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Judith S. Kaye

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Kaye: Things Judges Do
**THINGS JUDGES DO: STATE STATUTORY
INTERPRETATION***

Judith S. Kaye

Author's Note: I am especially pleased to be a part of an issue dedicated to Judge Richard D. Simons. As the Court of Appeals' two "junior judges" in 1983--Judge Simons went on the Court in January 1983, I followed in September--we established a bond that will endure forever, learning together the wondrous ways of a great institution and enjoying the ensuing years in the privileged position of colleagues and friends. Having shared with Judge Simons a dozen years around the Court's Conference Table and the dinner table (during Albany Sessions, the judges dine together), what emerges for me is the picture of an exemplary judge and an extraordinary human being. This article focuses on only one Simons opinion--*Cahill v. Rosa*.¹ So many of his writings are textbook examples of the judicial craft at its best.

In anticipation of my visit to Touro, your Dean wisely and thoughtfully sent me fascinating videotapes of two of my predecessors at this "Distinguished Jurist" podium. First, I watched Judge Alex Kozinski describe his experiences sharing pizza with Justice Antonin Scalia--I believe Judge Kozinski has done a scholarly piece on the subject. And then I watched the

* This article is based on remarks delivered at Touro College Jacob D. Fuchsberg Law Center on April 10, 1997 as part of the Distinguished Jurist in Residence Program. I am most grateful for the superb assistance of my Law Clerk Jeremy R. Feinberg in the preparation of this article.

1. 89 N.Y.2d 14, 674 N.E.2d 274, 651 N.Y.S.2d 344 (1996); *see infra* text accompanying notes 57-61.

pizza connoisseur himself. Talk about food for thought! Even the mention of those lectures leaves me lusting for pizza. So I'd like to join the party--regrettably not the culinary feast but the intellectual one.

Three years ago, Judge Kozinski called his speech "Things Judges Say."² Today, picking up where he left off, I would like to call my remarks "Things Judges Do." Then you'll have a complete picture: what judges say, what they do and what they eat.

As you all know, judges make and shape the law by developing the common law and interpreting statutes and constitutions. That's the easy part. How they do it is considerably more difficult.

In his lecture, Judge Kozinski described how judges interpret contracts under common law principles. He concluded that judges can make the words of a contract say just about anything. He called it "wresting ambiguity from the jaws of clarity."³ Judge Kozinski concluded that when judges let lawyers persuade them to interpret contracts in a manner contrary to the normal sense of the words, the bargaining process becomes meaningless and the contract merely a precursor to litigation--obviously a very bad result. He called on lawyers and judges to respect the importance of legal instruments and find ways to give their words meaning other than as a gateway to litigation.

The very next year, Justice Scalia offered a variation on the theme in describing considerations involved in interpreting the United States Constitution.⁴ He warned against treating the Constitution as a living document, capable of changing and reacting to the course of time. Doing so, Justice Scalia argued,

2. Remarks of Judge Alex Kozinski, Distinguished Jurist In Residence Program, Touro College Jacob D. Fuchsberg Law Center, March 16, 1994.

3. Judge Kozinski explained that judges can rely on canons of construction (such as narrowly interpreting exceptions), or elemental principles of fairness (like construing language against the drafter), or examining the circumstances under which the contract was written (such as duress and contracts of adhesion). *Id.*

4. Remarks of Justice Antonin Scalia, Distinguished Jurist In Residence Program, Touro College Jacob D. Fuchsberg Law Center, October 18, 1995.

invites judges to use their own prejudices and biases in the interpretation process and leads to rights never contemplated by the drafters of the Constitution.

In supporting his argument, Justice Scalia claimed that the logical end result of such practices is that federal judges will be selected and confirmed based on their views on specific constitutional issues rather than their general qualifications as jurists. This, according to Justice Scalia, will lead to judges who represent only the majority view on issues, and will erode the protections of the Bill of Rights, which was created to protect against the tyranny of the majority--again, obviously a very bad result.

The message I distill from these talks is that you like your pizza hot and crusty. So without attempting any rejoinder on either Judge Kozinski's thesis regarding the common law or Justice Scalia's on the United States Constitution, I'd like to venture into the third area and talk about statutory interpretation, especially state statutory interpretation.

Both of my predecessors here could also have added a lot of spice on the subject of statutory interpretation, another area they see where judges may be tempted--to use Judge Kozinski's words--to wrest "ambiguity from the jaws of clarity." Their views on this important subject are well known, and I might say entirely consistent with the portrait they paint of appropriate constitutional and common law decisionmaking.

In his new book, *A Matter of Interpretation: Federal Courts and the Law*,⁵ Justice Scalia estimates that constitutional interpretation is at issue in barely one-fifth of the Supreme Court's cases, and a mere one-twentieth if you exclude criminal cases.⁶ Overwhelmingly what federal judges do is interpret federal statutes and federal regulations.⁷ The subject of statutory

5. ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (Princeton University Press 1997); see also Walter Barthold, Book Review, N.Y. L.J., Mar. 25, 1997, at 2.

6. *Id.* at 13.

7. ERIC LANE and ABNER J. MIKVA, *LEGISLATIVE PROCESS* 763 (1995) ("In the age of statutes, their interpretation constitutes a major part of the

interpretation, Justice Scalia noted, "is the principal business of judges and (hence) lawyers."⁸

Statutory interpretation is a familiar topic for me too. Like the Supreme Court--indeed, even more so--the New York Court of Appeals docket is dominated by statutory interpretation cases. And because statutes today reach into every crevice of our lives, the array is amazing. Just last session, over a five-day period, the Court heard cases involving the Family Court Act,⁹ the Insurance Law,¹⁰ the Education Law,¹¹ the General Obligations Law,¹² the Labor Law,¹³ the Penal Law, and of course the Civil Practice Law and Rules and the Criminal Procedure Law.¹⁴ That wasn't at all unusual. New York statutes and regulations, like their federal counterparts, take up most of the shelf space in my chambers. With the process of enactment and revision going on constantly, if we don't update our New York Code of Rules and Regulations several times a month, we're in big trouble.

Given the modern "statutorification" of the law,¹⁵ what is surprising is the dearth of scholarly attention given to the subject of statutory interpretation. Justice Scalia, in his book, identified

judicial function. This is evidenced by court dockets filled with cases emanating from disputes over the meaning of statutory language.").

8. SCALIA, *supra* note 5, at 13-14.

9. N.Y. FAM. CT. ACT § 301.2(8)(vi) (McKinney 1983), *in In re Manuel R.* (argued March 18, 1997).

10. N.Y. INS. LAW § 5106(a) (McKinney 1985), *in Central General Hospital v. Chubb Group of Insurance Companies* (argued March 18, 1997).

11. N.Y. EDUC. LAW § 2509(1)(a) (McKinney 1995), *in In re Speichler v. BOCES* (argued March 19, 1997).

12. N.Y. GEN. OBLIG. LAW § 5-322.1 (McKinney 1989), *in Itri Brick & Concrete Co. v. Aetna Casualty and Surety Co. and Stottlar v. Ginsburg Dev. Corp.* (argued March 25, 1997).

13. N.Y. LAB. LAW § 511(17) (McKinney 1988), *in Matter of Killian v. GMC* (argued March 25, 1997).

14. *E.g.*, N.Y. PENAL LAW § 240.20(3) (McKinney 1989), *in People v. Noel Tichenor* (argued March 19, 1997); N.Y. CRIM. PROC. LAW § 670.10 (McKinney 1995) *in People v. Jose Carracedo* (argued March 24, 1997).

15. *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.").

only one authoritative treatise devoted to the subject.¹⁶ He lamented the fact that rather than teaching first-year law students about statutory interpretation, law schools teach about judges who have shaped the common law.¹⁷

Well, even less than a dearth of scholarly attention is paid to state statutory interpretation. What little literature there is on the subject tends, like Justice Scalia's book, to focus on how federal courts read federal law. Few, if any, of the authors consider whether there are issues distinctly germane to the interpretation of state statutes.¹⁸

Are there differences? I think there are, and I'd like to suggest just a few of them.

STATE-FEDERAL DIFFERENCES

Perhaps the most basic difference is that there are far more state statutory interpretation cases than federal. Why? There are simply far more state cases. In New York alone, for example, our state court system received a staggering 3.7 million new filings just last year--more than ten times the federal filings nationwide.¹⁹ And we're only one of 50. Plainly, there is much more statutory interpretation going on at the state court level.

16. *Id.* at 15 (referring to Sutherland's *Statutes and Statutory Construction*). See also LANE and MIKVA, *supra* note 7 (devoting an extensive section to statutory interpretation).

17. SCALIA, *supra* note 5, at 3-4, 15.

18. 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.").

19. Judith S. Kaye, *Courts, the Public and Criminal Justice*, N.Y. ST. B.J. 10 (December 1996).

Legislative history is a second notable difference--and here the tonnage is entirely on the federal side. Wherever one may come out in the debate over the value of legislative history as an interpretative tool--and there surely is a wide range of thinking on the issue (I thought the new movie "Liar, Liar" was a commentary by Judge Kozinski on legislative history)²⁰--there is much less of it at the state level.

In the federal system, debates are routinely printed in the Congressional Record, and joint or conference committee reports of both Houses of Congress readily obtainable. But in the states, committee reports can take many forms, not all of them accessible,²¹ and floor debates are sparse.²² In New York, typically all the courts have are Bill Jackets containing the Governor's approval memorandum, the Sponsor's memorandum and assorted constituent letters. Not much of a window on legislative intent. Passing from the physical to the theoretical, a

20. Compare SCALIA, *supra* note 5, at 29-38 (rejecting the use of legislative history as unreliable, easily manipulated, and not truly reflecting the view of the legislative branch) and LANE and MIKVA, *supra* note 7, at 777-785 (noting that legislative history can be easily manipulated to influence judicial decisionmaking and calling for its careful use), with Abner J. Mikva, *Statutory Interpretation: Getting the Law to Be Less Common*, 50 OHIO ST. L.J. 979, 981 (1990) ("an informed, careful use of legislative history can limit the number of interstices that judges plug") and Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 848 (1992) ("[u]sing legislative history to help interpret unclear statutory language seems natural. Legislative history helps a court understand the context and purpose of a statute"). On the debate generally, see United States Department of Justice, Office of Legal Policy, *Using and Misusing Legislative History: A Re-Evaluation of the Status of Legislative History in Statutory Interpretation* (1989).

21. WILLIAM N. ESKRIDGE, JR. & PHILLIP P. FRICKEY, *CASES & MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY*, 710 (2d ed. 1994).

22. As one commentator noted some years ago, state legislative history is ignored because state legislatures see no need for it. See Eric Lane, *Legislative Process and its Judicial Renderings: A Study in Contrasts*, 48 U. PITT. L. REV. 639, 651 (1987). See also *City of Lafayette v Louisiana Power & Light Co.*, 435 U.S. 389, 437 (1978) (Stewart, J., dissenting) ("[S]tate statutes are often enacted with little recorded legislative history, and the bare words of a statute will often be unilluminating in interpreting legislative intent.").

third crucial difference is the way our dockets are compiled. Absent a constitutional issue or treaty, federal courts usually have jurisdiction only because of a dispute over a statute or regulation. State courts are common law courts; they regularly, openly and freely speak the language of the common law. Federal courts do not and cannot; their jurisdiction is, ironically, curtailed by statute.²³

The state courts' unique role in shaping the common law is inevitably linked to their function of interpreting statutes. In the words of one recent commentator, we live in a "world where common and statutory law are woven together in a complex fabric defining a wide range of rights and duties."²⁴ This breeds yet a fourth significant difference—a closer relationship between the distinctly separate branches of state government than at the federal level.²⁵

Several times, for example, the New York Legislature has codified a rule developed by the courts as a matter of common law. On the criminal side, a notable Court of Appeals holding as a matter of fairness that a defendant is entitled to examine the prior statements of a witness before that person testifies, later

23. See 28 U.S.C. § 1331 (1988) ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treatises of the United States."). Indeed, Justice Scalia, in a recent Supreme Court opinion openly declared, "there is no general federal common law," *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 87 (1994). In making such a statement, Justice Scalia and the Supreme Court reaffirmed the settled rule of *Erie v. Tompkins Railroad*, 304 U.S. 64, 78 (1938). See also *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."); SCALIA, *supra* note 5, at 13.

24. DAVID L. SHAPIRO, *CONTINUITY AND CHANGE IN STATUTORY INTERPRETATION* 937 (1992).

25. As former Connecticut Chief Judge Peters observed "[t]he state court house is, if anything, too close to the state legislative house." Ellen A. Peters, *Common Law Judging in a Statutory World: An Address*, 43 U. PITT. L. REV. 995, 1007 (1982).

was codified in the Criminal Procedure Law.²⁶ And on the civil side, an entire body of statutory law affecting workers' compensation, indemnification and contribution grew out of the Court's decision, under the common law, in *Dole v. Dow Chemical Company*.²⁷

Common law rules, by the same token, can be modified or rejected by the Legislature, as was the case recently with respect to a rule precluding firefighters and police officers from recovering damages for injuries related to the dangers of their jobs.²⁸ The Legislature modified our rule by providing a cause of action for those occupations where the defendants involved had failed to comply with an applicable statute or ordinance.²⁹

Legislatures, of course, have the same ultimate "veto" power over courts' interpretation of statutes.³⁰ If, in their view, courts have misread a statute, legislators can rewrite it. Indeed, on our Court, as a matter of policy we make a special effort to achieve consensus in statutory interpretation cases--exactly because we

26. See *People v. Rosario*, 9 N.Y.2d 286, 289-91, 173 N.E.2d 881, 883-84, 213 N.Y.S.2d 448, 450-51 (1961); N.Y. CRIM. PROC. LAW § 240.45 (McKinney 1993).

27. 30 N.Y.2d 143, 151-53, 282 N.E.2d 288, 294-295, 331 N.Y.S.2d 382, 390-92 (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.").

28. *Santangelo v. State*, 71 N.Y.2d 393, 521 N.E.2d 770, 526 N.Y.S.2d 812 (1988) (police officers injured while apprehending escaped mental patient could not recover damages against state for negligence).

29. N.Y. GEN. MUN. LAW § 205-a (McKinney 1995).

30. Not all commentators agree that this is a common event. See, e.g., Otto J. Hetzel, *Instilling Legislative Interpretation Skills in the Classroom and the Courtroom*, 48 U. PITT. L. REV. 663, 678-79 (1987) (questioning the ease with which "[j]udges often imply that judicial decisions can be overruled by the legislature); see also Shirley S. Abrahamson & Robert L. Hughes, *Shall We Dance? Steps for Legislators and Judges in Statutory Interpretation*, 75 MINN. L. REV. 1045, 1054-55 (1991) ("[P]rompt legislative reaction to judicial [statutory] interpretation is probably the exception . . . not the rule.").

know that the Legislature can, and will, step in if it is not satisfied with our interpretation. Although I have seen press releases touting the Legislature's "overruling" of particular Court decisions, a side-by-side comparison of the original and amended statutes would make clear that in fact the Legislature has not "overruled" the Court. It has written a new statute that makes plain its intention. That is no insult to the Court, and no injury to the relationship.

Often courts even engage the Legislature in open dialogue over a statute—especially when the crucible of real-life facts demonstrates that a statute simply does not provide the intended result. Some years ago, for example, the Court of Appeals struggled with the statute of limitations for injuries caused by harmful substances like asbestos. Because these harms are discoverable only years after exposure, we repeatedly expressed frustration over the unfairness of commencing the statute of limitations on exposure to the substance.³¹ Ultimately the Legislature passed a law providing that the limitations period might accrue, instead, upon discovery of the injury.³²

The dialogue continues even after adoption of the statute, as courts begin the process of interpreting and applying the statute in a variety of cases—for example, determining the meaning of

31. *See, e.g.,* Thornton v. Roosevelt Hosp., 47 N.Y.2d 780, 784-85, 391 N.E.2d 1002, 1005-06, 417 N.Y.S.2d 920, 923-24 (1979) (Fuchsberg, J., dissenting).

32. N.Y. CIV. PRAC. L. & R. § 214-c (McKinney 1990 & Supp. 1995) (initially enacted in 1986 in response to Steinhardt v. Johns-Mansville Corp., 54 N.Y.2d 1008, 1010, 430 N.E.2d 1297, 1299, 446 N.Y.S.2d 244, 246 (1981) (holding that statute of limitations begins to run at time of injury)).

discovery of the injury,³³ the retroactivity of the statute,³⁴ and the survival of certain common law accrual rules.³⁵

SIGNIFICANCE OF THE DIFFERENCES

What is the significance of all this, you ask. What is the practical effect of the state-federal differences when it comes to the interpretation of statutes?

I begin my answer with the recognition that, whether state or federal, the Legislature, not the Judiciary, is the lawmaking branch of government; that though the Judiciary has some interstitial lawmaking function, it is the elected branches of our State and national government, responsive to the will of the people, that determine and set public policy. I have no quarrel with the expression of several scholars--a category that includes judges--that in matters of statutory interpretation, the judiciary must bend to the legislative command.³⁶ That is the oath and obligation of every judge.

33. See *In re New York County DES Litigation*, 1997 WL 55253 (N.Y. February 11, 1997) (holding that discovery of injury for accrual purposes occurs when the "injured party discovers the primary condition on which the claim is based.").

34. See *Rothstein v. Tennessee Gas Pipeline Co.*, 87 N.Y.2d 90, 661 N.E.2d 146, 637 N.Y.S.2d 674 (1995).

35. See *Jensen v. General Electric Co.*, 82 N.Y.2d 77, 623 N.E.2d 547, 603 N.Y.S.2d 420 (1993) (determining the trespass and nuisance accrual rules were not incorporated into CPLR 214-c).

36. These commentators believe that when judges are called upon to interpret statutes, it is their "primary responsibility, within constitutional limits, to subordinate [their] wishes to the will of Congress, because the legislator's collective intention, however discovered, trumps the will of the court." PATRICIA M. WALD, *THE SIZZLING SLEEPER: THE USE OF LEGISLATIVE HISTORY: A RE-EVALUATION OF THE STATUS OF LEGISLATIVE HISTORY IN STATUTORY INTERPRETATION* 6-20 (1989) (citing the quoted text as the nearly universal view among federal judges). See also CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION* 113 (1990) ("[a]ll approaches to statutory interpretation are framed by the constitutional truism that the judicial will must bend to the legislative command. It is through the subordination of the judiciary to the legislature that our laws are assured their 'democratic pedigree'").

My concern, however, is with the next sentiment: that judges--proper, well-behaved judges--are obliged simply to apply the words of statutes as they are written; that they must ask only what statutes say and not what the drafters meant;³⁷ that anything beyond the technical exercise of applying sections of a code to facts of a case smacks of activism and overreaching--in other words, that judges are on the prowl for opportunities to wrest ambiguity from the jaws of clarity. Based on my own experience, I simply cannot agree that statutory interpretation is such a mechanical exercise, or that the proper path of an honorable judge is so confined.³⁸

Let me illustrate my concern by describing two situations--there are many I assure you--from the nearly fourteen years I have been privileged to serve on the Court of Appeals.

First, as you all know, however careful we may be in choosing them, words--even very simple words--are rarely precise. Partly that is human limitation, partly language limitation.³⁹

Sometimes, the Legislature is deliberately imprecise.⁴⁰ In those instances, there is no need for any judge to "wrest" ambiguity

37. See Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 538 (1947) (quoting Justice Holmes as saying, "[o]nly a day or two ago--when counsel talked of the intention of a legislature, I was indiscreet enough to say I don't care what their intention was. I only want to know what the words mean."); OLIVER WENDELL HOLMES, COLLECTED LEGAL PAPERS 207 (1920) ("we do not inquire what the legislature meant, we ask only what the statute means,"), *quoted in* *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 397 (1951) (Jackson, J., concurring).

38. *Accord* LANE and MIKVA, *supra* note 7, at 765 ("The fact of the matter is judges, like law students, are not automatons. They form their own views based on what they hear, filtered through their own sensibilities. This is underscored by the nation's constitutional commitment to an independent judiciary and historical common law tradition.").

39. As late Chief Judge Breitel noted, the "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." *Bankers Assoc. v. Albright*, 38 N.Y.2d 430, 436, 343 N.E.2d 735, 738, 381 N.Y.S.2d 17, 20 (1975). See also Judith S. Kaye, *State Courts at the Dawn of a New Century*, 70 N.Y.U. L. REV. 1, 29 (1995) ("issues like these that reach a state appeals court cannot be resolved simply by consulting with a good dictionary or communing with the statutory text.").

from the enactment of a co-equal branch of government--it's decked out in neon lights beckoning to us. Consider common statutory phrases such as "best interests of the child,"⁴¹ "extraordinary circumstances,"⁴² "due diligence,"⁴³ and "prejudice."⁴⁴

But even where words on a page may seem crystal clear, application to real-life facts adorns them with a few of those neon lights. One of my colleagues--Chief Justice Shirley Abrahamson of Wisconsin--offers this neat hypothetical. A statute provides simply and unequivocally that a landlord can evict any tenant who keeps a pet. Everyone, of course, knows what a pet is. Keep a pet, you can be evicted. The "pet" in question, however, turns out to be a three-inch goldfish named Tootsie, doted on by its owner the tenant and lodged in a bowl of water. What do you, the judge, do? Evict or not? If you think the goldfish is an easy case, try a piranha, a python, a pitbull. How about a hamster or a

40. Indeed, there are many reasons for ambiguity. See LANE and MIKVA, *supra* note 7, at 768-769 (recognizing that statutes are usually drafted in general terms and address categories, rather than specific instances of conduct; some legislatures deliberately leave gaps in a statute for administrative agencies to fill; and vague language can be the result of legislative compromise); Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593, 604 (1995) ("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.").

41. See, e.g., *In re Michael B.*, 80 N.Y.2d 299, 312-15, 604 N.E.2d 122, 130-32, 590 N.Y.S.2d 60, 68-70 (1992).

42. See, e.g., *Yalango v. Popp*, 84 N.Y.2d 601, 609, 644 N.E.2d 1318, 1323, 620 N.Y.S.2d 762, 767 (1994).

43. See, e.g., *People v. Luperon*, 85 N.Y.2d 71, 79, 647 N.E.2d 1243, 1247, 623 N.Y.S.2d 735, 739 (1995); *People v. Bolden*, 81 N.Y.2d 146, 153-55, 613 N.E.2d 145, 149-50, 597 N.Y.S.2d 270, 274-75 (1993).

44. See, e.g., *People v. Sayavong*, 83 N.Y.2d 702, 709-11, 635 N.E.2d 1213, 1217-18, 613 N.Y.S.2d 343, 347-48 (1994); *People v. Jackson*, 78 N.Y.2d 638, 641, 585 N.E.2d 795, 797, 578 N.Y.S.2d 483, 485 (1991).

canary?⁴⁵ Those are the very next cases. If you refuse to evict, are you wresting ambiguity from the jaws of clarity? Crossing the line from judging to lawmaking? If you do evict--explicitly leaving it to the Legislature to rewrite the statute if it sees fit--are you a "citadel of technicality."

One of my favorite real-life examples is a recent case in our Court involving a statute that simply and forthrightly stated that a dangerous mental disorder--allowing confinement--means that because of mental illness a defendant "currently constitutes a physical danger to himself or others."⁴⁶ Clear enough you say. Unless a defendant is "currently dangerous"--meaning dangerous at the time you, the judge, confront him--he cannot, under the statute, be confined. Well, is a paranoid schizophrenic, found not responsible for attempted murder, "currently dangerous" when he is hospitalized, medicated, straitjacketed and surrounded by armed guards?⁴⁷

As it turned out, the Court of Appeals gave the term "currently" what must have been its intended meaning: not dangerous at the time of judicial review but foreseeably dangerous in the future if confinement and treatment were not continued into the future.⁴⁸ Had we interpreted the word "currently" in its ordinary sense, we concluded we would have been less than faithful to the underlying legislative purpose--to protect society from potentially dangerous insanity acquitees.⁴⁹

45. Shirley S. Abrahamson, *How Tootsie the Goldfish is Teaching People to Think Like A Judge*, JUDGE'S J., Spring 1982, at 12.

46. N.Y. CRIM. PROC. LAW § 330.20(1)(c) (McKinney 1995).

47. *In re George L.*, 85 N.Y.2d 295, 302-06, 648 N.E.2d 475, 478-80, 624 N.Y.S.2d 99, 102-04 (1995).

48. *Id.* at 307-08, 648 N.E.2d at 481, 624 N.Y.S.2d at 105.

49. The necessity of avoiding absurd results in statutory interpretation has been written on by another scholar: "virtually no one doubts the correctness of the ancient decision that a statute prohibiting 'letting blood in the streets' did not ban emergency surgery." Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281, 289 (1989). But avoiding absurd results is not the only reason why courts should be willing to look beyond the plain meaning of a statute. Even Justice Scalia, who is unabashedly a "textualist," admits that where, on the face of a statute, it is clear that the legislature made a mistake of expression (rather than legislative wisdom), for

Lest you think the choices are simple and my example far-fetched, I might point out that terrific judges of other courts have also gone the other way on this very issue, inviting the Legislature to rewrite the statute if it wished to provide something else.⁵⁰ That there are so many statutory interpretation cases, to my mind, is not attributable to hungry lawyers or power-crazed judges, or even to the inherent imprecision of language. It's because however careful, wise and farseeing the Legislature, the abstract words of a statute often require fitting and tailoring when applied to real-life cases, which may be more bizarre than anyone could possibly have imagined. Fitting and tailoring are what judges do, and what they are supposed to do--they make judgments.⁵¹

example, using the term "defendant" where only "criminal defendant" makes sense, judges are within their rights to correct the error. SCALIA, *supra* note 5, at 20 (referring to the phenomenon of *lapsus linguae* [slip of the tongue] or scrivener's error) (citing *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504 (1989)).

50. See *In re Torres*, 166 A.D.2d 228, 560 N.Y.S.2d 440 (1st Dep't 1990) (concluding that "to find that defendant has a 'dangerous mental disorder' the statute requires a showing that defendant 'currently constitutes a danger to himself or others'" and holding that so long as defendant was medicated, he was not currently dangerous). See also *In re Francis S.*, 87 N.Y.2d 554, 663 N.E.2d 881, 640 N.Y.S.2d 840 (1995) (affirming Appellate Division reversal of trial court, which had held that a medicated and confined patient was not currently dangerous). Whether a literal reading leads to an "absurd result" is, moreover, in the eye of the beholder. Compare *People v. Alston*, 88 N.Y.2d 519, 670 N.E.2d 426, 647 N.Y.S.2d 142 (1996) (interpreting N.Y. CRIM. PROC. LAW § 270.15 (McKinney 1993), enacted to streamline the jury selection process, to avoid bestowing a sizable tactical advantage on defendants in the use of peremptory challenges) with *id.* at 530, 670 N.E.2d at 432, 647 N.Y.S.2d at 148 (Titone, J., dissenting) (concluding the most logical reading of the statute was the one which granted such an advantage to defendants).

51. For another example of recent Court of Appeals "fitting and tailoring" see *People v. First Meridian Corp.*, 86 N.Y.2d 608, 658 N.E.2d 1017, 635 N.Y.S.2d 144 (1995) (construing the term "other securities" in the Martin Act, which bars fraud in the promotion of securities for sale, to include portfolios of numismatic coins, recognizing that a contrary holding would allow the perpetrators of the fraud to manipulate their transactions to frustrate and thwart the remedial protections of the statute).

I promised *two* illustrations of my concern with insistence that judges only apply statutes exactly as they are written. The first rests on the inherent vagaries of language, the second on the inherent vagaries of society. By this I have in mind the situation where though the balance of a statute remains relevant, a litigant raises a novel theory of the statute's applicability to an entire category of cases unforeseen, if not unforeseeable, by the Legislature. This, too, is not an infrequent event. It is here where judges must use the same approach they would for developing the common law, filling the gaps inevitably arising from the complex interplay between human facts and abstract laws. That is precisely what the Court of Appeals did in a much discussed statutory interpretation case several years ago called *Braschi v. Stahl Assoc.*⁵² A plurality of the court interpreted the term "family member" in the non-eviction provision of the New York City rent control statute—a statute originally passed in 1946 to alleviate the perceived housing crisis at the end of World War II—to include the deceased tenant's homosexual partner.⁵³

With no statutory definition of "family" and no relevant legislative history,⁵⁴ the court looked beyond the statute to resolve the case.⁵⁵ Basing our decision, in part, on "the reality of family life," we concluded that "the Legislature intended to extend protection to those who reside in households having all of the normal familial characteristics" and, therefore, that Mr. Braschi should have the opportunity to prove he had such a household with his deceased partner.

52. 74 N.Y.2d 201, 543 N.E.2d 49, 544 N.Y.S.2d 784 (1989).

53. *Id.* at 211-13, 543 N.E.2d at 54-55, 544 N.Y.S.2d at 789-90.

54. See LANE and MIKVA, *supra* note 7, at 785-787 (referring to *Braschi* as a "show down" question in which legislative history, plain meaning, other provisions of the statute, and canons of construction are unable to guide the court to a resolution).

55. *Braschi*, 74 N.Y.2d at 208, 543 N.E.2d at 52, 544 N.Y.S.2d at 786-87.

A few years later, we engaged in a similar exercise in construing the adoption statutes to apply to two cases involving adoptions by unmarried couples, one of them a lesbian couple.⁵⁶

Most recently, in *Cahill v Rosa*,⁵⁷ the Court of Appeals was called upon to determine whether dental offices were "places of public accommodation" within the meaning of the anti-discrimination provisions of the Human Rights Law. The two dental offices in question had refused to treat HIV-positive patients who then sued for disability discrimination. The statute included two extensive lists of businesses and locations that were defined either as places of public accommodation or not places of public accommodation.⁵⁸ Neither list included dental offices. Because--again--the statute's terms were ambiguous and the legislative history unhelpful, the Court examined the broader role in society of both the statute and dental offices and concluded that the offices were places of public accommodation.

Most significant of all, perhaps, is the fact that a court must resolve every dispute before it.⁵⁹ The court has to go one way or the other, and either result necessarily involves a judge's choice,

56. *In re Jacob*, 86 N.Y.2d 651, 660 N.E.2d 397, 636 N.Y.S.2d 716 (1995) (holding that intra-family adoptions by second parents--including the lesbian partner of the child's biological mother--are allowed under state adoption statute, and remitting two cases to family court to determine whether the particular adoptions were in the best interests of the child). For another recent Court of Appeals case with a similar problem of statutory interpretation, see *Symphony Space v. Pergola*, 88 N.Y.2d 466, 669 N.E.2d 799, 646 N.Y.S.2d 641 (1996) (concluding that the Rule Against Perpetuities applied to commercial option agreements, as they provided the same restraints on alienability and disincentive to improve the real property that the Rule was designed to prevent).

57. 89 N.Y.2d 14, 674 N.E.2d 274, 651 N.Y.S.2d 344 (1996).

58. N.Y. EXEC. LAW § 292(9) (McKinney 1993 & Supp. 1997).

59. One professor noted that in such situations, "the positive law is not a command to the judge but, at most, an authorization of alternative decisions. Judges by and large are reluctant lawmakers, but the role is thrust upon even the most modest of them by the realities of their function. The case must be decided, one way or the other. Unlike the pure social scientist, the judge cannot withhold his action until all the returns are in. There is no hiding place from the political and moral obligation to decide." Harry W. James, *An Invitation to Jurisprudence*, 74 COLUM. L. REV. 1023, 1041 (1974).

sometimes a judge's social policy choice.⁶⁰ Had we gone the other way in *Cahill*, for example, we would have decided that persons with disabilities could not be discriminated against at skating rinks and ice cream parlors (which were on the statutory list of public accommodations), but that health care providers were free to deny medical care solely on the basis of disability.⁶¹

I think it is clear that common-law courts interpreting statutes and filling gaps have no choice but to "make law" where neither the statutory text nor the "legislative will" provides a single clear answer. 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.⁶²

CONCLUSION

Many today have voiced concern over "legislating from the bench" and "judicial activism." They would, most likely, be more comfortable if only our elected representatives made the sensitive decisions.⁶³ But until words perfectly communicate ideas, and legislatures develop the unerring ability to foresee every application of the laws they enact, cases continue to call upon judges to fill the gaps--and do so by reference to social

60. LANE and MIKVA, *supra* note 7, at 765 ("a judge naturally may resist [a statute's] application if the consequence of that application seems absurd or if the statute's application conflicts strongly with his or her ideology, public policy view, or particular sense of fairness").

61. *Cahill*, 89 N.Y.2d at 23, 674 N.E.2d at 277-78, 651 N.Y.S.2d at 347-48.

62. The regulators apparently agreed with us in *Braschi*--within months after the 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." See *Rent Stabilization Ass'n v. Higgins*, 83 N.Y.2d 156, 166, 630 N.E.2d 626, 629, 608 N.Y.S.2d 930, 933 (1993) (upholding new regulations). The absence of any new statute signals a similar agreement in *Cahill*.

63. See, e.g., SCALIA, *supra* note 5, at 22 ("It is simply not compatible with democratic theory that laws mean whatever they ought to mean, and that unelected judges decide what that is.").

justice.⁶⁴ 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.⁶⁵

I conclude by making explicit my underlying thesis, which I hope was implicit throughout--and on this I suspect Justice Scalia, Judge Kozinski and I would be in complete agreement. Whether we are contemplating great thoughts about pizza, or reading contracts, constitutions and statutes, it's sometimes tough--but invariably great--to be a judge.

64. See, e.g., William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1554 (1987) (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.").

65. *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.").