in a similar process—some are loath to admit that there is *any* "freedom of choice" at all.

My task today is thus both descriptive and normative. It is descriptive in the sense that I believe state courts effectively "make law," and do so by reference to social policy, not only when deciding traditionally common-law cases but also when faced with cases that involve difficult questions of constitutional and statutory interpretation. My ambition is normative in the sense that I believe that this function is necessary both to fill the "gaps" inevitably arising from the complex interplay between human facts and abstract laws, and to fill the far deeper void that would result if state courts were to abrogate their traditional role as interstitial lawmakers.

Let me illustrate what I mean by examining the social policy choices state courts necessarily make (whether we admit it or not). First, I will address the role state judges have in interpreting state constitutions, and then I will focus on state judges interpreting state statutes.

III

COMMON LAW COURTS CONSTRUING STATE CONSTITUTIONS

No doubt in part attributable to his experience as a state court judge, nearly twenty years ago Justice Brennan issued his now famous wake-up call for state courts to "step into the breach" and resuscitate our state constitutions as the living documents they are.[59] I still remember the excitement those stirring words generated. Many of us

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[58] See, e.g., the debate engendered by a recent Court of Appeals conflict of laws decision—Symposium, Reflections on Cooney v. Osgood Machinery Inc., 59 Brook. L. Rev. 1323 (1994) (discussing *Cooney*, 612 N.E.2d 277 (N.Y. 1993))—as well as the debate among the judges on the court itself over the municipal liability question presented in a case where the police department failed to react to reports of an abduction (and eventual rape) in progress, Kircher v. City of Jamestown, 74 N.Y.2d 251, 260-270 (1989) (Hancock & Bellacosa, JJ., dissenting in separate opinions); see also Stewart F. Hancock, Jr., Municipal Liability Through a Judge's Eyes, 44 Syracuse L. Rev. 925, 926-31 (1993) (discussing judicial debate over policy behind exceptions to New York's statutory waiver of immunity); Horace B. Robertson, Municipal Tort Liability: Special Duty Issues of Police, Fire and Safety, 44 Syracuse L. Rev. 943, 946-55 (1993) (discussing principles underlying municipal liability relating to police protection, fire protection, and safety inspections).

[59] William J. Brennan, Jr., State Constitutions and the Protection of Individual Rights, 90 Harv. L. Rev. 489, 503 (1977) [hereinafter Brennan, State Constitutions]; see also William J. Brennan, Jr., The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights, 61 N.Y.U. L. Rev. 535, 549 (1986) ("[T]he state courts have responded with marvelous enthusiasm to many not-so-subtle invitations to fill the constitutional gaps left by the decisions of the Supreme Court majority.").

had grown so federalized, so accustomed to the Supreme Court of the United States as the fount of constitutional wisdom, that we barely remembered that our state even had a constitution.

No serious idea is without its critics, and the movement toward active state constitutional interpretation has certainly attracted its share.[60] But it is now clear that the promise inherent in Justice Brennan's challenge has made giant steps toward fulfillment.[61] Perhaps the most accurate assessment of state constitutionalism today is that it has emerged from the cauldrons of our nation's law reviews[62] into the crucible of our state courts, regrettably (I trust not fatally) missing most of our nation's law schools.[63] In the words of the author of a new

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[60] See, e.g., James A. Gardner, The Failed Discourse of State Constitutionalism, 90 Mich. L. Rev. 761, 764 (1992) (arguing that "failure of state constitutional discourse" results from inherent and theoretical weaknesses in very idea of state constitution); Paul W. Kahn, Interpretation and Authority in State Constitutionalism, 106 Harv. L. Rev. 1147, 1163 (1993) (arguing that state courts should participate in "common interpretive enterprise" in "American constitutionalism," rather than interpreting their own state constitutions as distinctive documents reflecting their own state's political identity and tradition). But see Daniel Gordon, Superconstitutions Saving the Shunned: The State Constitutions Masquerading as Weaklings, 67 Temp. L. Rev. 965, 968-70 (1994) (responding to Gardner's article); Burt Neuborne, A Brief Response to Failed Discourse, 24 Rutgers L.J. 971 (1993) (same); David Schuman, A Failed Critique of State Constitutionalism, 91 Mich. L. Rev. 274 (1992) (same).

[61] See Brennan, State Constitutions, supra note 59, at 502 ("I suggest to the bar that, although in the past it might have been safe for counsel to raise only federal constitutional issues in state courts, plainly it would be most unwise these days not also to raise the state constitutional questions.").

[62] For an early example of scholarly attention to state constitutional law, see Developments in the Law—The Interpretation of State Constitutions, 95 Harv. L. Rev. 1324 (1982) (reviewing development and current status of state constitutional jurisprudence). For more recent examples of such scholarship, see authorities cited in Tim J. Watts, State Constitutional Law Development: A Bibliography (1991); Earl M. Maltz, Selected Bibliography on State Constitutional Law, 1980-1989, 20 Rutgers L.J. 1093-113 (1989); see also Judith S. Kaye, Contributions of State Constitutional Law to the Third Century of American Federalism, 13 Vt. L. Rev. 49, 49 (1988) ("In the fascinating area of state constitutional law, the trickle of deep scholarly interest evident during the 1970's has grown thunderously." (citations omitted)); Robert F. Williams, State Constitutional Law: Teaching and Scholarship, 41 J. Legal Educ. 243, 247-49 (1991) (discussing expansion of scholarly interest in state constitutional law).

[63] I believe it is largely the failure of our nation's law schools to teach state constitutional law that has resulted in the poor grade earned by the vast majority of counsel who fail to develop state constitutional issues in their court filings. See, e.g., Davenport v. Garcia, 834 S.W.2d 4, 20-21 (Tex. 1992) ("Our consideration of state constitutional issues is encumbered when they are not fully developed by counsel. Many of our sister states, when confronted with similar difficulties, have . . . ordered additional briefing of the state issue. We will follow this procedure as necessary and appropriate, when asserted state grounds have not been adequately briefed." (citation omitted)); see also State v. Jewett, 500 A.2d 233, 235 (Vt. 1985) (noting that "[d]espite the burgeoning developments in state constitutional law, only about a dozen law schools have courses in state constitutional jurisprudence"); Daniel R. Gordon, The Demise of American Constitutionalism: Death by Legal Education, 16 S. Ill. U. L.J. 39 (1991) (arguing that unwillingness and/or inability of attor-

treatise on the subject: "The past ten years will be known as the era in which state appellate courts issued a Declaration of Independence."[64]

Examples of recent cases where state courts have concluded that their own constitutions afford greater protection than the minimum floor provided by the federal Constitution include decisions from Louisiana, Kentucky, and Michigan holding that it is unconstitutional to medicate a condemned prisoner forcibly so that the prisoner can be executed,[65] that a criminal statute prohibiting "deviate sexual intercourse with another person of the same sex" violates privacy and equal protection guarantees,[66] and that a sentence of life without the possibility of parole for possession of cocaine is improper.[67] In the area of free speech and assembly, the Texas Supreme Court recently held that its constitution was violated by a civil gag order,[68] and the New Jersey Supreme Court, in a decision released just before Christmas, joined at least four other states[69] in concluding that its state constitution guarantees the right of free speech in large, privately owned shopping malls.[70]

Every one of these cases is distinguished by close, heated divisions unusual in the jurisprudence of those courts.[71] Like the debate in the scholarly literature, these divisions reflect important differences about methodology—about when and how a state court should rely

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neys to employ, and law schools to teach, state constitutional law has paved way for evisceration of constitutional jurisprudence). With rare exceptions, our court will not consider an argument unless it has been preserved by counsel in the trial court.

64 Jennifer Friesen, Adventures in Federalism: Some Observations on the Overlapping Spheres of State and Federal Constitutional Law, 3 Widener J. Pub. L. 25, 25 (1993); see generally Jennifer Friesen, State Constitutional Law: Litigating Individual Rights, Claims & Defenses (1992) (providing a practitioner's guide to state constitutional law); Robert F. Williams, State Constitutional Law: Cases and Materials (2d ed. 1993) (same).

65 State v. Perry, 610 So. 2d 746, 755-56, 762 (La. 1992).

66 Commonwealth v. Wasson, 842 S.W.2d 487, 492-99 (Ky. 1992).

67 People v. Bullock, 485 N.W.2d 866, 870-72 (Mich. 1992).

68 Davenport v. Garcia, 834 S.W.2d 4, 10-11 (Tex. 1992).

69 See Robins v. Pruneyard Shopping Ctr., 592 P.2d 341, 346-48 (Cal. 1979); Bock v. Westminster Mall Co., 819 P.2d 55, 56 (Colo. 1991); Batchelder v. Allied Stores Int'l Inc., 445 N.E.2d 590, 593-96 (Mass. 1983); Lloyd Corp. v. Whiffen, 849 P.2d 446, 447 (Or. 1993).

70 New Jersey Coalition Against War in the Middle East v. J.M.B. Realty Corp., 650 A.2d 757, 760-62 (N.J. 1994).

71 See, e.g., *Bullock*, 485 N.W.2d at 883-84 (Riley, J., concurring in part and dissenting in part) ("In its analysis of the role this Court plays in state constitutional adjudication, the majority . . . contends that the Michigan Constitution is an independent source of rights, different in scope from the federal counterpart, and that the federal court decisions interpreting the parallel constitutional provisions are not presumptively correct. I cannot subscribe to the majority's argument because it is evidence of its decision to eschew the historical foundations which the Michigan constitutional provision shares with the federal counterpart. Furthermore, I view it as nothing more than an attempt to substitute a judicial policy choice for the policy choice already made by our Legislature." (citations omitted)).

on its own constitution.[72] They also reflect deep differences about the role of state constitutions in our judicial system.

These debates are not limited to the pages of law reports or law reviews but have extended to media campaigns and political action committees, one judicial candidate even calling for term limits for judges.[73] Because so many elected state court judges do not have the shield of life tenure—another contrast with the federal system—they have been swept into the whirlwind of new age politics.[74] The intensity of these campaigns has had its effects, with some perceiving the vibrancy of state constitutions as linked to more overtly political debates about specific results, for example, how expansively a court will interpret its citizens' state constitutional right to be free from unrea-

[72] See, e.g., the description in West v. Thomson Newspapers, 872 P.2d 999, 1005-07 (Utah 1994) where the Utah Supreme Court outlined "four models for determining when and under what circumstances courts should base decisions on their own constitutions where there are related or similar federal constitutional provisions"; the court embraced the "primacy" model, thus committing itself to reaching state constitutional concerns before federal ones. The other three models discussed by the court were: (1) the "interstitial" model (presumption that federal law is controlling; state issues reached only when case cannot be resolved under federal law); (2) the "dual sovereignty" model (both federal and state grounds analyzed even if case can be resolved solely on federal grounds); and (3) the "lockstep" model (independent analysis of state constitution considered improper); see also Immuno A.G. v. Moor-Jankowski, 567 N.E.2d 1270, 1282 n.6 (N.Y. 1991) (discussing the grounds on which the four concurrences diverge in their approaches to interpreting the interaction between state and federal constitutional law).

[73] A candidate was elected to the Texas Court of Criminal Appeals during this past election season based in part on his campaign promises to be "tough" on criminals and advocating a two-term limit for all judges. See Q&A with Stephen Mansfield: "The Greatest Challenge of My Life," Texas Lawyer, Nov. 21, 1994, at 8, 8, available in LEXIS, Legnew Library, Txlawr File.

[74] For example, in 1986, for the first time since California's judicial retention process was set in place in 1934, the voters refused to retain three members of the California Supreme Court (Chief Justice Rose Bird, Justice Joseph Grodin, and Justice Cruz Reynoso), a refusal based largely on their rulings in the area of criminal law and criminal procedure and specifically on their unwillingness to impose the death penalty. See, e.g., Judith S. Kaye, Book Review, 64 Tul. L. Rev. 985, 986-87 (1990) (reviewing Joseph R. Grodin, In Pursuit of Justice: Reflections of a State Supreme Court Justice (1989)); Robert S. Thompson, Judicial Retention Elections and Judicial Method: A Retrospective on the California Retention Election of 1986, 61 S. Cal. L. Rev. 2007 (1988).

More recently, Wyoming Justice Walter Urbrigkit was defeated in a 1992 election after he was attacked for his positions in criminal cases, while Chief Judge Rosemary Barkett of the Florida Supreme Court retained her position despite a retention election in which she was attacked for her votes in cases involving criminal procedure and abortion rights. Andrew Blum, Jurists, Initiatives on Ballot, Nat'l L. J., Nov. 16, 1992, at 1, 1; see also Harris v. Alabama, 130 L.Ed.2d 1004, 1018, 1020 (1995) (Stevens, J., dissenting) ("Voting for a political candidate who vows to be 'tough on crime' differs vastly from voting . . . to condemn a specific individual to death. . . . Not surprisingly, given the political pressures they face, judges are far more likely than juries to impose the death penalty."); Hans A. Linde, The Judge as Political Candidate, 40 Clev. St. L. Rev. 1, 1-4 (1992).

sonable searches and seizures.[75] It is well to remember that even the principle that the Supreme Court has the power to authoritatively interpret the Federal Constitution was forged against a backdrop of fierce political partisanship.[76]

Apart from extraordinary divisiveness, what distinguishes these state constitutional decisions from federal constitutional decisions is that, while federal constitutional law is cabined by the text of the Constitution,[77] state courts move seamlessly between the common law and state constitutional law, the shifting ground at times barely perceptible.

Indeed, the common law and state constitutional law often stand as alternative grounds for individual rights,[78] as one of my colleagues wrote recently of New York libel law.[79] In New Jersey, common-law principles of privacy and "fundamental fairness," as distinguished from the analogous constitutional guarantees of equal protection and

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[75] See Fla. Stat. Ann. § 933.19(2) (West 1985) (providing that "[t]he same rules as to admissibility of evidence [with respect to] unreasonable searches and seizures as were laid down . . . by the Supreme Court of the United States shall apply to and govern the rights, duties and liabilities of . . . citizens in the state under the like provisions of the Florida Constitution relating to searches and seizures."); cf. Grisson v. Gleason, 418 S.E.2d 27, 29 (Ga. 1992) (Georgia Supreme Court "disapprove[s]" of its previous decision in Denton v. Con-Way Southern Express, 402 S.E.2d 269 (Ga. 1991), to interpret equal protection clause of Georgia Constitution more expansively than that of federal Constitution).

Though some critics of state constitutionalism have charged it with the bare desire to achieve a political agenda, see Earl M. Maltz, The Political Dynamic of the "New Judicial Federalism," 2 Emerging Issues in St. Const. L. 233, 235-38 (1989) (arguing state constitutionalism is a device to advance "liberal politics"), even one of its foremost critics has acknowledged "that an overwhelming consensus has developed . . . that 'reactive' state constitutional jurisprudence—state rulings that reject federal constitutional decisions merely because the state court disagrees with the result—is generally inappropriate." Gardner, supra note 60, at 772.

[76] See Brennan, supra note 3, at 956 ("The Judicial branch was . . . born not on the lofty peaks of pure reason, but in the trenches of partisan politics."); see also Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803); 3 Albert J. Beveridge, The Life of John Marshall 101-56 (1919) (delineating conflict between Federalist and Republican parties preceding *Marbury*); Richard E. Ellis, The Jeffersonian Crisis: Courts and Politics in the Young Republic 43-45, 58, 64-68 (1971) (discussing role of partisan politics in development of federal judiciary).

[77] See Ellen A. Peters, Common Law Antecedents of Constitutional Law in Connecticut, 53 Alb. L. Rev. 259, 261 (1989) (suggesting common law as interpretive source in reading state constitutions); Suzanna Sherry, The Founders Unwritten Constitution, 54 U. Chi. L. Rev. 1127, 1155-77 (1987) (arguing that debate surrounding drafting and ratification of Constitution suggests framers' intent for Constitution to be read in context of fundamental law, a project the Supreme Court long ago abandoned).

[78] See Judith S. Kaye, The Common Law and State Constitutional Law as Full Partners in the Protection of Individual Rights, 23 Rutgers L.J. 727, 745-46 (1992) (presenting historical analysis of state common law and constitutions as pertains to individual rights).

[79] Immuno A.G. v. Moor-Jankowski, 567 N.E.2d 1270, 1286-90 (N.Y. 1991) (Titone, J., concurring) (opting to ground speech rights in state common and constitutional doctrine rather than on narrower federal constitutional grounds).

due process, have been invoked in situations as factually diverse as endorsing a dying patient's right to refuse medical treatment[80] and preventing unfair exclusion of members of the public from blackjack tables.[81] A decade after the California Supreme Court decision in *Bakke v. Regents of the University of California*,[82] the author of that opinion, Justice Mosk, noted that, given another opportunity, instead of equal protection he would have seriously considered relying on the duty to serve (a common law doctrine that requires persons providing goods or services to the public to do so on a nondiscriminatory basis).[83]

There is of course a "critical difference" between when courts make constitutional law and when they make common law.[84] Outside the area of constitutional adjudication, state court decisions "are subject to overrule or alteration by ordinary statute. The court is standing in for the legislature, and if it has done so in a way the legislature does not approve, it can soon be corrected."[85] But when a case is decided on constitutional grounds, the court solidifies the law in ways that may not be as susceptible to subsequent modification either by courts or by legislatures. Because of this crucial difference, use of the common law to define rights at times has been preferable in that it has allowed both courts and legislatures room to adapt principles to changed circumstances,[86] for example in areas like the "right to die"[87]

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[80] In re Farrell, 529 A.2d 404, 414 (N.J. 1987); see also Bartling v. Superior Court, 163 Cal. App. 3d 186, 193-95 (Cal. Ct. App. 1984); Severns v. Wilmington Medical Ctr., Inc., 421 A.2d 1334, 1341-44 (Del. 1980); In re Estate of Longeway, 549 N.E.2d 292, 297-98 (Ill. 1989); In re Storar, 420 N.E.2d 64, 70 (N.Y.), cert. denied, 454 U.S. 858 (1981).

[81] See Uston v. Resorts Int'l Hotel, Inc., 445 A.2d 370, 375-76 (N.J. 1982).

[82] 553 P.2d 1152, 1162-64 (Cal. 1976) (holding in part that discrimination based on race, even if favoring majority, is still subject to Fourteenth Amendment scrutiny), aff'd in part and rev'd in part, 438 U.S. 265 (1978).

[83] Stanley Mosk, The Common Law and the Judicial Decision-Making Process, 11 Harv. J.L. & Pub. Pol'y 35, 37 (1988). For a description of the duty to serve, see Charles M. Haar & Daniel W. Fessler, The Wrong Side of the Tracks: A Revolutionary Rediscovery of the Common Law Tradition of Fairness in the Struggle Against Inequality (1986) (exploring potential, and urging use of, common law duty to serve in fighting discrimination); Note, The Antidiscrimination Principle in the Common Law, 102 Harv. L. Rev. 1993 (1989) (reviewing history and analyzing power of common-law duty to serve on non-discriminatory basis).

[84] John H. Ely, Democracy and Distrust 4 (1980).

[85] Id.

[86] Kaye, supra note 78, at 745.

[87] See, e.g., In re Conroy, 486 A.2d 1209, 1222-25 (N.J. 1985), and In re Farrell, 529 A.2d 404, 408 (N.J. 1985), in which the New Jersey Supreme Court abandoned its previous reliance on the federal Constitution and In re Quinlan, 355 A.2d 647, 671-72 (N.J. 1976), where it held that the right to remove life-sustaining medical support from a comatose patient was grounded in New Jersey common law.

and forcible medication of mental patients.[88] Of course, that same flexibility is not an option for the federal courts which must decide either that a constitutional right has been violated or that it has not—a distinction perhaps not fully appreciated by those accustomed to litigating "rights" issues in federal court.

In the area of "rights" adjudication, state courts plainly have a distinct advantage in that the common law allows them to shape evolving legal standards more cautiously. It is therefore important that they be explicit about whether and why they are deciding cases on common-law or constitutional grounds.[89] The New Jersey Supreme Court did exactly that in its recent shopping mall case involving the right of free speech on private property.[90] The court had earlier been reluctant to rest that right on constitutional grounds and had decided instead on what it called the "more satisfactory" common-law free speech grounds.[91] Given the more than two decades of "experimentation"[92] that elapsed since the court first addressed the scope of those rights,[93] it transplanted what had previously been a common-law right to firmer constitutional ground.

Despite the controversy that has surrounded the movement toward active state constitutionalism, and given the inherent role of state courts under the common law and the clear similarities between deciding a common-law case and what is currently required, for example, by the constitutional guarantee of "due process,"[94] I think it beyond doubt that we are well embarked on what has been called a

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88 See, e.g., In re Storar, 420 N.E.2d 64, 73-74 (N.Y.) (holding based, in absence of specific legislative or constitutional provisions, on common law), cert. denied, 454 U.S. 858 (1981); Rivers v. Katz, 495 N.E.2d 337, 342-45 (N.Y. 1986) (holding that right of mental patient to refuse treatment was based on state constitution).

89 Kaye, supra note 78, at 745-46.

90 New Jersey Coalition Against War in the Middle East v. J.M.B. Realty Corp., 650 A.2d 757, 770-84 (N.J. 1994) (holding on state constitutional grounds that speech is protected in shopping centers).

91 See State v. Shack, 277 A.2d 369, 372 (N.J. 1971) ("[The] policy considerations which underlie that conclusion may be much the same as those which would be weighed with respect to one or more of the constitutional challenges, but a decision in nonconstitutional terms is more satisfactory, because the interests of migrant workers are more expansively served in that way than they would be if they had no more freedom than these constitutional concepts could be found to mandate if indeed they apply at all.").

92 See, e.g., New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

93 See *Shack*, 277 A.2d at 372-74 (basing migrant workers' right to receive visitors on common-law limitations on property rights of employers).

94 See, e.g., Brennan, supra note 3, at 963 ("Perhaps more than any other provision of the Constitution, the Due Process Clause requires reliance on both reason and passion for its interpretation.").

"larger interpretive enterprise of American constitutionalism."[95] I am confident that courts will continue to consult their own constitutions to vindicate the rights of their citizens.

My primary concern, however, in this age of political "sound bites" and "spin control" is that state courts continue to do so without reluctance or apology.[96] As Justice Brennan wrote: "Each age must seek its own way to the unstable balance of those qualities that make us human, and must contend anew with the questions of power and accountability with which the Constitution is concerned."[97] Those words are as true of the state constitutions as they are of the federal Constitution, which lawyers and judges are sworn to uphold.

IV

COMMON LAW COURTS CONSTRUING STATE STATUTES

Vital though the common law still may be, I think it inarguable that it has been surpassed as the preeminent source of law it once was.[98] Why?

The primary reason, of course, is the "orgy of statute making"[99] engaged in by legislatures not only at the federal but also at the state level.[100] In the years since the Depression and the Second World War, "statutorification"[101] of the law has continued unabated so that today, after a half-century of the "relentless annual . . . grinding of more than fifty legislative machines,"[102] statutory interpretation is likely the prin-

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95 Kahn, supra note 60, at 1159.

96 See, e.g., Kaye, supra note 62, at 50 ("What has to my mind been decisively established . . . —if ever it was in doubt—is the legitimacy of state constitutional decisionmaking by state courts. We do, after all, have state constitutions, a fact that is central to American Government." (emphasis omitted)).

97 Brennan, supra note 3, at 974; see also Mosk, supra note 83, at 41 ("Judges must be fearless and independent, unafraid of applying the Constitution and laws to the least among us.").

98 See Guido Calabresi, A Common Law for the Age of Statutes 1, 1 (1982) ("In [the last 50 to 80 years] we have gone from a legal system dominated by the common law . . . to one in which statutes . . . have become the primary source of law."); Ruggero J. Aldisert, The Nature of the Judicial Process: Revisited, 49 U. Cin. L. Rev. 1, 48 (1980) ("The common law is no longer the major source of legal precepts . . . .").

99 Grant Gilmore, The Ages of American Law 95 (1977) (discussing difficulties created by recasting, in statutory form, substantive law once left to judges "for decision in light of common law principles").

100 Thomas G. Alexander & David R. Hall, State Legislatures in the Twentieth Century, in Encyclopedia of the American Legislative System 215, 225 (Joel H. Silbey ed., 1994) ("[T]he New Deal changed the idea of 'states' rights' from a negative to a positive concept. While the role of the federal government expanded dramatically during the era, so too did that of state governments.").

101 Calabresi, supra note 98, at 1.

102 Max Radin, Statutory Interpretation, 43 Harv. L. Rev. 863, 863 (1930).

cipal task engaged in by state courts.[103] The current set of New York statutes, like the full set of the United States Code, takes up an entire wall of shelving in my Chambers.

Perhaps in reaction to the proliferation of statutes, perhaps inspired by Judge (then Professor) Guido Calabresi's thought-provoking work *A Common Law for the Age of Statutes*,[104] or perhaps nudged along by the lively and ongoing debate at the Supreme Court,[105] in the last decade the subject of statutory interpretation has seized center-stage in scholarly journals.[106] In the words of a foremost proponent, statutory interpretation, once Cinderella, "now dances in the ballroom."[107] And as tends to happen in scholarly places, Cinderella speaks a whole new language of elusive polysyllabic labels: "new textualists," "dynamic statutory interpreters," "metademocrats."[108]

Despite the outpouring of scholarly ink, analysis has focused almost entirely on how *federal* courts read *federal* statutes. Few, if any, of the recent commentators have considered whether the subject of

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[103] Peters, supra note 40, at 998 (stating that "statutes are central to the law in courts, and judicial lawmaking must take statutes into account virtually all of the time").

[104] Calabresi, supra note 98.

[105] See, e.g., United States v. X-Citement Video, Inc., 115 S. Ct. 464, 473-76 (1994) (Scalia, J., dissenting) (arguing that majority's reading of statutory scienter requirement is unsupported by precedent or statute's language); Dewsnup v. Timm, 502 U.S. 410, 420-36 (1992) (Scalia, J., dissenting) (arguing that the majority's "misinterpretation" of § 506(d) of the Bankruptcy Code destroys predictability by "disregarding well-established and oft-repeated principles of statutory construction"); Chisom v. Roemer, 501 U.S. 380, 417 (1991) (Scalia, J., dissenting) ("When we adopt a method that psychoanalyzes Congress rather than reads its laws, when we employ a tinkerer's toolbox, we do great harm.").

[106] William N. Eskridge, Jr. & Philip P. Frickey, Statutory Interpretation as Practical Reasoning, 42 Stan. L. Rev. 321, 321 (1990) ("In the last decade, statutory interpretation has reemerged as an important topic of academic theory and discussion."); Daniel A. Farber, Statutory Interpretation and Legislative Supremacy, 78 Geo. L.J. 281, 281 (1989) ("In the [past] six years . . . , there has been . . . a renaissance of scholarship about statutory interpretation.").

This renewed interest has no doubt also been influenced by current theories of literary criticism that question the concept of a text having an intelligible and stable meaning, see, e.g., William N. Eskridge, Jr., Dynamic Statutory Interpretation, 135 U. Pa. L. Rev. 1479, 1482-83 (1987) (describing "recent developments in the philosophy of interpretation"), as well as new theories about the behavior of legislatures in democratic governments, see, e.g., Daniel A. Farber & Philip P. Frickey, In the Shadow of the Legislature: The Common Law in the Age of the New Public Law, 89 Mich. L. Rev. 875, 875 (1991) (discussing "how modern common law judges should view their role vis-a-vis the legislature").

For examples of this new scholarship, see Shirley S. Abrahamson & Robert L. Hughes, Shall We Dance? Steps for Legislators and Judges in Statutory Interpretation, 75 Minn. L. Rev. 1045, 1051 n.16 (1991) (compiling recent scholarship).

[107] William N. Eskridge, Jr., Dynamic Statutory Interpretation 1 (1994).

[108] Examples of scholarship using this type of terminology include William N. Eskridge, Jr., The New Textualism, 37 UCLA L. Rev. 621 (1990); Eskridge, supra note 106, at 1479; Jane S. Schacter, Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation, 108 Harv. L. Rev. 593 (1995).

statutory interpretation presents a different set of issues for state judges reading state statutes.[109]

I submit that it does. And of the many reasons that come to mind, perhaps most important, as is evident in the area of state constitutional law, is the fact that state courts regularly, openly, and legitimately speak the language of the common law whereas federal courts do not.[110] The federal courts, after all, may have jurisdiction over a dispute only because a federal statute exists.[111]

Accepting the reality of today's statutory world and its concomitant obligations, however, does not oust state courts from their traditional role. Even in a world dominated by statutes, there remain clear, direct links with the common law. In the words of one recent commentator, we now live in a "world where common and statutory law are woven together in a complex fabric defining a wide range of rights and duties."[112]

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[109] See, Larry Kramer, The Lawmaking Power of the Federal Courts, 12 Pace L. Rev. 263, 279 n.55 (1992) ("Contemporary scholars speak in general terms and offer general solutions while in fact dealing only with a narrow set of issues associated with the federal government . . . . State courts and state legislatures are ignored . . . . "); Larry Kramer, More Notes on Methods and Objectives in the Conflict of Laws, 24 Cornell Int'l L.J. 245, 260 n.50 (1991) ("Most recent scholarship on interpretation," dealing only with the federal context, is incomplete because "[m]any issues that seem easy from a federal perspective are less so from the states' point of view. Conversely, issues . . . controversial in the federal context may become relatively straightforward from the perspective of the states.").

[110] See, e.g., City of Milwaukee v. Illinois, 451 U.S. 304, 312 (1981) ("Federal courts, unlike state courts, are not general common-law courts and do not possess a general power to develop and apply their own rules of decision."); see also Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 640-42 (1981) ("[A]bsent some congressional authorization to formulate substantive rules of decision, federal common law exists only in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases."). But see Bob Jones Univ. v. United States, 461 U.S. 574 (1983) (using common-law concept of "charitable" as starting point for Court's analysis).

[111] See 28 U.S.C. § 1331 (1988) ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."); see also United States v. Standard Oil Co., 332 U.S. 301, 313 (1947) ("We would not deny . . . the law's capacity for growth, or that it must include the creative work of judges . . . . But in the federal scheme our part in that work, and the part of the other federal courts, outside the constitutional area is more modest than that of state courts, particularly in the freedom to create new common-law liabilities . . . ."); Martha A. Field, Sources of Law: The Scope of Federal Common Law, 99 Harv. L. Rev. 881, 899 (1986) ("[S]tate courts . . . can fill in any gap, as long as no directive to the contrary exists. Federal judges by contrast . . . can fill in a gap only if some enactment permits them to do so . . . .").

[112] Shapiro, supra note 45, at 937. Of course, this same fabric is woven by courts and legislatures in the realm of constitutional law, for example, when legislatures employ court-originated phrases such as "fighting words" in statutes intended to prohibit certain forms of "hate speech." See Ira C. Lupu, Statutes Revolving in Constitutional Law Orbits, 79 Va. L. Rev. 1, 3-4 (1992) (noting, as one focus, statutes that utilize "the language of judicial gloss on the Constitution").

As one rather obvious sample of this modern-day fabric, state legislatures frequently endorse court decisions by codifying causes of action created and carefully crafted by state courts as a matter of common law.[113] A prominent instance in the law of New York is the legislature's endorsement of the ground-breaking court decision some twenty years ago discarding as unfair the concept of contributory negligence and embracing instead the principle of comparative fault.[114] The Tennessee Supreme Court, in a more recent decision adopting comparative fault, stated as follows: "We recognize that this action could be taken by our General Assembly. However, legislative inaction has never prevented judicial abolition of obsolete common law doctrines, especially those . . . conceived in the judicial womb."[115] By the same token, legislatures at times express their disagreement by "repealing" or "vetoing" other common-law doctrines.[116]

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113 For a detailed description of the relationship of state courts and state legislatures, see generally Abrahamson & Hughes, supra note 106; see also Peters, supra note 40, at 1007 ("The state court house is, if anything, too close to the state legislative house."); cf. People v. Rosario, 173 N.E.2d 881, 883-84 (N.Y. 1961) (holding that fairness entitles the defense to examine witness's prior statement) (this requirement was later enacted by the legislature in N.Y. Crim. Proc. Law § 240.45 (McKinney 1993) (requiring that people produce written statements of prosecution witnesses prior to testimony)); Caceci v. Di Canio Constr. Corp., 526 N.E.2d 266 (N.Y. 1988) (holding that implied warranty of habitability and workmanlike construction applies to purchase of newly-constructed home) (this, too, was ultimately codified by the legislature in N.Y. Gen. Bus. Law §§ 777-a to 777-b (McKinney Supp. 1995) (initially effective March 1, 1989)); Note, New York's Implied Merchant Warranty for the Sale of New Homes: A Reasonable Extension to Reach Initial Owners?, 1990 Colum. Bus. L. Rev. 373 (examining history of debate over the extension of implied warranty to reach initial owners).

114 Dole v. Dow Chem. Co., 282 N.E.2d 288, 294-95 (N.Y. 1972); see N.Y. Civ. Prac. L. & R. 1411 (McKinney 1976) ("In any action to recover damages for personal injury, injury to property, or wrongful death, the culpable conduct attributable to claimant . . . , including contributory negligence or assumption of risk, shall not bar recovery, but the amount of damages otherwise recoverable shall be diminished in the proportion which the culpable conduct attributable to the claimant . . . bears to culpable conduct which caused the damages.").

115 McIntyre v. Balentine, 833 S.W.2d 52, 56 (Tenn. 1992); see also Alvis v. Ribar, 421 N.E.2d 886, 896 (Ill. 1981) (describing "a mutual state of inaction in which the court awaits action by the legislature and the legislature awaits guidance from the court").

116 See, N.Y. Gen. Mun. Law § 205-a (McKinney 1995) (creating a cause of action in negligence for firefighters in connection with injuries where the defendant had failed to comply with an applicable statute or ordinance, thus "repealing" in part New York's common law "firefighter's rule" ("Santangelo" rule) which precludes firefighters and police officers from recovering damages when the injuries sustained are related to the particular duties and dangers police officers and firefighters are expected to assume); see, e.g., Santangelo v. State, 521 N.E.2d 770 (N.Y. 1988) (police officers injured while apprehending escaped mental patient could not recover damages against state for negligence); see also Zanghi v. Niagara Frontier Transp. Comm'n, 85 N.Y.2d 423 (1995) (applying firefighter's rule, disallowing recovery by policemen and firefighter); Cooper v. City of New York, 619 N.E.2d 369 (N.Y. 1993) (holding suit barred by "Santangelo" rule).

Legislatures have this same "veto" power over judicial interpretations of statutes.[117] Although some scholars have concluded that the incidence of legislative "overruling" of court interpretations is exaggerated,[118] I find this sort of "re-interpretation" not an altogether infrequent occurrence.[119] In her State of the Judiciary Address earlier this month, Chief Justice Peters described precisely such a situation—where the Connecticut legislature passed a statute effectively overruling the "common law gloss"[120] courts had placed on a divorce statute when they limited judicial authority to modify child support orders.[121] Based on the legislative policy choice to permit such modifications, the Connecticut Supreme Court then proceeded to extend the new principle—"as a matter of common law adjudication"—to alimony payments as well.[122]

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117 See, e.g., N.Y. Elec. Law § 6-134(15) (McKinney 1995) (overruling courts' longstanding practice of strictly construing technical requirements of New York election law in providing that "[t]he provisions of . . . this section shall be liberally construed, not inconsistent with substantial compliance thereto"); cf. Staber v. Fidler, 482 N.E.2d 1204, 1206 (N.Y. 1985) (holding that incorrect statement of number of signatures was sufficient reason to invalidate petitions); Hargett v. Jefferson, 468 N.E.2d 1114, 1114 (N.Y. 1984) (validating petitions where misstatement of number of signatories was insignificant); see generally Note, A Call for Reform of New York State's Ballot Access Laws, 64 N.Y.U. L. Rev. 182 (1989) (examining constitutional test applied by judiciary in cases about New York's designating petition rules).

118 Otto J. Hetzel, Instilling Legislative Interpretation Skills in the Classroom and the Courtroom, 48 U. Pitt. L. Rev. 663, 678-79 (1987) (questioning ease with which "[j]udges often imply that judicial decisions can be overruled by the legislature"); see also Abrahamson & Hughes, supra note 106, at 1054-55 ("[P]rompt legislative reaction to judicial [statutory] interpretation is probably the exception, . . . not the rule."); Schacter, supra note 108, at 605 ("The frequency of strategic avoidance and legislative gamesmanship suggest that legislators will generally be tempted to hide behind, rather than to contest, judicial interpretations of statutory law. . . . [L]egislators have a strong incentive to avoid taking up a question that has been provisionally settled by a court and have little incentive to spend precious political capital vindicating the claimed 'real' intention of the prior legislature that enacted the law.").

119 See, e.g., Abrahamson & Hughes, supra note 106, at 1054-55 (describing examples of such "overruling" by legislatures in Wisconsin, California, and Colorado); William N. Eskridge, Jr., Overriding Supreme Court Statutory Interpretation Decisions, 101 Yale L.J. 331, 332-34 (1991) (examining only Supreme Court decisions but finding that rate at which Congress overrides statutory interpretations of the Supreme Court may be higher than previously thought).

120 See Fahy v. Fahy, 630 A.2d 1328, 1333 (Conn. 1993).

121 See Peters, supra note 16; see also Conn. Gen. Stat. Ann. § 46b-86 (West 1994) "overruling" Darak v. Darak, 556 A.2d 145 (Conn. 1989) (statute permitting modification of financial orders entered in dissolution agreement without regard to prior contemplation of financial changes had to be applied prospectively); Turner v. Turner, 595 A.2d 297, 304 (Conn. 1991) (recognizing that legislature's enactment of current version of § 46b-86 was intended "to reverse the effect of our judgment in Darak v. Darak").

122 See *Fahy*, 630 A.2d at 1334 (concluding that "as a matter of common law adjudication, it is appropriate to extend elimination of the noncontemplation of the circumstances requirement to orders of alimony"); see also Schuster v. City of New York, 154 N.E.2d 534,

No one can question the legislature's authority to correct or redirect a state court's interpretation of a statute.[123] Indeed, on our court we especially strive for consensus in statutory interpretation cases as a matter of policy, knowing that the legislature always can, and will, step in if it feels we have gotten it wrong.

In addition, the state legislative/judicial relationship often takes the form of an open dialogue.[124] Some years ago, for example, the New York Court of Appeals felt constrained by the language of the New York private placement adoption statute[125] to uphold an "irrevocable consent" to adoption by a newborn infant's biological parents, though they argued that they had not been given fair notice of the legal consequences.[126] Courts having previously expressed difficulty applying that statute,[127] we ended that opinion by suggesting to our

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540 (N.Y. 1958) (stating that "[s]tatutes have played their part in the formation of the common law, and, like court decisions that are not strictly analogous, sometimes point the way into other territory when the animating principle is used as a guide").

123 See In re Randy K., 570 N.E.2d 210, 214 (N.Y. 1991) (holding that bench warrant issued after juvenile's failure to appear at first scheduled fact-finding hearing did not relieve presentment agency and Family Court of statutory obligations), subsequently "overruled" by N.Y. Fam. Ct. Act § 340.1(7) (McKinney 1995). For other examples of such legislative "overruling," see Sullivan v. Brevard Assocs., 488 N.E.2d 1208 (N.Y. 1985) (holding that New York City's Rent Stabilization Law did not obligate landlord to offer renewal lease to tenant's sister); Festa v. Leshen, 537 N.Y.S.2d 147 (App. Div. 1989) (upholding amendments to Rent Stabilization Law that provide that relatives who reside with a named tenant may succeed to the tenant's lease rights); see also People v. Sturgis, 345 N.E.2d 331 (N.Y. 1976) (holding that where adjusted period between commencement of action and time prosecution was ready for trial exceeded six months, defendant was entitled to dismissal on ground of denial of speedy trial) as "overruled" by N.Y. Crim. Proc. Law § 30.30(4)(c) (McKinney 1992). Indeed, a bill was recently signed by the governor effectively overruling a court of appeals decision holding that in prosecutions for possession of a controlled substance the people must prove that the defendant had knowledge as to the weight of the controlled substance at issue. See Assembly Bill No. 210, 218th Gen. Assembly, 1st Sess., 1995 NY A.B. 210 § 1 ("The legislature hereby finds that a recent decision of the Court of Appeals, People v. Ryan (82 N.Y.2d 497),... will greatly diminish the ability of the district attorney's office across the state to prosecute narcotics offenses.").

124 See William N. Eskridge, Jr. & Philip P. Frickey, Legislation Scholarship and Pedagogy in the Post-Legal Process Era, 48 U. Pitt. L. Rev. 691, 724 (1987) (describing "new legal process" school of statutory interpretation as assuming that "[l]aw is conversation rather than coercion").

125 N.Y. Dom. Rel. Law § 115-b (McKinney 1988 & Supp. 1995).

126 In re Sarah K., 487 N.E.2d 241, 249 (N.Y. 1985), cert denied, 475 U.S. 1108 (1986). Before *In re Sarah K.*, § 115-b was read to provide that where the consent is not executed or acknowledged before a judge or surrogate, the consent is irrevocable thirty days after the commencement of the adoption proceeding. After *In re Sarah K.*, where there is an extrajudicial consent, the consent is irrevocable 45 days after its execution.

127 See In re Daniel C., 472 N.Y.S.2d 666, 692 (App. Div.) (Gibbons, J., dissenting) (arguing that adoption of consent form signed by natural mother was invalid as a matter of statutory and constitutional law), aff'd sub nom. In re Adoption of Daniel C., 473 N.E.2d 31 (N.Y. 1984) (Jasen, J., dissenting); In re Anonymous, 390 N.Y.S.2d 433, 436 (App. Div. 1977) (Suozzi, J., dissenting).

legislative colleagues—who sit directly across the street from us in Albany—that they reexamine the statute "in light of 13 years' experience, for it appears that the well-founded concerns that engendered the law are not yet dispelled."[128] And indeed, the statute was amended the following year.[129]

A similar dialogue took place concerning the statute of limitations for injuries caused by harmful substances, like asbestos, that are discoverable only years after initial exposure.[130] After the court's repeated expressions of frustration over the unfairness of commencing the statute of limitations with exposure to the harmful substance,[131] the legislature passed a law providing that the limitations period might accrue, instead, upon discovery of the injury.[132]

Sometimes, of course, the outcome is not quite so felicitous. I think, for example, of the "right to die" cases, where state courts around the country have struggled with these complex social policy issues, sometimes as a matter of constitutional law, sometimes as a matter of common law.[133] In 1985, then Governor Mario Cuomo appointed a Task Force on Life and the Law which actually did draft legislation.[134] To date, however, the New York legislature has enacted only a statute permitting individuals to designate a "proxy" to make their health care decisions if they are unable to do so.[135]

Surely, it would be better for a legislature with its greater fact-finding powers and direct accountability to address such questions.

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128 *In re Sarah K.*, 487 N.E.2d at 251.

129 See 1986 N.Y. Laws 817, Memorandum in Support of State of New York Unified Court System, Office of Court Administration ("This measure is being introduced at the request of the Court of Appeals.").

130 See Steinhardt v. Johns-Manville Corp., 430 N.E.2d 1297, 1299 (N.Y. 1981) (holding that statute of limitations begins to run at time of injury); Thornton v. Roosevelt Hosp., 391 N.E.2d 1002, 1003 (N.Y. 1979) (same); Victorson v. Bock Laundry Mach. Inc. Co., 335 N.E.2d 275, 278 (N.Y. 1975) (same).

131 See, e.g., *Thornton*, 391 N.E.2d at 1005-06 (Fuchsberg, J., dissenting).

132 N.Y. Civ. Prac. L. & R. § 214-c (McKinney 1990 & Supp. 1995) (initially enacted in 1986 in response to *Steinhardt*).

133 See, e.g., Fosmire v. Nicoleau, 551 N.E.2d 77, 84 (N.Y. 1990) (holding on common-law grounds that patient had right to refuse medically necessary blood transfusion); In re Westchester County Medical Ctr. ex rel. O'Connor, 531 N.E.2d 607, 614-15 (N.Y. 1988) (holding on common-law grounds that hospital could insert feeding tube in critically ill patient); see also Schloendorff v. Society of New York Hosp., 105 N.E. 92, 93 (N.Y. 1914) (Cardozo, J.) ("Every individual of adult years and sound mind has a right to determine what shall be done with his own body.").

134 See New York State Task Force on Life and the Law, When Others Must Choose: Deciding For Patients Without Capacity, app. A at 247-68 (1992) (listing proposed legislation for surrogate decisions).

135 N.Y. Pub. Health Law §§ 2980-2994 (McKinney 1993 & Supp. 1995); see generally Judith S. Kaye, Surrogate Decisionmaking: Staking Out the Law, 58 Mount Sinai J.M. 369 (1991) (discussing the New York common-law treatment of right to die cases).

Yet I doubt that anyone would seriously contend that a court should decline to decide the next case in this area, stating that it could not resolve the dispute because the legislature had not acted. Indeed, in a recent decision, my court indicated that as a matter of common law we would recognize the concept of a "living will," which the legislature has yet to sanction formally.[136] The Supreme Judicial Court of Massachusetts manifested a similar willingness to fill a gap, when, in light of advances in medical technology, it overruled its common-law rule that a homicide could not be prosecuted if the victim had died more than a year and a day after the criminal act.[137] In so doing, the Court acknowledged that though it would have been better for the legislature to enact a statute "reflect[ing] modern enhanced scientific capabilities, . . . [s]uch a task . . . if not undertaken by that branch, may fall to the courts."[138]

Even when interpreting statutes that have been passed, ascertaining the legislative intent is often no less difficult than drawing common-law or constitutional distinctions, requiring "a choice between uncertainties,"[139] surely an "ungainly judicial function."[140] When the meaning of a statute is in dispute, there remains at the core the same common-law process of discerning and applying the purpose of the law. As one commentator noted, "courts have not only a law-*finding* function . . . but [also] . . . a law-*making* function that engrafts on the statute meaning appropriate to resolving the controversy."[141] Indeed, "there is no sharp break of method in passing from 'common law,' old style, to the combinations of decisional and statutory law now familiar. Statutes, after all, need to be interpreted, filled in, related to the rest of the corpus."[142]

I certainly do not mean to suggest that as judges we are not always mindful of the "legislature's authority, within constitutional lim-

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136 *In re Westchester County Medical Ctr.*, 531 N.E.2d at 613.

137 Commonwealth v. Lewis, 409 N.E.2d 771, 773 (Mass. 1980), cert. denied, 450 U.S. 929 (1981).

138 Id. at 775; see also N.Y. Crim. Proc. Law § 40.20(2)(d) (McKinney 1992) ("delayed death" exception from statutory double jeopardy protection); People v. Latham, 631 N.E.2d 83, 85 (N.Y. 1994) ("Particularly in an era where medical advances can prolong the life of a critically injured victim, a prosecution must proceed on the basis of the victim's present condition. Where death follows, however, it is also in society's interest that a homicide be redressed." (citations omitted)); People v. Brengard, 191 N.E. 850 (N.Y. 1934) (abandoning New York's common-law "year-and-a-day" rule).

139 Burnet v. Guggenheim, 288 U.S. 280, 288 (1933).

140 Abner J. Mikva, Reading and Writing Statutes, 48 U. Pitt. L. Rev. 627, 627 (1987) ("The interpretation of statutes—as opposed to the administration of the common law—is a very ungainly judicial function.").

141 Dickerson, supra note 45, at 1127-28.

142 Benjamin Kaplan, Encounters with O.W. Holmes, Jr., 96 Harv. L. Rev. 1828, 1845 (1983).

its, to formulate whatever law it chooses."[143] Unless a statute in some way contravenes the state or federal constitution, we are obliged to follow it—and of course we do.[144] In many instances the "plain meaning" of the statutory language dictates a clear result.[145] But that is not always invariably so. Statutory interpretation is not a mechanical exercise.

At times the common-law method compels courts even to read a statute in a way that appears contrary to its "plain meaning." Only recently, for example, my court construed the words "currently dangerous" in a criminal statute governing whether a paranoid schizophrenic, found not responsible for attempted murder by reason of mental disease or defect, should remain confined in a secure mental hospital.[146] Surely the word "currently" is clear enough: it means right now, at this moment. But, as the court wrote, to apply those words strictly "would lead to the absurd conclusion that a defendant in a straightjacket, surrounded by armed guards, is not currently dangerous under the statute."[147] Instead, we applied concepts of "common-sense and substantial justice" to give the term "currently" what must have been its intended meaning: dangerous not at the moment of confinement and treatment, but foreseeably dangerous if confinement and treatment were not continued into the future.[148] Indeed, had our courts interpreted the word "currently" in its most literal

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143 O'Connell, supra note 44, at 231; see also Felix Frankfurter, Some Reflections on the Reading of Statutes, 47 Colum. L. Rev. 527, 533 (1947) ("[N]o one will gainsay that the function in construing a statute is to ascertain the meaning of words used by the legislature. To go beyond is to usurp a power which our democracy has lodged in its elected legislature."); William D. Popkin, Law-Making Responsibility and Statutory Interpretation, 68 Ind. L.J. 865, 867 (1993) ("A court's relationship to statutes is not the same as a common-law court's relationship to the common law. Statutes are not as malleable as common-law precedents.").

144 See, e.g., Doctor's Council v. New York City Employees' Retirement Sys., 525 N.E.2d 454, 457 (N.Y. 1988) ("'Where the statute is clear and unambiguous on its face, the legislation must be interpreted as it exists.'" (citation omitted)).

145 Justice Cardozo, of course, believed that in some ninety percent of the cases, the law was clear and in only a portion of these was the application of the law to the facts doubtful. Benjamin N. Cardozo, The Growth of the Law 60 (1924). While I might argue with the percentage, I would agree that many of our statutory cases are not "difficult" in the sense of discerning the meaning of the statutory language. See Shirley S. Abrahamson, Judging in the Quiet of the Storm, 24 St. Mary's L.J. 965, 972 n.27 (1993) (discussing more recent judicial commentary on Cardozo's "tripartite topology of appellate cases"). Yet even in such cases, the process of statutory interpretation has an analog to the common law: finding that a statute's meaning is sufficiently "plain" to end the question is not all that different from finding, as a matter of law, that the language in a contract is unambiguous and thus that extrinsic evidence of its purported ambiguity should not be consulted. See, e.g., W.W.W. Assocs. v. Giancontieri, 566 N.E.2d 639, 642 (N.Y. 1990).

146 In re George L., 648 N.E.2d 475, 478-80 (N.Y. 1995).

147 Id. at 479.

148 Id. at 481.

sense, we would have been less than faithful to the underlying legislative purpose—to protect society from potentially dangerous insanity acquitees.

The very fact that a controversy over statutory interpretation has found its way to a state's high court—quite possibly after several other trial and appellate judges have divided on the question—signals that discerning the statutory meaning may not be quite so simple.[149] As our late Chief Judge Charles Breitel noted, "[t]he words men use are never absolutely certain in meaning; the limitations of finite man and the even greater limitations of his language see to that."[150] Modern linguists speak of language's innate "structural ambiguity," its "opaque context," "categorical indeterminacy," and "shared understandings."[151] And everyone is by now familiar with Karl Llewellyn's demonstration, almost a half-century ago, that two equally time-honored maxims of statutory construction often support the contrary positions of each party to a litigation.[152]

In preparation for this lecture, I have revisited the recent decisions of my court where, in deciding cases based on statutory language, we stated that we were following the "will of the Legislature"—and indeed we were. Although in several of those cases the plain language dictated an obvious result,[153] it was an interesting, even an eye-opening experience to realize that a good many of the cases were among the most difficult we have encountered in recent years, many with impassioned dissents, despite our extra efforts to achieve consensus in matters of statutory interpretation.[154]

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149 See Clark D. Cunningham et al., Plain Meaning and Hard Cases, 103 Yale L.J. 1561, 1561 (1994) (reviewing Lawrence M. Solan, The Language of Judges (1993)) ("If the language of a statute is plain, how can interpreting that statute create a hard case? And if a case is hard, how can recourse to the statutory language help resolve the case?").

150 Bankers Ass'n v. Albright, 343 N.E.2d 735, 738 (N.Y. 1975).

151 See, e.g., Cunningham et al., supra note 149 (discussing how Solan's methodology can provide useful information as to whether text of statute is ambiguous).

152 Karl N. Llewellyn, Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Construed, 3 Vand. L. Rev. 395, 395-96 (1950). For more recent discussions of the use of the canons of statutory construction, see generally Shapiro, supra note 45; John C. Yoo, Note, Marshall's Plan: The Early Supreme Court and Statutory Interpretation, 101 Yale L.J. 1607 (1992) (examining Marshall Court's approach to statutory interpretation).

153 See Longway v. Jefferson County Bd. of Supervisors, 628 N.E.2d. 1316 (N.Y. 1993) (holding that local statute's definition of population did not necessarily exclude transients); Sutka v. Conners, 538 N.E.2d 1012 (N.Y. 1989) (giving plain meaning interpretation of firefighters' benefits statute).

154 See People v. Luperon, 647 N.E.2d 1243, 1250-56 (N.Y. 1995) (Bellacosa, J., dissenting) (disagreeing with court's decision to dismiss an indictment on statutory interpretation grounds); People v. Thompson, 633 N.E.2d 1074, 1081-88 (N.Y. 1994) (Bellacosa, J., dissenting) (dissenting from majority's application of a mandatory sentencing law); People v. Ryan, 626 N.E.2d 51, 58 (N.Y. 1993) (Bellacosa, J., dissenting) (objecting to holding that

I do not think one has to be a "metademocrat," a "public law theorist," or even (heaven forfend) a "dynamic statutory interpreter"[155] to acknowledge that the "will of the legislature" is not always easy (or even possible) to discern when it comes to specific facts before a court.[156] I would venture the guess that in nearly every statutory case that reaches a state's highest court, there exist at least two plausible interpretations, each in some way supported by the text.

My own firsthand experience, study, and good sense convince me that state judges construing statutes are more than pharmacists filling prescriptions written by the legislature: often they are involved as well in treating the ailment. And that task becomes considerably more difficult when the legislature's handwriting is hard to decipher.

At times, of course, the delegation of lawmaking authority from the legislature to the courts is explicit. New York's "poison pill" statute, for example, specifies that decisions by a corporation's board of directors "shall be subject to judicial review in an appropriate proceeding in which courts formulate or apply appropriate standards."[157]

But most often the delegation is implicit. I think, for instance, of cases where our court has had to define statutory terms such as "extraordinary circumstances,"[158] "due diligence,"[159] "best interests of the child,"[160] and "prejudice."[161] The court had to decide whether equitable "circumstances" or "conditions"—words I am quoting directly from a New York statute—existed to grant standing where a

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knowledge requirement in criminal statute applies to knowledge of weight of controlled substance); Jensen v. General Elec. Co., 623 N.E.2d 547, 554-59 (N.Y. 1993) (Smith and Hancock, JJ., dissenting in separate opinions) (dissenting from holding that statute of limitations on personal injury actions runs from time of the injury without exception); People v. Smith, 591 N.E.2d 1132, 1135-36 (N.Y. 1992) (Titone, J., dissenting) (objecting to holding that defendant had requisite mental state for robbery conviction).

155 See generally Calabresi, supra note 98.

156 In articulating the concept of the "will of the legislature" we necessarily create a fiction of the legislature—comprised, after all, of many individuals—as a single being "because we want to imagine that there is a contemporary speaker behind the text [of a statute] whose meaning [we judges are] trying to determine." William D. Popkin, An "Internal" Critique of Justice Scalia's Theory of Statutory Interpretation, 76 Minn. L. Rev. 1133, 1186 (1992); see also Radin, supra note 102, at 870-71 (discussing the difficulty of discussing the true "intention" of a legislature).

157 N.Y. Bus. Corp. Law § 505(a)(2)(ii) (McKinney 1995); see also N.Y. Fam. Ct. Act § 303.1(2) (McKinney 1995) ("A court may . . . consider judicial interpretations of . . . the criminal procedure law to the extent that such interpretations may assist the court in interpreting similar provisions of this article.").

158 See, e.g., Yalango v. Popp, 644 N.E.2d 1318, 1323 (N.Y. 1994).

159 See, e.g., People v. Luperon, 647 N.E.2d 1243, 1247 (N.Y. 1995); People v. Bolden, 613 N.E.2d 145, 149-50 (N.Y. 1993).

160 See, e.g., In re Michael B., 604 N.E.2d 122, 130-32 (N.Y. 1992).

161 See, e.g., People v. Sayavong, 635 N.E.2d 1213, 1217-18 (N.Y. 1994); People v. Jackson, 585 N.E.2d 795, 797 (N.Y. 1991).

child's grandparents were seeking visitation over the parents' objection.[162]

Let's be frank: issues like these that reach a state appeals court cannot be resolved simply by consulting a good dictionary or communing with the statutory text.[163] Yet, as with common-law cases, no one could doubt our authority—indeed our responsibility—to define these terms, and to fit each case within the body of the law, thereby necessarily fixing the range and direction of the statute and the course of future litigation. A recent law review article concluded that:

> if a state court can legitimately make public policy when the legislature has said nothing at all about a subject, the same court should also be able to make policy when the legislature has spoken, but spoken so unclearly that the court cannot confidently decipher its directions. In such a case, the fact that the legislature has spoken makes it clear that the legislature intends for something to be done about the particular issue. . . . [T]he line between common law policymaking and statutory construction is just not as sharp as it might seem.[164]

Yet another crucial distinction between state courts and federal courts interpreting statutes is the quantity of the legislative history that is available. Five years ago, in arguing against the "new textualists" (who would preclude all reference to legislative history),[165] Abner Mikva wrote that "seeking legislative intent is [not] a fool's errand. [Though] the quest is difficult and will never provide the holy grail . . . , an informed, careful use of legislative history can limit the number of interstices that judges plug."[166]

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[162] See Emanuel S. v. Joseph E., 577 N.E.2d 27, 28 (N.Y. 1991) (interpreting N.Y. Dom. Rel. Law § 72 as amended in 1975).

[163] See James Oakes, Personal Reflections on Learned Hand and the Second Circuit, 47 Stan. L. Rev. 387, 390-91 (1995) ("[O]ne principle area of [Learned] Hand's work . . . remains relevant today and bears mention—the field of statutory interpretation. . . . Hand firmly believed that a good judge must not fear the unknown or the ambiguous. Rather, he insisted that 'it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.'" (quoting Cabell v. Markham, 148 F.2d 737, 739 (2d Cir. 1945)).

[164] Farber, supra note 106, at 286; see also Schacter, supra note 108, at 604 ("There is growing recognition that legislators often deliberately employ vague, symbolic, and sometimes meaningless statutory language . . . in order to placate warring interests and achieve compromise, to please as many and alienate as few constituencies as possible, or to avoid difficult policy choices by postponing decision or transferring responsibility to an agency through a broad delegation.").

[165] See, e.g., Eskridge, supra note 108; W. David Slawson, Legislative History and the Need to Bring Statutory Interpretation Under the Rule of Law, 44 Stan. L. Rev. 383 (1992). For a discussion of new textualism, see Nicholas S. Zeppos, Justice Scalia's Textualism: The "New" New Legal Process, 12 Cardozo L. Rev. 1597 (1991).

[166] Mikva, supra note 42, at 981.

Viewed from a state court perspective, I am not at all sure that Mikva's solution is a workable one. In the federal system, legislative history abounds. Debates are routinely printed in the *Congressional Record*, while more authoritative sources such as joint or conference committee reports of both Houses of Congress are customary.[167] But in New York and likely other states as well, legislative history is relatively sparse with legislative intent evidenced primarily by the language of the statute itself. Rarely is a committee report available.[168]

Just last month, to give one example of the problem, the Court of Appeals was required to give practical application to a broadly worded statute forbidding "[d]eceptive acts and practices in the conduct of any business, trade or commerce or in the furnishing of any service," with no further indication as to the nature of the prohibited conduct.[169] Having as guidance only the words of the statute and minimal background indicating that the statute was designed for consumers, we held, much as any common-law court, that for a cause of action to be stated, the alleged deceptive acts or practices need not be a course of conduct—a single act will suffice; that the conduct must be judged objectively, meaning is it "likely to mislead a reasonable consumer acting reasonably under the circumstances"; and that the conduct must be "consumer-oriented in the sense that [it] potentially affect[s] similarly situated consumers."[170]

Acknowledging the dilemma and drawing on the traditions of the common law, Calabresi has suggested that a solution is for courts simply and openly to "update" obsolete statutes to ensure that the law remains responsive to changes in society.[171] Although there is a great

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167 See, e.g., William N. Eskridge, Jr. & Philip P. Frickey, Cases and Materials on Legislation: Statutes and the Creation of Public Policy 709 (2d ed. 1994) ("Most scholars and judges agree that committee reports should be considered as authoritative legislative history and should be given great weight (i.e., a statement in a committee report will usually count more than a statement by a single legislator.)").

168 Id. at 710 ("In state legislatures, committee reports can take a variety of forms, not all of which are published or are readily available to the public . . . ."). This situation is confirmed by Frances Murray, the Court of Appeals' (absolutely extraordinary) law librarian, who reports that the New York Legislature ceased publishing joint legislative committee reports in the mid 1970s. See also City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 437 (1978) (Brennan, J., dissenting) ("[S]tate statutes often are enacted with little recorded legislative history, and the bare words of a statute will often be unilluminating in interpreting legislative intent."); Eric Lane, Legislative Process and Its Judicial Renderings: A Study in Contrast, 48 U. Pitt. L. Rev. 639, 651 (1987) ("More simply stated, legislative history is generally ignored because [state] legislators see no need for it.").

169 Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, 647 N.E.2d 741, 744 (N.Y. 1995).

170 Id. at 745.

171 Calabresi, supra note 98, at 81-145; see also Jack Davies, A Response to Statutory Obsolescence: The Nonprimacy of Statutes Act, 4 Vt. L. Rev. 203, 204 (1979) (suggesting

deal of value in Calabresi's ideas, I am not sure that such a radical step is necessary in that the incidence of obsolete statutes seems relatively infrequent.[172]

Rather, I think the more serious dilemma judges face occurs in circumstances where, though the balance of a statute remains relevant, a litigant raises a novel theory of a statute's applicability to a category of cases unforeseen, perhaps even unforeseeable, by the legislature. In other words, courts are often faced with requests to extend a legislatively-created right or duty to facts not previously considered. And that such situations arise with some regularity is not difficult to understand given that no legislature could possibly envision the infinite variety of fact patterns that the human mind, assisted by counsel, can devise. I would submit that once again such analysis is not altogether different from reasoning under the common law.

Thirty years ago, former Chief Judge Traynor stated the proposition as follows:

> Suppose, for example, a statute . . . specifying that it shall apply to A and B and clearly unconcerned with anyone else. Why not an equivalent rule for C, the judge might ask himself, when there is a perplexing C before the court who appears to be a little cousin, if not the sibling of A and B. Before the fortuitous appearance of the statute, the judge might have deemed it prudent to abandon C to his legislative fate. Now he might deem it proper to compose a judgment as to C that would be in keeping with the newly declared legislative policy, even though the legislative authors had ended their text with B. He would thus make law to govern C by virtue of the analogy he would draw from the statute governing A and B. Whatever he chose to call his method, he would be creating law with a capital C.[173]

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that legislature, in exercise of its law making authority, create an age of "semi-retirement" for its enactments).

[172] Indeed, the only example that comes to mind is a recent case involving a 1933 New York law which on its face prevents an applicant, owned directly or indirectly in any proportion by a foreign company that manufactures alcohol, from obtaining a license to serve liquor to the public. Though we acknowledged that the Act, passed at the close of Prohibition to prevent monopolies in the alcoholic beverages industry, may no longer be relevant in today's economy of global conglomerates, we nevertheless felt constrained to apply the statute as written. See Rihga Intl. U.S.A., Inc. v. New York State Liquor Auth., 644 N.E.2d 1340, 1341 (N.Y. 1994) (referring to N.Y. Alco. Bev. Cont. Law § 101(1)(a), originally enacted in 1933).

[173] Traynor, supra note 45, at 405. For a more modern formulation of this metaphor, see Farber & Frickey, supra note 106, at 892 ("Public choice [theory] teaches that a statute reflects not only the preferences of the legislature, but also the procedural obstacle course of enactment. The fact that a statute explicitly regulates situations A and B, but not C, should not necessarily be interpreted as a decision to immunize C from regulation. It may only indicate that, for whatever reason, the legislative process failed to produce a bill covering C. Thus, the meandering boundaries of a statute may reflect only the exigencies of

Some years ago our court issued a much-discussed[174] decision reading the term "marital property" in New York's equitable distribution statute to include a spouse's professional license.[175] We accepted our responsibility, making clear in the court's writing that "[h]aving classified the 'property' subject to distribution, the legislature did not attempt to go further and define it but left it to the courts to determine what interests come within the terms of [the statute]."[176] And in rejecting the argument that the statutory provision referred not to a professional license but only to an already established practice, the court stated, in the best common-law tradition, that

> [t]here is no reason in law or logic to restrict the plain language of the statute to existing [medical] practices, [which] merely represent[ ] the exercise of the privileges conferred upon the professional spouse by the license . . . . That being so, it would be unfair not to consider [a medical] license a marital asset.[177]

In perhaps the most commented-on statutory decision handed down by the New York Court of Appeals in recent years,[178] a plurality interpreted the term "family member" in the non-eviction provisions of the New York City rent control statute—a statute originally passed

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the legislative process rather than any majority view about the treatment of excluded cases."); see also discussion of Fahy v. Fahy, 630 A.2d 1328 (Conn. 1993), supra at text accompanying notes 120-22.

174 See, e.g., Kenneth R. Davis, The Doctrine of O'Brien v. O'Brien: A Critical Analysis, 13 Pace L. Rev. 863 (1994); Herma H. Kay, Toward a Theory of Fair Distribution, 57 Brook. L. Rev. 755, 761 (1991) (noting that the New York Court of Appeals believed it was following the legislature in *O'Brien*); Scott E. Willoughby, Note, Professional Licenses as Marital Property: Responses to Some of O'Brien's Unanswered Questions, 73 Cornell L. Rev. 133 (1987) (approving of result in *O'Brien*).

175 O'Brien v. O'Brien, 489 N.E.2d 712 (N.Y. 1985) (holding that husband's newly acquired license to practice medicine was marital property).

176 Id. at 715.

177 Id. at 717.

178 See, e.g., Paris R. Baldacci, Pushing the Law to Encompass the Reality of Our Families: Protecting Lesbian and Gay Families From Eviction from Their Homes—Braschi's Functional Definition of "Family" and Beyond, 21 Fordham Urb. L.J. 973 (1994) (discussing Braschi v. Stahl Assocs., 543 N.E.2d 49 (N.Y. 1989), and its inclusive interpretation of "family" and its potential impact on gay and lesbian equality); Schacter, supra note 108; Hubert J. Barnhardt III, Comment, Let the Legislatures Define the Family: Why Default Statutes Should Be Used to Eliminate Potential Confusion, 40 Emory L.J. 571 (1991) (arguing *Braschi* invites courts to discard concrete definition of "family" for determination on case by case basis, with great potential for confusion); Note, Braschi v. Stahl Associates Co.: Much Ado About Nothing?, 35 Vill. L. Rev. 361 (1990) (discussing *Braschi* decision and limited effect it will have outside of context of protection against eviction); Note, Looking for a Family Resemblance: The Limits of the Functional Approach to the Legal Definition of Family, 104 Harv. L. Rev. 1640 (1991) (citing the *Braschi* decision as example of the courts using functional approach to defining "family"); Heidi A. Sorenson, Note, A New Gay Rights Agenda? Dynamic Statutory Interpretation and Sexual Orientation Discrimination, 81 Geo. L.J. 2105 (1993) (citing *Braschi* as classic case of dynamic statutory interpretation in protecting gay partner of deceased tenant from eviction).

in 1946 to alleviate the perceived housing crisis at the end of World War II—to include the deceased tenant's homosexual partner.[179] In so doing, the plurality reasoned that though the record was devoid of a specific legislative will with respect to the question at issue, the overall policy expressed in the statute "of protecting a . . . class of occupants from the sudden loss of their homes," required the result reached.[180] Significantly, only months after that decision, regulations were enacted enlarging the definition of family member to include "[a]ny other person residing with a tenant . . . who can prove emotional and financial commitment and interdependence [with] the tenant."[181]

Given the enormous volume of state court litigation, the unending array of novel fact patterns pushing the law to progress, and the inability of legislatures to react immediately to the many changes in society,[182] I think it clear that common-law courts interpreting statutes and filling the gaps have no choice but to "make law" in circumstances where neither the statutory text nor the "legislative will" provides a

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[179] Braschi v. Stahl Assocs., 543 N.E.2d 49, 54-55 (N.Y. 1989). But see In re Alison D., 572 N.E.2d 27 (N.Y. 1991) where, in the context of a child visitation determination, the court declined to construe the term "parent" in New York domestic relations law to encompass the former lesbian lover of the child's biological mother who helped to raise the child. Dissenting in *Alison D.*, I noted that the statutory provision at issue "does not define the term 'parent' at all. That remains for the courts to do, as often happens when statutory terms are undefined." Id. at 31.

[180] *Braschi*, 543 N.E.2d at 53; see also id. at 52 ("The present dispute arises because the term 'family' is not defined in the rent-control code and the legislative history is devoid of any specific reference to the noneviction provision. All that is known is the legislative purpose underlying the enactment of the rent-control laws as a whole."); East Tenth St. Assocs. v. Estate of Goldstein, 552 N.Y.S.2d 257, 258-59 (App. Div. 1990) (extending *Braschi* to rent stabilization regulations).

[181] See Rent Stabilization Ass'n v. Higgins, 630 N.E.2d 626, 629 (N.Y. 1993) (upholding new regulations); see also People v. Capolongo, 647 N.E.2d 1286, 1287 (N.Y. 1995) (holding that pretrial notice provisions of New York wiretap statute applied to foreign wiretap evidence, and noting that "[t]he central question we confront is . . . not expressly answered by our comprehensive statutory scheme for electronic eavesdropping").

[182] Some public law theorists have suggested that current legislative processes lead to arbitrary or incoherent outcomes. For a brief overview of this theory, see Eskridge & Frickey, supra note 167, at 52-61; Eskridge & Frickey, supra note 124, at 701-10; Farber & Frickey, supra note 106, at 877-82; see also John Ferejohn & Barry Weingast, Limitations of Statutes: Strategic Statutory Interpretation, 80 Geo. L.J. 565, 565-66 (1992) ("It is no longer possible to assume that Congress is simply a deliberative institution devoted wholly to determining the best course of public action and putting it into statutory commands."). My former colleague on the New York Court of Appeals, Bernard S. Meyer, expressed similar thoughts (though I doubt he had public choice theory in mind) when he wrote that "[t]he deference courts give to legislative action or inaction is predicated upon assumptions many of which are little more than fiction: that legislatures act in the interest of the majority, that most legislators who vote upon a given bill . . . are knowledgeable concerning its provisions." Bernard S. Meyer, Justice, Bureaucracy, Structure and Simplification, 42 Md. L. Rev. 659, 677-78 (1983).

single clear answer.[183] Indeed, it is my perception that state legislatures not only accept such judicial decisionmaking as entirely legitimate, but also expect that within defined boundaries courts will make such choices, which can of course then be embraced, enlarged, or entombed.[184]

However much we might prefer in this age of anxiety about "legislating from the bench" and "judicial activism" for only our elected representatives to make all the sensitive decisions, so long as human language remains imprecise and the human capacity to predict the future limited, the cascade of cases that call upon judges to fill the gaps—and to do so by reference to social justice—will unquestionably continue.[185] For state judges, schooled in the common law, to refuse to make the necessary policy choices when properly called upon to do so would result in a rigidity and paralysis that the common-law process was meant to prevent.[186]

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183 See Bernard S. Meyer, Some Thoughts on Statutory Interpretation with Special Emphasis on Jurisdiction, 15 Hofstra L. Rev. 167, 167-68 (1987) ("Unlike his civil law counterpart, who . . . was expected to refer problems of statutory interpretation in a given case to the legislature for solution, a common law judge is faced at various times with arguments that he construe an unclear statutory provision, or that he interpolate interstitially what can be found to be within the purpose though not the wording of a statute [or even] with applying a statute the terms of which have remained constant to circumstances which have changed sufficiently since a prior interpretation to require a different interpretation in the case presently before him.").

184 An illustration of this legislative acceptance of judicial lawmaking, which is essentially superimposed upon a relatively simple statutory enactment, is in the area of sovereign immunity. Although a statute was passed more than a half-century ago, pursuant to which "[t]he state hereby waives its immunity from liability and action and hereby assumes liability . . . ," see N.Y. Court of Claims Act § 8 (McKinney 1995) (no substantive changes have been made to statute since its enactment in 1929), the courts in applying the principle that statutes in derogation of sovereign immunity must be strictly construed, see Smith v. State, 125 N.E. 841, 842 (N.Y. 1920), have engrafted upon that statute various mechanisms designed to limit its far-reaching ramifications. For example, a municipality cannot be held liable for injuries resulting from a failure to provide police protection absent a "special relationship" between the municipality and the inured party. See, e.g., Sorichetti v. New York, 482 N.E.2d 70, 74 (N.Y. 1985); see also Survey of New York Practice: Court of Claims Act § 8, 58 St. John's L. Rev. 199 (1983) (discussing court of appeals decisions interpreting the Act).

185 See, e.g., Eskridge, supra note 106, at 1554 (describing judges interpreting statutes as analogous to "diplomats . . . [who] must often apply ambiguous or outdated communiqués to unforeseen situations, which they do in a creative way, not strictly constrained by their orders. But they are, at bottom, agents in a common enterprise, and their freedom of interpretation is bounded by the mandates of their orders, which are not necessarily consistent or coherent over time, or even at any one time.").

186 United States v. Standard Oil Co., 332 U.S. 301, 313 (1947) (describing advantage of common law process as preventing law from becoming "antiquated straight jacket and then dead letter").

CONCLUSION

I have two concluding thoughts. The first is that I would be delighted if my comments about the unique tradition, competence, and role of the state courts stimulated others to focus attention on state courts and state lawmaking. Those are serious subjects too often overlooked in many of our nation's law schools. I am willing even to run the risk that some future commentator will conclude that I have overstated both the differences between state and federal court decisionmaking and the capacity of the common law to explain those differences.

Second, I would like to end where I began, with the inspiring words of Justice Brennan, which for me genuinely capture the sense of my remarks:

> The struggle for certainty, for confidence in one's interpretive efforts, is real and persistent. Although we may never achieve certainty, we must continue in the struggle, for it is only as each generation brings to bear its experience and understanding, its passion and reason, that there is hope for progress in the law.[187]

[187] Brennan, supra note 3, at 962.