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## **Judge Levine: A Survey of His Most Influential Court of Appeals Decisions - 1993-2002**

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## Judge Levine: A Survey of His Most Influential Court of Appeals Decisions - 1993-2002

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## JUDGE LEVINE: A SURVEY OF HIS MOST INFLUENTIAL COURT OF APPEALS DECISIONS – 1993 TO 2002

The Touro Law Review would like to thank John Caher of the *New York Law Journal* for his kind permission in allowing us to expand on his research and article on Judge Howard A. Levine, retired Court of Appeals judge, which appeared in the *Law Journal* on December 2, 2002.

### INTRODUCTION

Howard A. Levine retired from the Court of Appeals on November 14, 2002, after spending nine years as one of seven Justices on New York State's highest court.<sup>1</sup> Judge Levine, age 70, faced mandatory retirement as of January 1, 2003.<sup>2</sup>

Judge Levine, the son of two lawyers, grew up in Schenectady, New York, where he attended the local public schools.<sup>3</sup> He received his undergraduate degree from Yale in 1953, as well as his law degree in 1956.<sup>4</sup> After graduating, he practiced briefly in Manhattan, but soon moved back to Schenectady.<sup>5</sup>

In 1961, Judge Levine worked as an assistant district attorney, and in 1966 was elected, on the Republican ticket, to the position of District Attorney; a position he retained until 1970.<sup>6</sup> In 1970, he was elected Schenectady County Family Court Judge, where he served for ten years.<sup>7</sup> He was then elected to the New York Supreme Court, Schenectady County<sup>8</sup> for a very brief time before he was promoted to the Appellate Division, Third Department, where he served until his appointment to the Court of Appeals.<sup>9</sup> Judge Levine, a moderate/conservative and self-

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<sup>1</sup> John Caher, *Self-Described 'Centrist' at Court of Appeal Retires*, N.Y.L.J., Dec. 2, 2002, at 1.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> Caher, *supra* note 1.

<sup>7</sup> Caher, *supra* note 1.

<sup>8</sup> <http://www.courts.state.ny.us/4jd/Schenectady/Supctjudges.html> (last visited May 15, 2003).

<sup>9</sup> Caher, *supra* note 1.

described centrist,<sup>10</sup> was appointed to the Court of Appeals in 1993 by Mario Cuomo, a Democrat and then Governor of New York State.<sup>11</sup> Presently, Judge Levine is senior counsel in the Albany firm of Whiteman, Osterman and Hanna.<sup>12</sup>

Judge Levine has been described by court scholars as more inclined to side with the government than the individual, and to defer to the legislature.<sup>13</sup> However, Judge Levine's decisions indicate a devotion to fair play and an aversion to abuse of power, thereby making it difficult to pigeonhole his ideology into any one category. In fact, the following review of Judge Levine's opinions and dissents indicates no strict adherence to any ideology except fair play and justice, which Judge Levine considered on a case-by-case basis. Judge Levine's background in both the district attorney's office and the family court is evident in his opinions, but not as taking any particular side of an issue, rather as understanding the underlying principles of justice.

Judge Levine has indicated that Justice Harlan, known as a dissenter on the Warren Court, is his judicial role model. It was Justice Harlan's "very principled adjudications" that impressed Judge Levine.<sup>14</sup> Judge Levine has stated that although he ultimately agreed with many of the decisions of the Warren Court,<sup>15</sup> it was Judge Levine's opinion that they may have "been on firmer foundation had they followed his [Harlan's] approach of incremental, common law law-making."<sup>16</sup> Judge Levine's philosophy, "Go a little slower, develop the law incrementally to see if the changes work" is evident in his judicial opinions.<sup>17</sup>

During his term in the appellate division, Justice Levine wrote passionate dissents, hoping to influence the Court of Appeals' final decisions.<sup>18</sup> Although he has stated that being on the court of last resort removes the primary reason for his dissents,

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<sup>10</sup> *Caher, supra* note 1.

<sup>11</sup> *Id.*

<sup>12</sup> N.Y.L.J., Jan. 15, 2003, at 1.

<sup>13</sup> *Caher, supra* note 1.

<sup>14</sup> *Caher, supra* note 1.

<sup>15</sup> *Caher, supra* note 1.

<sup>16</sup> *Caher, supra* note 1.

<sup>17</sup> *Caher, supra* note 1.

<sup>18</sup> *Caher, supra* note 1.

and he does not dissent unless he feels very strongly against the majority opinion,<sup>19</sup> he continued to speak his mind in dissents.

### SEARCH AND SEIZURE

In Judge Levine's opinions and dissents in the area of search and seizure, he did not adhere to the position of either the prosecution or defense, but steadfastly adhered to the underlying principles of fair play, reasonableness and objectivity, the foundation of our search and seizure jurisprudence.

Judge Levine wrote the unanimous opinion of *People v. Banks* in 1995.<sup>20</sup> The defendant was convicted of criminal possession of a controlled substance after being stopped on the New York State Thruway for not wearing a seatbelt.<sup>21</sup> Once the defendant stopped his car and exited, the police officer testified that the defendant appeared very nervous.<sup>22</sup> The officer ran a check on the defendant's license and registration, which revealed no violations.<sup>23</sup> The officer began to write up a ticket for a seatbelt violation, and decided to search the interior of the car.<sup>24</sup> He radioed for back up<sup>25</sup> while the defendant waited in his car, not being told what caused the delay.<sup>26</sup>

The officer, upon giving defendant the seat belt ticket, asked if there were any drugs or weapons in the vehicle.<sup>27</sup> The defendant answered in the negative and told the officer he could look for himself. The officer filled out a consent to search form, which the defendant signed.<sup>28</sup> Upon searching the vehicle, the officer found one-half kilogram of cocaine in the vehicle.<sup>29</sup>

Judge Levine, writing for the majority, held the search of the interior of the car inappropriate, in that the search was "the

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<sup>19</sup> *Caher*, *supra* note 1.

<sup>20</sup> *People v. Banks*, 85 N.Y.2d 558, 650 N.E.2d 833, 626 N.Y.S.2d 986 (1995).

<sup>21</sup> *Id.* at 560, 650 N.E.2d at 834, 626 N.Y.S.2d at 987.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 561, 650 N.E.2d at 834, 626 N.Y.S.2d at 987.

<sup>24</sup> *Id.*

<sup>25</sup> *Banks*, 85 N.Y.2d at 561, 650 N.E.2d at 834, 626 N.Y.S.2d at 987.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

product of an inseparate illegal detention.”<sup>30</sup> Although the officer was justified in stopping the defendant for the seat belt infraction, the length of time and circumstances of the detention were not justified.<sup>31</sup> In order for the search to be constitutional, Judge Levine opined, it must relate to the circumstances which justified the stop in the first instance,<sup>32</sup> which was the seat belt infraction. Therefore, the court held that once the license and registration check came back negative and the ticket was written, the initial justification for the stop terminated, and the signed consent was considered to be acquired by illegal detention.<sup>33</sup>

Also in 1995, Judge Levine wrote the dissent in *People v. Spencer*,<sup>34</sup> a four-to-three decision. In *Spencer*, the police answered the call of an assault victim.<sup>35</sup> The police drove the victim around the neighborhood for the purpose of locating the suspect, who was the victim’s boyfriend.<sup>36</sup> The victim spotted the defendant, a friend of the assailant, seated in a car.<sup>37</sup> The police pursued him and pulled him over.<sup>38</sup> Upon peering into the vehicle, the officers saw a plastic bag with what appeared to be vegetable matter in it (which was, ultimately, found to be marijuana).<sup>39</sup> The police officer also observed the butt of a gun protruding from under the seat of the car.<sup>40</sup> The defendant was charged with criminal possession of a weapon and criminal possession of marijuana.<sup>41</sup> The defendant claimed that the police stop of his vehicle for the purpose of requesting information from him was an unreasonable seizure<sup>42</sup> under the Fourth Amendment.<sup>43</sup>

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<sup>30</sup> *Banks*, 85 N.Y.2d at 561, 650 N.E.2d at 835, 626 N.Y.S.2d at 988.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> 84 N.Y.2d 749, 646 N.E.2d 785, 622 N.Y.S.2d 483 (1995).

<sup>35</sup> *Id.* at 751, 646 N.E.2d at 786, 622 N.Y.S.2d at 484.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 753, 646 N.E.2d at 787, 622 N.Y.S.2d at 485.

<sup>39</sup> *Spencer*, 84 N.Y.2d at 751, 646 N.E.2d at 787, 622 N.Y.S.2d at 485.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 752, 646 N.E.2d at 787, 622 N.Y.S.2d at 485.

<sup>43</sup> U.S. CONST. amend. IV provides in pertinent part: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .”

The majority agreed with the defendant, applying a balancing test that the “reasonableness of a seizure must be judged by balancing its intrusion on the Fourth Amendment interests of the individual involved against its promotion of legitimate governmental interests.”<sup>44</sup> In applying this balancing test, the majority concluded that the intrusion on the individual far outweighed the governmental interest.<sup>45</sup>

Judge Levine, in his dissenting opinion, argued that the state interest in gaining important information regarding the crime, immediately after it took place, was more substantial than the majority indicated,<sup>46</sup> and the intrusiveness on defendant’s privacy interest was minimal.<sup>47</sup> Further, Judge Levine reasoned that the stop “was not arbitrary nor based on mere whim, caprice or idle curiosity,”<sup>48</sup> but was based on the victim’s information that the defendant would know where the suspect could be found.<sup>49</sup> Therefore, he reasoned the search, which was limited, was reasonable under the facts of the case.<sup>50</sup>

Judge Levine opined that there were “specific, objective facts”<sup>51</sup> to justify the police stopping the vehicle, and given that the police were in hot pursuit of a violent felon, less intrusive means, such as surveillance of the defendant<sup>52</sup> were not an alternative.<sup>53</sup>

In 1999, Judge Levine wrote the majority opinion in *In re Muhammad F.*,<sup>54</sup> which held a traffic stop search unreasonable and violative of the Fourth Amendment of the United States Constitution.<sup>55</sup> At issue was a course of action by New York City police officers where plain clothes officers, in unmarked vehicles,

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<sup>44</sup> *Spencer*, 84 N.Y.2d at 754, 646 N.E.2d at 788, 622 N.Y.S.2d at 486 (quoting *People v. Scott*, 63 N.Y.2d 518, 525, 473 N.E.2d 1, 3, 483 N.Y.S.2d 649, 651 (1984)).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 760, 646 N.E.2d at 792, 622 N.Y.S.2d at 490 (Levine, J., dissenting).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* (quoting *People v. Spencer*, 193 A.D.2d at 95, 602 N.Y.S.2d at 415).

<sup>49</sup> *Spencer*, 84 N.Y.2d at 760, 646 N.E.2d at 792, 622 N.Y.S.2d at 490.

<sup>50</sup> *Id.* at 761, 646 N.E.2d at 793, 622 N.Y.S.2d at 491.

<sup>51</sup> *Id.* at 764, 646 N.E.2d at 794, 622 N.Y.S.2d at 492.

<sup>52</sup> *Id.* at 763, 646 N.E.2d at 794, 622 N.Y.S.2d at 492.

<sup>53</sup> *Id.*

<sup>54</sup> 94 N.Y.2d 136, 722 N.E.2d 45, 700 N.Y.S.2d 77 (1999).

<sup>55</sup> *Id.* at 140, 722 N.E.2d at 46, 700 N.Y.S.2d at 78.

stopped taxicabs in areas of high incidence of taxi robberies.<sup>56</sup> The policy was to pull over a predetermined percentage of taxis, but the policy did not set any further guidelines.<sup>57</sup> It was, therefore, up to the individual police officers to determine which taxis would be stopped for what was ostensibly a “safety check.”<sup>58</sup> If a passenger was in the vehicle, the passenger would be asked to exit the vehicle, and the officers would search the area under the seats.<sup>59</sup> In the instant case, when the officers pulled over the taxi and shined their light into the interior, they observed the defendant, a passenger, acting suspiciously.<sup>60</sup> A bag was found, containing crack/cocaine, resulting in the defendant being “adjudicated a juvenile delinquent for committing an act which, if committed by an adult, would constitute criminal possession of a controlled substance.”<sup>61</sup>

Judge Levine, writing for the majority, applied the standard set forth in *Brown v. Texas*,<sup>62</sup> and held the search unconstitutional. *Brown* sets forth a three-part balancing test to determine whether such a stop is constitutional, balancing “the gravity of the public concerns served by the seizure; the degree to which the seizure advances the public interest; and the severity of the interference with individual liberty.”<sup>63</sup> In applying these factors, the court held that although the “governmental interest in protecting victim-prone taxicab drivers” was a valid governmental interest,<sup>64</sup> no evidence was produced that this type of stop was more effective than, perhaps, a fixed checkpoint by uniformed officers in marked cars.<sup>65</sup> The court also found there was no showing of the unavailability of less intrusive or discretionary means to prevent violent crime directed at the drivers.<sup>66</sup> Therefore, these stops could

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<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Muhammad F.*, 94 N.Y.2d at 140, 722 N.E.2d at 46, 700 N.Y.S.2d at 78.

<sup>60</sup> *Id.* at 141, 722 N.E.2d at 47, 700 N.Y.S.2d at 79.

<sup>61</sup> *Id.*

<sup>62</sup> 443 U.S. 47 (1979).

<sup>63</sup> *Muhammad F.*, 94 N.Y.2d at 142, 722 N.E.2d at 47-48, 700 N.Y.S.2d at 79-80 (quoting *Brown*, 443 U.S. at 50-51).

<sup>64</sup> *Id.* at 146, 722 N.E.2d at 50, 700 N.Y.S.2d at 82.

<sup>65</sup> *Id.* at 146-47, 722 N.E.2d at 50-51, 700 N.Y.S.2d at 82-83.

<sup>66</sup> *Id.*



not be established as reasonable under the three-part test. The court further held the stops excessively and unjustifiably intrusive considering the lack of any departmental standards as to vehicular stops, and the fact that the decision of which vehicle to stop was at the “standardless and unconstrained discretion of the official in the field.”<sup>67</sup>

In the Court’s 2001 decision of *People v. Robinson*,<sup>68</sup> Justice Levine wrote a strong dissent, disagreeing with the majority that held the vehicular stop did not constitute a violation of Article I, Section 12, of the New York State Constitution.<sup>69</sup> The police policy was essentially the same as that of *In re Muhammad F.*<sup>70</sup> In *Robinson*, the police officers, in a marked police car, followed taxicabs in an attempt to prevent robberies from occurring.<sup>71</sup> The officers observed a car go through a red light and while pulling the vehicle over, the officers saw a passenger looking back at the officer’s vehicle several times.<sup>72</sup> One of the officers shined his light into the vehicle and realized that the defendant, a passenger in the livery cab, was wearing a bulletproof vest.<sup>73</sup> The officer ordered the defendant out of the cab, at which time the officer observed a gun on the floor of the vehicle where the defendant was seated.<sup>74</sup> The defendant was charged with criminal possession of a weapon, and unlawfully wearing a bulletproof vest.<sup>75</sup> The defendant argued that the evidence should have been suppressed, in that the officers used the traffic infraction as a pretext to search him.<sup>76</sup>

The majority adopted *Whren v. United States*<sup>77</sup> as a matter of state law. *Whren* essentially holds that as long as the police

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<sup>67</sup> *Id.* at 147-48, 722 N.E.2d at 51, 700 N.Y.S.2d at 83.

<sup>68</sup> 97 N.Y.2d 341, 767 N.E.2d 638, 741 N.Y.S.2d 147 (2001).

<sup>69</sup> N.Y. CONST. art. 1, § 12 provides in pertinent part: “The right of the people to be secure in their persons, houses papers and effects, against unreasonable searches and seizures, shall not be violated . . .”

<sup>70</sup> 94 N.Y.2d at 136, 722 N.E.2d at 45, 700 N.Y.S.2d at 77.

<sup>71</sup> *Robinson*, 97 N.Y.2d at 346, 767 N.E.2d at 640, 741 N.Y.S.2d at 149.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 347, 767 N.E.2d at 640, 741 N.Y.S.2d at 149.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Robinson*, 97 N.Y.2d at 347, 767 N.E.2d at 640, 741 N.Y.S.2d at 149.

<sup>77</sup> 517 U.S. 806 (1996).

have probable cause to believe a traffic violation has occurred, the decision to stop the vehicle is reasonable and not a violation of the Fourth Amendment.<sup>78</sup>

Justice Levine, in a strong dissent, argued that *Whren* should not be adopted as a matter of state constitutional law.<sup>79</sup> He reasoned that pretextual traffic stops, “stops that would not have been made but for the aim of the police to accomplish an otherwise unlawful investigative seizure or search . . . is manifestly insufficient to protect against arbitrary police conduct.”<sup>80</sup> Judge Levine stated that motor vehicle travel, the most regulated activity engaged in by Americans, is a universal activity Americans engage in outside of their homes.<sup>81</sup> Judge Levine reasoned the combination of the numerous motor vehicle laws that could initiate a stop, as well as the amount of time Americans spend in their cars is a dangerous combination in the area of search and seizure jurisprudence,<sup>82</sup> and he believed that the ultimate consequence of the adoption of the holding in *Whren* “is to allow the police to stop vehicles in almost countless circumstances. When *Whren* is coupled with today’s holding, the Court puts tens of millions of passengers at risk of arbitrary control by the police.”<sup>83</sup> Judge Levine’s view is further grounded in the possibility that “a persevering police officer, armed only with a copy of the Vehicle and Traffic Law and bent on subjecting a vehicle and its occupants to an unjustified investigative stop, will ultimately be able to accomplish that objective virtually *at will*.”<sup>84</sup>

Judge Levine promulgated an objective standard, “would a reasonable officer assigned to Vehicle and Traffic Law enforcement in the seizing officer’s department have made the stop under the circumstances presented, absent a purpose to investigate serious criminal activity of the vehicle’s occupants.”<sup>85</sup> Therefore, in Judge Levine’s view, there must be more than a traffic infraction

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<sup>78</sup> *Robinson*, 97 N.Y.2d at 348-49, 767 N.E.2d at 641, 741 N.Y.S.2d at 150 (citing *Whren*, 517 U.S. at 810).

<sup>79</sup> *Id.* at 360, 767 N.E.2d at 650, 741 N.Y.S.2d at 159 (Levine, J., dissenting).

<sup>80</sup> *Id.* at 363, 767 N.E.2d at 652, 741 N.Y.S.2d at 161.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Robinson*, 97 N.Y.2d at 366, 767 N.E.2d at 654, 741 N.Y.S.2d at 163.

<sup>84</sup> *Id.* at 373, 767 N.E.2d at 660, 741 N.Y.S.2d at 169.

<sup>85</sup> *Id.* at 371-72, 767 N.E.2d at 659-60, 741 N.Y.S.2d at 168-69.

to search a vehicle and use the fruits of that search in a criminal proceeding against the defendant.<sup>86</sup>

Judge Levine wrote the majority opinion in the 1993 case of *In re Gregory M.*,<sup>87</sup> which, in effect, held that the threshold to establish reasonable cause for a school search is a lower standard than what is ordinarily constitutionally required.<sup>88</sup> The defendant, a high school student in the Bronx, was asked to put his book bag on a metal shelf as he entered the school.<sup>89</sup> As he did, a nearby security guard heard a metallic thud and, in response, ran his hands over the outside of the bag feeling the shape of a gun.<sup>90</sup> It was discovered that the bag contained a small hand gun.<sup>91</sup>

Judge Levine, in writing for the Court, held that to determine the validity of a school search, there must be “a balancing of basic personal rights against urgent social necessities.”<sup>92</sup> The Court held that defendant’s expectation of privacy was minimal with regard to someone touching the outside of his school bag;<sup>93</sup> however, the state interest in keeping weapons out of the New York City schools was “a governmental interest of the highest urgency.”<sup>94</sup> In light of this balancing test, the Court held the search reasonable in that a “lesser standard than reasonable suspicion” applied to the feeling of the outside of the defendant’s back pack.<sup>95</sup>

### CONSTITUTIONAL RIGHTS OF PRISONERS

In Judge Levine’s opinions with regard to prisoners’ rights, he has held that interrogation of an inmate is not a *per se* custodial

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<sup>86</sup> *Id.* at 374, 767 N.E.2d at 661, 741 N.Y.S.2d at 170.

<sup>87</sup> 82 N.Y.2d 588, 627 N.E.2d 500, 606 N.Y.S.2d 579 (1993).

<sup>88</sup> *Id.* at 591, 627 N.E.2d at 591, 606 N.Y.S.2d at 580.

<sup>89</sup> *Id.* at 590, 627 N.E.2d at 590, 606 N.Y.S.2d at 580.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Gregory M.*, 82 N.Y.2d at 592, 627 N.E.2d at 502, 606 N.Y.S.2d at 581 (quoting *People v. Scott*, 34 N.Y.2d 483, 315 N.E.2d 466, 358 N.Y.S.2d 403 (1974)).

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 593, 627 N.E.2d at 502, 606 N.Y.S.2d at 581.

<sup>95</sup> *Id.* at 594, 627 N.E.2d at 503, 606 N.Y.S.2d at 582.

interrogation, and that a prison program mandating Alcoholic's Anonymous attendance violated the Establishment Clause.

Judge Levine wrote the majority opinion in *People v. Alls*,<sup>96</sup> which held that interrogating an inmate in a penal institution is not a *per se* custodial interrogation,<sup>97</sup> and therefore, does not require *Miranda* warnings.<sup>98</sup> *Miranda* warnings grew out of the United States Supreme Court decision in *Miranda v. Arizona*<sup>99</sup> where the Court held that with respect to statements made by a defendant, "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination."<sup>100</sup> The Court further held that "[b]y custodial interrogation we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."<sup>101</sup> The Supreme Court reasoned that custodial interrogation was inherently coercive, and the individual had to be protected from incriminating him or herself in such an atmosphere.<sup>102</sup>

In the instant case, the defendant, Alls, was an inmate in a New York State correctional facility.<sup>103</sup> He was involved in an incident in the facility which led to his indictment for sodomy in the first degree and assault in the second degree.<sup>104</sup> A correctional officer questioned Alls, alone in an empty basement room of the facility, without first administering *Miranda* warnings.<sup>105</sup> Alls claimed that because an inmate is not free to leave the facility, "any questioning of the prisoner is *per se* custodial interrogation, requiring *Miranda* warnings."<sup>106</sup> The court held that for *Miranda* warnings to be necessary, there must be an added constraint, so

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<sup>96</sup> 83 N.Y.2d 94, 629 N.E.2d 1018, 608 N.Y.S.2d 139 (1993).

<sup>97</sup> *Id.* at 97, 629 N.E.2d at 1019, 608 N.Y.S.2d at 140.

<sup>98</sup> *Id.*

<sup>99</sup> 384 U.S. 436 (1966).

<sup>100</sup> *Id.* at 444.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Alls*, 83 N.Y.2d at 96, 629 N.E.2d at 1018, 608 N.Y.S.2d at 139.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 97, 629 N.E.2d at 1019, 608 N.Y.S.2d at 140.

<sup>106</sup> *Id.*

that the “inmate reasonably believes there has been a restriction on his or her freedom over and above that of ordinary confinement.”<sup>107</sup>

Judge Levine wrote the majority opinion in *In re David Griffin*,<sup>108</sup> which held that the Establishment Clause of the United States Constitution’s First Amendment<sup>109</sup> was violated by a prison policy that denied a prisoner’s family visitation privileges for refusing to attend Alcoholic’s Anonymous meetings, which was the only alcohol and drug rehabilitation program offered in the prison.<sup>110</sup> The court held that the religious-orientated practices of Alcoholic’s Anonymous “necessarily entail[s] religious exercise.”<sup>111</sup> Such mandatory attendance violates the Establishment Clause due to the prison’s exercising coercive power to advance religion, taking into account the severe consequence of non-attendance.<sup>112</sup>

### DEATH PENALTY STATUTE

Judge Levine, writing for the majority, addressed the New York State death penalty statute in his majority opinion in *Francois v. Dolan*,<sup>113</sup> where the court held that a defendant in a death penalty case has no legal right to enter a plea of guilty, which, in effect, would result in no possibility of the death sentence.<sup>114</sup> The defendant, Francois, was indicted for eight counts of murder in the first degree, eight counts of murder in the second degree, and one count of attempted second degree assault.<sup>115</sup> Francois entered a plea of not guilty.<sup>116</sup>

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<sup>107</sup> *Id.* at 100, 629 N.E.2d at 1021, 608 N.Y.S.2d at 142.

<sup>108</sup> 88 N.Y.2d 674, 673 N.E.2d 98, 649 N.Y.S.2d 903 (1996).

<sup>109</sup> U.S. CONST. amend. I provides in pertinent part: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .”

<sup>110</sup> *Griffin*, 88 N.Y.2d at 677, 673 N.E.2d at 99, 649 N.Y.S.2d at 904.

<sup>111</sup> *Id.* at 686, 673 N.E.2d at 105, 649 N.Y.S.2d at 910.

<sup>112</sup> *Id.*

<sup>113</sup> 95 N.Y.2d 33, 731 N.E.2d 614, 709 N.Y.S.2d 898 (2000).

<sup>114</sup> *Id.* at 35, 731 N.E.2d at 614, 709 N.Y.S.2d at 898.

<sup>115</sup> *Id.* at 35, 731 N.E.2d at 615, 709 N.Y.S.2d at 899.

<sup>116</sup> *Id.*

Under New York State law, the district attorney has 120 days from the date of defendant's arraignment to serve a notice of intent to seek the death penalty.<sup>117</sup> Prior to the death penalty notice being filed, the defendant offered to plead guilty to the indictment; however, the District Attorney opposed the plea, and filed the required notice to seek the death penalty.<sup>118</sup> The county court judge refused to accept the defendant's plea of guilty.<sup>119</sup> The defendant sought an order directing the county court to entertain his guilty plea of the entire indictment, claiming that a defendant in all cases, including capital crimes, has an absolute right to plead guilty prior to the verdict.<sup>120</sup>

The Court of Appeals held a capital defendant does not have such a right.<sup>121</sup> The outcome of such a right, in light of the structure of New York's death penalty statute would negate any possibility of the defendant actually receiving the death penalty.<sup>122</sup> New York's statute mandates "a jury trial for the guilt-adjudication stage and then, upon conviction, there is a mandated second sentencing proceeding before a jury to determine whether the penalty imposed will be death or life imprisonment without parole."<sup>123</sup> As the guilty plea renders the jury determination moot, so too would it render the possibility of a death sentence moot.

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<sup>117</sup> N.Y. CRIM. PROC. LAW § 250.40(2) (McKinney 2003) provides:

1. A sentence of death may not be imposed upon a defendant convicted of murder in the first degree unless, pursuant to subdivision two of this section, the people file with the court and serve upon the defendant a notice of intent to seek the death penalty.
2. In any prosecution in which the people seek a sentence of death, the people shall, within one hundred twenty days of the defendant's arraignment upon an indictment charging the defendant with murder in the first degree, serve upon the defendant and file with the court in which the indictment is pending a written notice of intention to seek the death penalty. For good cause shown the court may extend the period for service and filing of the notice.

<sup>118</sup> *Francois*, 95 N.Y.2d at 37, 731 N.E.2d at 616, 709 N.Y.S.2d at 900.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 37-38, 731 N.E.2d at 616, 709 N.Y.S.2d at 900.

<sup>123</sup> *Francois*, 95 N.Y.2d at 36, 731 N.E.2d at 615, 709 N.Y.S.2d at 899 (citing N.Y. CRIM. PROC. LAW § 400.27).

Judge Levine, writing for the majority, cautioned that to rule that a defendant does have a legal right to plead guilty in such a case “would inevitably result, in the most heinous or high profile cases, in an unseemly race to the courthouse between defense and prosecution to see whether a guilty plea or notice of intent to seek the death penalty will be filed first.”<sup>124</sup> Such a race, in the court’s view, is not only unacceptable, but would “undeniably preclude the thorough, fully deliberative decision making on whether to seek the death penalty . . .,” which the Legislature has intended.<sup>125</sup>

One year later, in 2001, Judge Levine again wrote the majority opinion in *People v. Edwards*,<sup>126</sup> where the defendant was indicted on one count of murder in the first degree, murder in the second degree, and criminal possession of a weapon in the second degree.<sup>127</sup> The prosecution filed a timely notice of intent to seek the death penalty.<sup>128</sup> In the month following, the prosecution and defendant entered into a plea agreement, wherein the defendant would receive a sentence of twenty-five years to life in exchange for his cooperation in the prosecution of his co-defendants.<sup>129</sup>

After the defendant’s guilty plea had been entered, but before sentencing, the New York Court of Appeals struck the plea provisions from New York’s death penalty statute.<sup>130</sup> The repealed provisions had permitted a defendant, who had a death penalty notice pending, to enter a guilty plea of first degree murder with the consent of the prosecution and permission of the court, and only when the agreed upon sentence was life without parole or a term of years.<sup>131</sup> The court struck these provisions, fearing a constitutional defect, in that the act “created a two-tiered penalty structure that impermissibly burdened capital defendants’ Fifth Amendment rights against self-incrimination<sup>132</sup> and Sixth

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<sup>124</sup> *Id.* at 39, 731 N.E.2d at 617, 709 N.Y.S.2d at 901.

<sup>125</sup> *Id.*

<sup>126</sup> 96 N.Y.2d 445, 754 N.E.2d 169, 729 N.Y.S.2d 410 (2001).

<sup>127</sup> *Id.* at 448, 754 N.E.2d at 170, 729 N.Y.S.2d at 411.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 449, 754 N.E.2d at 170, 729 N.Y.S.2d at 411.

<sup>131</sup> *Edwards*, 96 N.Y.2d at 449, 754 N.E.2d at 170, 729 N.Y.S.2d at 411.

<sup>132</sup> U.S. CONST. amend. V provides in pertinent part:

No person shall be held to answer for a capital, or other infamous crime unless on a presentment or indictment of a

Amendment rights to trial by jury<sup>133</sup> by limiting imposition of a death sentence exclusively to defendants asserting those rights by insisting upon a jury trial.”<sup>134</sup> In response to this decision, the defendant in the instant case moved to withdraw his guilty plea,<sup>135</sup> and the county court denied the motion.<sup>136</sup>

The Court of Appeals held that the defendant entered an entirely valid plea under the law then existing,<sup>137</sup> in spite of the fact that the law was defective at the time the plea was entered.<sup>138</sup> Therefore, the court held defendant’s plea, even if only entered because of fear of exposure to the death penalty, did not violate his Fifth or Sixth Amendment rights.<sup>139</sup>

### CRUEL AND UNUSUAL PUNISHMENT

In *People v. Thompson*,<sup>140</sup> a seventeen year-old female defendant was sentenced to not less than fifteen years and not more than twenty-five years for the sale of two ounces of cocaine to an undercover police officer.<sup>141</sup> The trial court concluded that in this case, even the minimum mandatory sentence constituted cruel and unusual punishment under both the Eighth Amendment to the

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Grand Jury . . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . .

<sup>133</sup> U.S. CONST. amend. VI provides in pertinent part: “In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State . . .”

<sup>134</sup> *Edwards*, 96 N.Y.2d at 449, 754 N.E.2d at 171, 729 N.Y.S.2d at 412.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 454, 754 N.E.2d at 174, 729 N.Y.S.2d at 415.

<sup>138</sup> *Id.*

<sup>139</sup> *Edwards*, 96 N.Y.2d at 454, 754 N.E.2d at 174, 729 N.Y.S.2d at 415.

<sup>140</sup> 83 N.Y.2d 477, 633 N.E.2d 1074, 611 N.Y.S.2d 470 (1994).

<sup>141</sup> *Id.* at 479, 633 N.E.2d at 1075, 611 N.Y.S.2d at 471.



United States Constitution,<sup>142</sup> and Article I, Section 5 of the New York State Constitution.<sup>143</sup>

Judge Levine, writing for the court, gave deference to the legislature, although acknowledging that the “mandatory sentences for drug offenses are relatively severe, but not irrationally so.”<sup>144</sup> The court held that for a sentence to be considered cruel and inhumane, the United States Supreme Court has held that there must be “gross disproportionality” between the sentence of imprisonment and the crime to violate the Eighth Amendment’s Cruel and Unusual Punishment Clause.<sup>145</sup>

The court held that “the Legislature may constitutionally define criminal punishments without giving the courts any sentencing discretion.”<sup>146</sup> The court further held that the “selling of narcotic drugs represents a grave offense of the first magnitude,”<sup>147</sup> and that compared to the sentences of other crimes within the state, or in comparing other states’ narcotics sentences to New York’s, “the mandatory sentences for drug offenses are relatively severe, but not irrationally so, given the epidemic dimensions of the problem.”<sup>148</sup>

### RIGHT TO A SPEEDY TRIAL

In *People v. Vernace*,<sup>149</sup> the six judge majority held that a fourteen year delay in the prosecution of a murder suspect was not unreasonable, and the prosecution could proceed.<sup>150</sup> The majority reasoned that although the delay was extensive, the nature of the

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<sup>142</sup> U.S. CONST. amend. VIII provides: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.”

<sup>143</sup> N.Y. CONST. art. 1, § 5 provides: “Excessive bail shall not be required nor excessive fines imposed, nor shall cruel and unusual punishments be inflicted, nor shall witnesses be unreasonably detained.”

<sup>144</sup> *Thompson*, 83 N.Y.2d at 482, 633 N.E.2d at 1077, 611 N.Y.S.2d at 473 (citing *People v. Broadie*, 37 N.Y.2d 100, 117, 332 N.E.2d 338, 345, 371 N.Y.S.2d 471, 480-81 (1975)).

<sup>145</sup> *Id.* at 479, 633 N.E.2d at 1076, 611 N.Y.S.2d at 472 (citing *Harmelin v. Michigan*, 501 U.S. 957 (1991)).

<sup>146</sup> *Id.* at 482, 633 N.E.2d at 1077, 611 N.Y.S.2d at 473.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* (citing *Broadie*, 37 N.Y.2d 100, 332 N.E.2d 338, 371 N.Y.S.2d 471).

<sup>149</sup> 96 N.Y.2d 886, 756 N.E.2d 66, 730 N.Y.S.2d 778 (2001).

<sup>150</sup> *Id.* at 888, 756 N.E.2d at 67, 730 N.Y.S.2d at 779.

underlying charge did not “demonstrate undue prejudice to the defendant.”<sup>151</sup>

Judge Levine, in his solitary dissent, stated that the New York Court of Appeals has viewed “an unjustified, protracted pre-indictment delay in prosecution . . . as a deprivation of a defendant’s state constitutional right to due process, without requiring a showing of actual prejudice.”<sup>152</sup> In the case of a prolonged delay, the prosecution must establish good cause for the delay.<sup>153</sup> In Judge Levine’s dissent, he opined not only did the prosecution fail to establish good cause for the delay, but “the evidence points only to complete prosecutorial inertia and inattention . . . .”<sup>154</sup>

### RIGHT TO COUNSEL

In 1997, Judge Levine wrote the unanimous opinion in *People v. Cohen*,<sup>155</sup> holding that a criminal defendant’s right to counsel was violated when the police, who knew the defendant was represented by counsel in a prior related crime, interrogated him on a subsequent crime, but intermingled questions regarding the first crime.<sup>156</sup> The court held the interrogation “actually entailed an infringement of the suspect’s State constitutional right to counsel by impermissible questioning on the represented crime.”<sup>157</sup>

The defendant, Cohen, was implicated in the murder of a store clerk at a Citgo gas station.<sup>158</sup> The weapon used in the crime was stolen from a nearby garage, and an informant advised police that the defendant was one of the three people who had stolen the gun and told the informant of their plan to rob the Citgo station.<sup>159</sup> The defendant retained counsel with respect to the gun theft.<sup>160</sup>

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<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at 889, 756 N.E.2d at 69, 730 N.Y.S.2d at 781 (Levine, J., dissenting).

<sup>153</sup> *Id.*

<sup>154</sup> *Vernace*, 96 N.Y.2d at 890, 756 N.E.2d at 69-70, 730 N.Y.S.2d at 781-82.

<sup>155</sup> 90 N.Y.2d 632, 687 N.E.2d 1313, 665 N.Y.S.2d 30 (1997).

<sup>156</sup> *Id.* at 642, 687 N.E.2d at 1319, 665 N.Y.S.2d at 36.

<sup>157</sup> *Id.* at 640, 687 N.E.2d at 1317, 665 N.Y.S.2d at 34.

<sup>158</sup> *Id.* at 635, 687 N.E.2d at 1314, 665 N.Y.S.2d at 31.

<sup>159</sup> *Id.*

<sup>160</sup> *Cohen*, 90 N.Y.2d at 635, 687 N.E.2d at 1315, 665 N.Y.S.2d at 32.

Subsequently, the police questioned the defendant about the Citgo robbery and murder, and intermingled questions about the garage robbery.<sup>161</sup> Defendant's counsel was not present, and the defendant fully incriminated himself in the robbery/murder.<sup>162</sup> The court held there was an interference with an existing attorney/client relationship of which the officers were personally aware,<sup>163</sup> and that the officers' questions regarding the garage crime "was designed to add pressure on the defendant to confess"<sup>164</sup> to the subsequent crime.

### CONFRONTATION CLAUSE

In *In re Edwin L.*,<sup>165</sup> the majority held that where a juvenile violated the conditions of an adjournment in contemplation of dismissal, there was no confrontation clause defect in the court producing only hearsay testimony against the minor-defendant.<sup>166</sup> The alleged violations were testified to by a social worker at the minor's hearing, who testified from reports, but had no personal knowledge of the information contained therein.<sup>167</sup> In his dissent, Judge Levine reasoned that "procedural due process protections . . . include a hearing at which the juvenile has the right to confront and cross-examine adverse witnesses."<sup>168</sup> He further reasoned that the agency had the burden to prove the violations occurred,<sup>169</sup> and that Edwin L.'s interest, in being released from the court's supervision was a "constitutionally significant liberty interest."<sup>170</sup> Therefore, the fact that the hearing rested solely on hearsay evidence, without finding good cause for dispensing with confrontation, "violated his right to procedural due process."<sup>171</sup>

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<sup>161</sup> *Id.* at 638, 687 N.E.2d at 1316, 665 N.Y.S.2d at 33.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* at 641, 687 N.E.2d at 1318, 665 N.Y.S.2d at 35.

<sup>164</sup> *Id.* at 642, 687 N.E.2d at 1319, 665 N.Y.S.2d at 36.

<sup>165</sup> 88 N.Y.2d 593, 671 N.E.2d 1247, 648 N.Y.S.2d 850 (1996).

<sup>166</sup> *Id.* at 597, 671 N.E.2d at 1248, 648 N.Y.S.2d at 851.

<sup>167</sup> *Id.* at 599, 671 N.E.2d at 1249, 648 N.Y.S.2d at 852.

<sup>168</sup> *Id.* at 607, 671 N.E.2d at 1253, 648 N.Y.S.2d at 856 (Levine, J., dissenting).

<sup>169</sup> *Id.* at 608, 671 N.E.2d at 1254, 648 N.Y.S.2d at 857.

<sup>170</sup> *Edwin L.*, 88 N.Y.2d at 613, 671 N.E.2d at 1258, 648 N.Y.S.2d at 861.

<sup>171</sup> *Id.* at 616, 671 N.E.2d at 1259, 648 N.Y.S.2d at 862.

## EQUAL PROTECTION

Judge Levine wrote the dissent in *In re Cahill*,<sup>172</sup> wherein the majority held that a dentist's office is a place of public accommodation.<sup>173</sup> As such, the office falls within New York Executive Law Section 296(2)(a),<sup>174</sup> which holds discrimination unlawful "if a place of public accommodation denies its accommodations to any person on the basis of race, creed, color, national origin, sex, or disability or marital status."<sup>175</sup> The dentist in the instant case denied treatment to a patient he perceived as being at risk for HIV.<sup>176</sup> The court held such discriminatory practices were unlawful under the civil rights law of New York State, in that "persons within the reach of the statute may not pick and choose those against whom they discriminate."<sup>177</sup>

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<sup>172</sup> 89 N.Y.2d 14, 674 N.E.2d 274, 651 N.Y.S.2d 344 (1996).

<sup>173</sup> *Id.* at 21, 674 N.E.2d at 277, 651 N.Y.S.2d at 347.

<sup>174</sup> N.Y. EXEC. LAW § 296(2)(a) (McKinney 2002) provides:

It shall be an unlawful discriminatory practice for any person, being the owner, lessee, proprietor, manager, superintendent, agent or employee of any place of public accommodation, resort or amusement, because of the race, creed, color, national origin, sexual orientation, sex, or disability or marital status of any person, directly or indirectly, to refuse, withhold from or deny to such person any of the accommodations, advantages, facilities or privileges thereof, including the extension of credit, or, directly or indirectly, to publish, circulate, issue, display, post or mail any written or printed communication, notice or advertisement, to the effect that any of the accommodations, advantages, facilities and privileges of any such place shall be refused, withheld from or denied to any person on account of race, creed, color, national origin, sexual orientation, sex, or disability or marital status, or that the patronage or custom thereof of any person of or purporting to be of any particular race, creed, color, national origin, sexual orientation, sex or marital status, or having a disability is unwelcome, objectionable or not acceptable, desired or solicited.

<sup>175</sup> *Cahill*, 89 N.Y.2d at 23, 674 N.E.2d at 279, 651 N.Y.S.2d at 348.

<sup>176</sup> *Id.* at 18, 674 N.E.2d at 275, 651 N.Y.S.2d at 345.

<sup>177</sup> *Id.* at 23, 674 N.E.2d at 278, 651 N.Y.S.2d at 348.

Judge Levine disagreed that a dentist's office was within a "place of public accommodation, resort or amusement,"<sup>178</sup> lamenting that to include the dentist's office in the class would "result in an explosive increase in the jurisdiction of the State Division of Human Rights."<sup>179</sup> Judge Levine stated that although "the private practices of dentists or medicine is important to the public, traditionally it lacks that openness of access by the general public that has been an essential characteristic of a place of public accommodation."<sup>180</sup> Judge Levine reasoned that to read the statute so broadly, the court brought within the statute businesses which the legislature did not intend to include,<sup>181</sup> and, in so doing, the majority rewrote the law "without the benefit of a legislative enactment."<sup>182</sup>

Furthermore, in *In re Clara C.*,<sup>183</sup> although Judge Levine concurred in the decision of the court, he would have taken the decision one step further and declared that the statute at issue "unconstitutionally denied the child . . . right to the equal protection of the laws. (U.S. Constitution Fourteenth Amendment<sup>184</sup> and New York Constitution Article 1, Section 1<sup>185</sup>)."<sup>186</sup>

An unwed mother and the putative father entered into a support agreement pursuant to Family Court Act Section 516.<sup>187</sup>

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<sup>178</sup> *Id.* at 25, 674 N.E.2d at 279, 651 N.Y.S.2d at 349 (Levine, J., dissenting).

<sup>179</sup> *Id.* at 24-25, 674 N.E.2d at 278-79, 651 N.Y.S.2d at 348-49.

<sup>180</sup> *Cahill*, 89 N.Y.2d at 26, 674 N.E.2d at 280, 651 N.Y.S.2d at 350.

<sup>181</sup> *Id.* at 27, 674 N.E.2d at 280, 651 N.Y.S.2d at 350.

<sup>182</sup> *Id.*

<sup>183</sup> 96 N.Y.2d 244, 750 N.E.2d 1068, 727 N.Y.S.2d 20 (2001).

<sup>184</sup> U.S. CONST. amend. XIV provides in pertinent part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

<sup>185</sup> N.Y. CONST. art. 1, § 11 provides:

No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, creed or religion, be subjected to any discrimination in his civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state.

<sup>186</sup> *Clara C.*, 96 N.Y.2d at 251, 750 N.E.2d at 1073, 727 N.Y.S.2d at 25 (Levine, J., concurring).

<sup>187</sup> N.Y. FAM. CT. ACT § 516 (McKinney 2003) provides:

Section 516 applies only to non-marital children and holds that once the parties enter into a binding support agreement, which has been approved by a court, the agreement bars any future “remedies of the mother or child for the support and education of the child.”<sup>188</sup> Twelve years after the agreement was signed, the mother applied to the court to modify the agreement, in light of the child’s current educational needs.<sup>189</sup>

The majority held that based on the facts, there was a flaw in the original proceeding, in that the family court never made a determination as to the agreement’s adequacy, as required by the statute, and, therefore, the mother could proceed with her family court petition for an increase in support.<sup>190</sup> The majority consciously chose not to address the constitutionality of Section 516 “[b]ecause a compelling nonconstitutional ground resolves this appeal, we refrain, at this time, from addressing the constitutional issues raised.”<sup>191</sup>

However, Judge Levine, in his concurring opinion was not as restrained as the majority. He reasoned that Family Law Section 516 violates the Equal Protection Clause of the United States Constitution<sup>192</sup> and Article 1 Section 11 of the New York Constitution. He reasoned that the Act “treat[s] the support of non-

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- (a) An agreement or compromise made by the mother or by some authorized person on behalf of either the mother or child concerning the support of either is binding upon the mother and child only when the court determines that adequate provision has been made and is fully secured and approves said agreement or compromise.
  - (b) No agreement or compromise under this section shall be approved until notice and opportunity to be heard are given to the public welfare official of the county, city or town where the mother resides or the child is found.
  - (c) The complete performance of the agreement or compromise, when so approved, bars other remedies of the mother or child for the support and education of the child.

<sup>188</sup> *Clara C.*, 96 N.Y.2d at 249, 750 N.E.2d at 1071, 727 N.Y.S.2d at 23.

<sup>189</sup> *Id.* at 248, 750 N.E.2d at 1070, 727 N.Y.S.2d at 22.

<sup>190</sup> *Id.* at 250, 750 N.E.2d at 1072, 727 N.Y.S.2d at 24.

<sup>191</sup> *Id.*

<sup>192</sup> U.S. CONST. amend. XIV provides in pertinent part: “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.”

marital children, whose mothers have entered into court approved compromises of paternity suits, differently from the support rights of children born of married parents.”<sup>193</sup> The non-marital child, under Section 512, is forever barred after the agreement is entered into, from “seeking either an initial order of support through paternity proceedings . . . or from seeking modification of the court approved agreement . . . .”<sup>194</sup> Such disparate treatment of this class of individuals, Judge Levine wrote, “triggers the intermediate level of scrutiny.”<sup>195</sup>

Judge Levine opined that the state’s interest of “reducing and disposing of litigation in the courts through settlement agreements . . . [and] ensur[ing] that the child will not be without support from his father”<sup>196</sup> as well as “avoiding the vagaries of paternity litigation”<sup>197</sup> are no longer viable in light of developed technology in determining paternity. Therefore, Judge Levine believed the state interest was not substantial.<sup>198</sup> He further reasoned that “[t]here is little apparent reason apart from purely invidious discrimination, why the state’s general interest in settling lawsuits with finality should be greater in the case of a non-marital child.”<sup>199</sup>

Apparently the New York State Assembly agreed with Judge Levine’s position. A bill to repeal Section 516 of the Family Court Act is presently before the New York State Legislature.<sup>200</sup>

### CAMPAIGN FUNDING

In *In re Robert L. Schulz*,<sup>201</sup> Judge Levine wrote the majority opinion, which held that a newsletter, *The Voice of the*

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<sup>193</sup> *Clara C.*, 96 N.Y.2d at 253, 750 N.E.2d at 1074, 727 N.Y.S.2d at 26.

<sup>194</sup> *Id.* at 254, 750 N.E.2d at 1075, 727 N.Y.S.2d at 27.

<sup>195</sup> *Id.*

<sup>196</sup> *Id.* at 255, 750 N.E.2d at 1077, 727 N.Y.S.2d at 29.

<sup>197</sup> *Id.* at 256, 750 N.E.2d at 1077, 727 N.Y.S.2d at 29.

<sup>198</sup> *Clara C.*, 96 N.Y.2d at 257, 750 N.E.2d at 1077, 727 N.Y.S.2d at 29.

<sup>199</sup> *Id.*

<sup>200</sup> A04284, 2003 Gen. Assem., Reg. Sess. (NY 2003) states in pertinent part: Repeals section 516 of the family court act which provides for court approval of a written agreement or compromise for child support between a putative father and a mother or person on behalf of the child, which, when so approved, bars other remedies for child support.

*New, New York*, sent to the public at the direction of Governor Cuomo<sup>202</sup> on the eve of the 1992 presidential campaign, was in violation of Article VII, Section 8(1)<sup>203</sup> of the New York State Constitution.<sup>204</sup>

In writing for the majority, Judge Levine opined that although “the newsletter contained a substantial amount of factual information which would have been of assistance to the electorate . . . ,”<sup>205</sup> the newsletter also contained criticism of the Bush administration and republicans with regard to welfare reform, a primary issue in the campaign.<sup>206</sup> Therefore, the newsletter went beyond disseminating information to the electorate, but was “an unequivocal promotion of a partisan political position,”<sup>207</sup> and could not be “prepared and disseminated at public expense.”<sup>208</sup>

#### DEFAMATION ON THE INTERNET

Judge Levine wrote the majority opinion in *Firth v. New York*,<sup>209</sup> which held that for purposes of the statute of limitations, the single publication rule is applicable to defamatory statements posted on the Internet.<sup>210</sup> The court reasoned that to hold otherwise would “implicate an even greater potential for endless

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<sup>201</sup> 86 N.Y.2d 225, 654 N.E.2d 1226, 630 N.Y.S.2d 978 (1995).

<sup>202</sup> Governor Cuomo appointed Judge Levine to the Court of Appeals.

<sup>203</sup> N.Y. CONST. art. VII § (8)(1) provides:

The money of the state shall not be given or loaned to or in aid of any private corporation or association, or private undertaking; nor shall the credit of the state be given or loaned to or in aid of any individual, or public or private corporation or association, or private undertaking, but the foregoing provisions shall not apply to any fund or property now held or which may hereafter be held by the state for educational, mental health or mental retardation purposes.

<sup>204</sup> *Schulz*, 86 N.Y.2d at 235, 654 N.E.2d at 1231, 630 N.Y.S.2d at 983.

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> *Id.* at 236, 654 N.E.2d at 1231, 630 N.Y.S.2d at 983.

<sup>208</sup> *Id.*

<sup>209</sup> 98 N.Y.2d 365, 775 N.E.2d 463, 747 N.Y.S.2d 69 (2002).

<sup>210</sup> *Id.* at 370, 775 N.E.2d at 466, 747 N.Y.S.2d at 72.



retriggering of the statute of limitations, multiplicity of suits and harassment of defendants.”<sup>211</sup>

### CONCLUSION

This brief summary of Judge Levine’s opinions and dissents demonstrates a non-partisan jurist, a jurist not influenced by political pressure nor political “correctness,” but rather influenced by fundamental fairness in a changing modern society. Judge Levine’s jurisprudence leaves the foundation on which the Constitution was built intact, and uses it to support his well-reasoned decisions.

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<sup>211</sup> *Id.*

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