LAW 101: FUNDAMENTALS OF THE LAW (LUMEN)



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1.1: MAJOR FACTORS IN CHOOSING AND WORKING WITH AN ATTORNEY

INTRODUCTION

Why would one need an attorney? Perhaps you are buying or selling a house. Or, you are getting married and want a will. You may be starting a new business or have had difficulty with a contractor and need assistance in pursing your grievance. You may be a landlord and need to evict a tenant, or you may be a tenant and your landlord is violating your lease. You may have gotten a speeding ticket or been charged with a DWI or some other crime. In these, and many other circumstances, you may need the assistance and counsel of an attorney. So, who are attorneys, how does one become an attorney, what is his/her role, and how would you choose and work with one?

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1.2: PART I- BECOMING AN ATTORNEY IN NYS

WHAT FORMAL EDUCATION IS REQUIRED TO BECOME AN ATTORNEY **IN NYS?**

- High School Degree
- Bachelor's Degree from an accredited college
- Juris Doctorate Degree from an American Law School

There are some exceptions and special rules for attorneys who move to NYS from another country. Those will depend on what country and legal system they are licensed to practice in.

Regarding the college degree, law schools are not particularly concerned about a student's major. Most important are your college grades and your score on the Law School Admission Test, most commonly known as the LSAT. Law school is typically a three-year program, and most law schools require full-time attendance. One can attend any law school in the United States and apply to practice in NYS, as long as the law school is approved by the American Bar Association, also known as the ABA. The ABA is the recognized national representative of the legal profession. Most American law schools award a JD (Juris Doctor) degree.

The following is a list of ABA approved law schools in NYS:

- Albany Law School (Albany, NY)
- Brooklyn Law School (Brooklyn, NY)
- CUNY School of Law (Flushing, NY)
- Columbia Law School (New York, NY)
- Cornell Law School (Ithaca, NY)
- Fordham University School of Law (New York, NY)
- Hofstra University School of Law (Hempstead, NY)
- New York University School of Law (New York, NY)
- Pace University School of Law (White Plains, NY)
- Saint John's University School of Law (Queens, NY)
- State University of New York at Buffalo (Buffalo, NY)
- Syracuse University College of Law (Syracuse, NY)
- Touro College Law Center (Central Islip, NY)
- Yeshiva University Benjamin N. Cardozo School of Law (New York, NY)
- New York Law School (New York, NY)

WHAT IS **NEXT AFTER GRADUATION FROM LAW SCHOOL?**

After graduation from an approved law school, you are still not an attorney. You are technically only a law-school graduate with a JD degree. Graduating from law school, in and of itself, does not qualify you to practice law. The New York Judiciary Law § 478 makes it unlawful for anyone to practice, appear, or hold themselves out to be an attorney, lawyer, or counselor-at-law without first being duly authorized. So, how does one become duly authorized? To actually become an attorney, the law school graduate must decide in what state(s) he/she wishes to practice law and must submit to a professional qualifying test known as the Bar Exam in that state/those states. Passing this exam ultimately qualifies the law school graduate the right to practice law in that given state. As of July 2016, New York State is now administering the Uniform Bar Exam, which is also called the UBE.

The UBE is administered on the last Tuesday and Wednesday of February and July. During the morning session on Tuesday, applicants are given three hours to complete two Multistate Performance Test (MPT) items. During the afternoon session on Tuesday, applicants are given three hours to answer six Multistate Essay Exam (MEE) questions. On Wednesday, applicants will take the Multistate Bar Examination (MBE), which is a six-hour, 200 question multiple-choice exam divided into two 3-hour sessions. The passing score for the exam varies from state to state. In NYS, the passing score is 266 out of a 400-point scale. The score is transferable between states that also administer the UBE. As of May 2018, there are 31 states and US territories that have adopted the UBE. The remaining states have their own individual bar exams.

After passing the UBE, there are several more hurdles left before a law school graduate can practice law in NYS. An applicant for admission in New York must also take and complete an online course in New York-specific law, known as the New York Law

Course (NYLC), and must take and pass an online examination, known as the New York Law Exam (NYLE). Applicants must comply with the 50-hour pro bono service requirement. Applicants must also take and pass the Multistate Professional Responsibility Examination (MPRE). Additionally, applicants who commence their law school studies after August 1, 2016 must comply with the Skills Competency Requirement. Finally, applicants must satisfy the character and fitness requirements by appearing before the committee on character and fitness. If one has a felony conviction, that will be a disqualifier.

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1.3: PART II- CHOOSING AN ATTORNEY

HOW **DO YOU FIND AN ATTORNEY?**

One way is by word-of-mouth, or professional reputation. You may ask and talk to friends and/or family members about an attorney who they have liked or disliked, for a particular legal matter like a speeding ticket or divorce. Or, you may talk to a business associate of attorneys who will recommend an attorney for a particular legal matter. For example, you may be in the process of selling or buying a house and your real estate agent recommends an attorney for a real estate closing.

Secondly, there is attorney advertising. Attorney advertising, like all professional advertising, is the exercise of the constitutionally protected right to freedom of speech (*Bates v State Bar of Arizona*, (1977) 433 US 350). You will find attorneys advertising on billboards, television, the radio, and the internet. These ads may help you find an attorney to fit your particular legal needs. However, as is true with all advertising, you should do your own due diligence and research to determine if these attorneys and/or firms are the right fit for you. While many of these ads will indicate an attorney's or firm's expertise, or area of concentration in a particular area of law, NYS does not have any specialized certifications of attorneys. All attorneys are qualified to practice in any area of law. However, many do limit themselves to certain areas of law like criminal or personal injury. An attorney's experience in a particular area of law may be a major factor in helping you choose an attorney.

Another method is through various attorney referral services. In NYS, each county has its own local Bar Association under the umbrella of the NYS Bar Association located in Albany, NY. Each of these local bar associations has some sort of attorney referral program. There are also non-profit legal services available like Legal Aid. For criminal matters, based on your income or wealth, you may be entitled to legal representation by the Public Defender's office.

I THINK I FOUND AN ATTORNEY. NOW WHAT?

A friend or family member has recommended an attorney and from what they are telling you, she/he seems perfect for your particular legal needs. Now what? You will need to make an appointment and have your first attorney-client in-person meeting. This meeting is really a two-way interview to determine whether the proposed personal/professional relationship will be taken further. It is the time for both parties to decide whether this will be a good fit. This initial consultation is as much for the attorney's information gathering as it is for the client to make a basic assessment of the attorney's appearance, office set-up, competence, availability, time, and cost. Some attorneys charge a fee for this initial consultation, some do not.

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1.4: PART III- HOW ATTORNEYS GET PAID AND ATTORNEY FEES

Some attorneys work as salaried employees just like many others in our economy. Examples of salaried attorneys are patent/trademark attorneys who work for major corporations. Others may be agency or government employees such as criminal prosecutors who work for a District Attorney's Office, or criminal defense attorneys who work for a Public Defender's Office. Some may work as trust officers for a bank or other financial institution or become judges or town attorneys. Some go into politics or become television personalities. However, these are not typically the attorneys you would hire to give you legal advice or represent you in a legal matter.

Client-specific attorneys often work for themselves as solo practitioners, or perhaps share office space with other attorneys, but not their clients. Many are associates and/or partners in law firms which can range in size from two attorneys to thousands of attorneys in national and even international law firms.

How do client-specific attorneys get paid?

Attorneys are paid primarily for two things, their time and their legal advice. How much an attorney charges for these two things varies greatly from attorney to attorney. The cost of an attorney often varies based on the location. Attorneys in New York City often charge much more than those in Upstate or Western New York State. It can vary based on the particular area of law concentration or expertise of an attorney or law firm. It can vary based on the reputation of an attorney as well. Regardless, the compensation of client-specific attorneys is determined, directly or indirectly, in one of four ways: flat fee, hourly, on a contingency fee basis, or on retainer.

Flatfee payment arrangements: This is a task-based method of payment. This fee arrangement is particularly suited to a legal task that is deemed routine or predictable, in both time required and complexity.

Some examples of this type of legal work may include:

- Name changes
- Uncontested divorces
- Real Estate Closings
- Wills
- Power of Attorney documents
- Criminal Defense Representation
- Traffic Court Appearance
- Evictions

Hourlyfee payment arrangements: This is legal compensation based on a fixed hourly rate. Most attorneys charge more per hour for "in court" time than they do for office work. Fractional hours are billable hours. This may range from one-tenth of an hour (i.e. every six minutes) to every quarter-hour (15 minutes), or half-hour (30 minutes). Phone calls (whether to, from, or about clients), text messages, and emails count as much as face-to-face meeting time. These fees can range from small town attorneys charging $100 per hour, to large firm attorneys in major cities charging $725 per hour. Back in 2013, the ABA Journal published that the average billing rate for partners ranged from $343 at firms of 50 or fewer lawyers to $727 at firms of more than 1,000 lawyers.

Contingent fee payment arrangements: With this fee arrangement, an attorney only gets paid if he/she wins a case. The attorney then gets paid a percentage, often between 25-33% of any monetary judgment or settlement. What is important to remember is that an attorney who takes on a contingent fee case, and loses, does not get paid. Secondly, contingent fee arrangements are uniquely applicable to personal injury actions, and are inherently inapplicable to matters like criminal defense, divorces, obtaining patents, or adoptions. Most often in personal injury actions, there are expenses that go beyond attorney fees. Filing fees, fees for obtaining documents, expert witness fees, travel expenses, deposition transcripts, and getting copies of medical records all cost money. An attorney who works on a contingent fee basis cannot pay for these client expenses of litigation. The client is responsible for these expenses whether they win or lose their case. With all of this in mind, attorneys who work on contingency fee cases are careful to take on cases they believe they can win. They typically do not want to work for free. When a client unsuccessfully shops their case around with several firms, it is usually because the case is likely not going to go well for the client.

On retainer fee payment arrangements: In some circumstances, a client anticipates having an on-going and substantial need for an attorney's professional services. In these circumstances, an agreement may be reached that for an agreed-upon fee, the attorney will be "on call" to such a client. The attorney is then guaranteed at least the agreed-upon amount for remaining available to do whatever legal work is required for the client. This sometimes referred to as being on retainer.

What is a **retainer agreement?**

A retainer agreement is a signed written document between the client and the attorney on how the attorney is going to be paid. Not all legal representation requires the signing of a retainer agreement. Often attorneys forgo a retainer agreement for legal work such as representing a client in a town court for a traffic ticket or preparing a will. However, retainer agreements are highly encouraged, and in some circumstances, legally required to prevent any down-the-road misunderstandings of how an attorney is going to be paid. This signed written confirmation of the mutually-agreed-upon fee arrangement is to be distinguished from "being on retainer" in that a retainer agreement sets out how an attorney is to be paid, whether by flat fee, hourly, on contingency, or being on retainer. It may also set out whether the attorney is requiring an advance or upfront payment by the client. This is much like a deposit which the attorney can draw from as the legal matter proceeds. Part or all of an advance, or upfront retainer fee, may be refundable depending on the agreement between the client and attorney. There are also some legal restrictions placed on attorneys on how much of an advance, or upfront retainer fee, they can keep if the legal representation of a client prematurely ends.

The following is an example of a contingency fee retainer agreement:

CONTINGENT FEE RETAINER **AGREEMENT**

THIS AGREEMENT is made and entered into this ____ day of _____, 20__ by and between the law firm of _____, hereinafter referred to as "law firm" and _____, hereinafter referred to as "client(s)."

WHEREAS, the law firm is a firm of regularly practicing attorneys located in _____, New York, who engage in litigation involving personal injury and property damage, and

WHEREAS, client(s) believe(s) that (s)he may have claim or cause of action for personal injury and/or property damage against (insert appropriate name(s)) or any other person, firm, or corporation that may be liable thereto resulting from an incident that occurred on the (date) day of (month, year).

WHEREAS, the client(s) is/are desirous of hiring said law firm to proceed against said Defendant(s), or some of them, or any other person's legal entities or insurers against whom a recovery might be obtained, as determined by the discretion of said law firm.

NOW, THEREFORE, the client(s) and law firm do hereby mutually agree that the law firm will proceed as it shall deem appropriate to affect a recovery for any and all personal injury and/or property damage that has been sustained by client(s).

Client(s) shall, upon the signing of this Agreement, pay the law firm the sum of $(dollar amount) that shall be applied upon account for expenses as needed, to obtain photographs, hospital reports, to secure records and documents, to pay the costs of medical examinations and reports, fees for expert witnesses, and the costs of service of notice of suit and filing of Petition. Law firm may demand from time to time, and client(s) shall pay such, additional sums as shall be necessary to pay said expenses. Any expense fund balance shall apply on law firm's fees; however, such balances so applied, unless hereinafter otherwise set forth, shall be considered in determining the percentages hereinafter referred to.

Client(s) further agree(s) that, in addition to the expenses or including the expenses referred to in the preceding paragraph, or if not otherwise paid, the client(s) will pay in advance all out-of-pocket costs of suit, including any and all costs of suit, including any and all costs as may be necessary for the opening of an Estate, Guardianship, or Conservatorship, as herein after set forth, and all out-of-pocket expenses to discover, preserve, and present evidence, to prepare for trial, and client(s) further agree(s) to pay all reasonable incidental expenses, including reasonable and necessary travel costs. Client(s) agrees(s) to pay all said fees promptly at the request of the law firm.

Client(s) and law firm further agree that, in the event of recovery, such expenses as hereinabove referred to, not already paid, shall be paid by client(s) from his/her/their share of the proceeds as hereinafter set forth.

In the event of recovery, the amount of recovery shall be used as a basis for compensation as hereinafter specified. **The firmshall receive an amount equal to thirty-three and one-third percent (331/3rd) of said recovery in money or property if effected by settlement made after service of notice of suit, or up to the time of the beginning of the selection of the jury in said trial or if made at any point between the beginning of the selection of the jury and the final decision of the jury,or after appeal if an appeal is taken.**

Client(s) and law firm further agree that law firm may, at its own expense, employ another attorney, or attorneys, in such place or places as may appear desirable to assist in the above matter. If client(s) employ(s) another attorney, or attorneys, in this matter, such employment shall be at the client's expense and shall not affect the amount due law firm under this contract. If client(s) should settle or collect his/her/their claim himself/herself/themselves, such fact shall not affect the amount due law firm under this agreement. Client(s) agree(s) that any settlement of this claim shall be made through, and at the offices of, said law firm.

Client(s) and law firm further agree that, in the event the proper prosecution of this case requires proceedings in an Estate or Guardianship, the law firm herein shall in addition to the contingent fee herein agreed upon, be reasonably compensated for such services in the event of recovery as allowed by the Court and provided by law. Should there be no recovery, client(s) shall pay to the law firm such reasonable amount for opening and closing such Estate or Guardianship as allowed by the Court, and as provided by law.

Client(s) and law firm further agree that all sums due herein shall be paid at the offices of (your address).

Client(s) and law firm further agree (insert as needed).

Client(s) and law firm further agree that except as may be heretofore set forth, or as provided by law for the administration of assets other than this lawsuit, said attorneys shall receive no compensation for services rendered under this Agreement if there is no recovery of money and/or property.

Signed and dated at _____, on the date first above written.

_____
(Law Firm Name)

By: _____
(Attorney Name)

_____
(Client name)

_____
(Client name)

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1.5: PART IV- ATTORNEY ETHICS

All attorneys who practice law are subject to a Code of Ethics and can be professionally disciplined for failing to meet minimal performance and ethical standards.

How **ATTORNEYS ARE professionally disciplined.**

Complaints alleging attorney misconduct whether brought by clients, fellow attorneys, or others can be made to an attorney grievance commission. The commission conducts a thorough investigation, and issues a written report, either dismissing the complaint or recommending to the Appellate Division, that the attorney be disciplined in one of three ways ranging from least to most serious.

Censure: This is a public statement that an attorney has done something wrong. Censure is the least serious form of attorney discipline. While embarrassing to the attorney, it does not include any restrictions on the attorney's right to continue to practice law in NYS.

Suspension: This is for more serious professional misconduct. It requires an attorney to take a "leave" from the practice of law in NYS for a period of time ranging from months to years. It may require restitution and/or rehabilitation measures such as counseling and treatment for alcohol and/or drug abuse. A written report that a suspended attorney's problem has been resolved may result in his/her re-instatement to practice law.

Disbarment: This is the most serious of all attorney discipline measures, and results in a lifetime ban on any further practice of law in NYS. With reciprocity agreements, it is also a lifetime ban on the practice of law in any other state as well. An attorney's felony conviction that has not been reversed on appeal is a reason for disbarment. Other possible grounds for disbarment include creation of evidence known to be false, perjury, and assisting a client in conduct known to be illegal. Some attorneys choose to voluntarily resign from the Bar when facing imminent disbarment. Upon a voluntary resignation from the Bar, the lifetime ban on the practice of law is the same as for disbarment. Voluntary resignation amounts to an attorney opting for a face-saving action. President Clinton chose to resign from the Arkansas Bar, rather than face pending perjury charges.

Analogous to attorney disciplinary actions applicable to NYS judges, from least serious to most serious, are censure, admonition, and removal from office, with resignation always an ultimate alternative.

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1.6: PART V- Other Attorney-Related Matters

The Attorney-Client Privilege .

The attorney-client privilege is a requirement of professional confidentiality, akin to the priest-penitent and the doctor-patient privileges.

What the attorney-client privilege means is that what is told by a client to his/her attorney is not to be told by the attorney to anyone else, without the client's express permission. This is not an absolute privilege. There are limits. For example, anything said by a client to their attorney, on any matter whatsoever, which speaks to the intent by the client to commit a future illegal act is **not** covered by the privilege. Statements made by a client to their attorney with no reasonable expectations of privacy or confidentiality are **not** covered by the privilege. For example, a client's statement shouted to an attorney in a crowded courtroom hallway.

The attorney-client privilege applies not only to statements made to their attorney, but also to the attorney's office staff, ranging from an attorney's receptionist to any attorney associate or partner of the attorney. The attorney-client privilege not only applies to a client statement, but also to other client-related information, including the fact that the individual is even a client of the attorney, or had an appointment with the attorney.

So, what is the definition of a client? In general, a client is generally defined as the intended and immediate beneficiary of the lawyer's services. To be considered a client for the purpose of invoking the attorney-client privilege, two conditions must be met. First, the client must communicate with the attorney to obtain legal advice, and second, the client must interact with the attorney to advance the client's own interests. A prospective client communication is protected, even if never retained.

WHO ARE PARALEGALS **and what do they do?**

The American Bar Association defines a paralegal as:

"A paralegal is a person, qualified by education, training or work agency or other entity and who performs specifically delegated substantive legal work for which a lawyer is responsible."

Paralegals assist supervising attorneys in a variety of tasks, from in-take interviewing, to information gathering, to completing legal forms, to drafting documents. A paralegal cannot practice law, meaning they cannot give legal advice, cannot appear in court with a client, and cannot establish an attorney-client relationship.

There is no certification or educational requirements for paralegals in NYS, and this is true in most other states. So, in NYS, anyone can hold themselves out as a paralegal. However, most NYS paralegals have either experience working in a law office and/or have obtained a degree or certificate recognizing completion of a formal paralegal education program.

WHO ARE NOTARY PUBLICS **and what do they do ?**

A notary public (often referred to as a notary) is someone who is licensed by NYS to determine the identity of a person signing a legal document. The notary then affixes their signature and notary stamp to acknowledge that a signed document has been legally and properly signed.

The role of a notary public is all too often misunderstood. This is especially true for those that immigrate to the United States from some Spanish speaking countries. The term "notary public" in Spanish is "*notario publico*," which in several countries means "a person highly specialized in the practice of law." In NYS, a notary public who is not an attorney cannot give legal advice, explain legal documents, draft legal documents, or legally represent someone.

Most attorneys are a notary public. However, non-attorneys can also be a notary public. All that is required to be a notary public is to pass a written test (attorneys seeking to become notaries are not required to take this test) as to the powers, duties, and regulations applicable to notaries.

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1.7: References-

American Bar Association. (June). Retrieved August 5, 2020, from http://www.americanbar.org/aba.html

BOLE- OFFICIAL PAGE NEW YORK STATE BAR EXAMINATION. (n.d.). Retrieved June 5, 2018, from http://www.nybarexam.org/

Home. (n.d.). Retrieved June 5, 2018, from http://www.ncbex.org/

New York State. (n.d.). New York State Unified Court System. Retrieved June 7, 2018, from http://nycourts.gov/

Pogue, D. L., Clifford, E., & Schwartz, A. L. (2009). *Understanding New York Law, 2013-14*. Upstate Legal Publishers

School of Law. (2018, June 04). Retrieved July 23, 2018, from http://www.law.buffalo.edu/

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CHAPTER OVERVIEW

2: COMPARING AND CONTRASTING CIVIL AND CRIMINAL LAW

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2.1: COMPARING AND CONTRASTING CIVIL AND CRIMINAL LAW

INTRODUCTION

The law is generally divided into two categories – civil and criminal law. This chapter will assist the student in identifying the differences and similarities between them.

EXAMPLES OF **CRIMINAL CASES IN NEW YORK STATE :**

MURDER/HOMICIDE: The unjustified taking of another human life.

ROBBERY: Stealing property by force from another person.

LARCENY: The intent to wrongfully take, withhold, or obtain the property of another person.

ARSON: The burning of another person's dwelling, building, car, etc.

BURGLARY: The knowingly entering or remains unlawful in a building with the intent to commit a crime therein.

RAPE: Having sex with an individual without their legal permission.

ASSAULT: Intentionally or recklessly striking and injuring a person.

DRUG OFFENSES: Selling or possessing illegal drugs or controlled substances.

COMMON EXAMPLES OF CIVIL CASES IN NEW YORK STATE :

WRONGFUL DEATH: Asking for money damages when the death of a person is caused by another.

CONVERSION: The unauthorized assumption and exercise of the right of ownership over property belonging to another to the exclusion of the owner's rights.

DIVORCE: Terminating the marital relationship.

NEGLIGENCE: Cases such as personal injury claims, car accidents, and medical malpractice cases.

ASSAULT AND BATTERY: A civil assault is the intentional placing of another person in fear of imminent or harmful contact, and battery is an intentional wrongful physical contact with another person without consent.

CAN A PERSON COMMIT A CRIME AND ALSO BE SUED IN A CIVIL COURT FOR THE SAME ACT?

The answer is yes. Some actions involve both criminal and civil matters. For example, assault can be both a civil matter and a criminal matter. It is criminal case because when one person intentionally strikes and injures another individual, he has committed a crime in violation of the Penal Code. At the same time, if a victim of said crime receives injuries and experiences pain and suffering, he can sue the person who caused the injury in civil court for money damages to compensate the victim for his medical expenses, pain and suffering.

Many court cases can be both civil and criminal. For example, a person who has intentionally killed another can be charged in criminal court with homicide and can also be sued civilly for wrongful death. A person who takes your car can be charged criminally with larceny and can be sued civilly for conversion.

Because the standard of proof in a criminal case is higher than that of a civil lawsuit, a guilty verdict or plea may help a plaintiff in their civil lawsuit. However, a not guilty verdict in the criminal case does not stop the civil case from proceeding forward on its own merits.

WHAT LAW APPLIES?

How many laws exist in the United States? No one really knows for sure. It is estimated that there are at least 20,000 laws just regulating guns. Perhaps as many as 300,000 federal regulations include criminal penalties if violated. Regardless of the number, the following is where you will find them in NYS and at the federal level.

New York – Consolidated/Unconsolidated Laws

Criminal

- Penal Law
- Criminal Procedure Law

Civil

- Civil Practice Law and Rules

For administrative law, the New York Codes, Rules and Regulations (NYCRR) contains the state agency rules and regulations.

Federal – Code of Laws of the United States (U.S.Code or U.S.C.)

Criminal

- U.S. Code: Title 18 – Crimes and Criminal Procedure
- Federal Rules of Criminal Procedure

Civil

- Federal Rules of Civil Procedure

The Code of Federal Regulations (CFR) is the official record of all federal government regulations. The CFR consists of 50 volumes called titles, each of which focuses on a particular area.

WHO IS THE VICTIM?

In both a civil and criminal case, the victim is a person or entity (such as an agency, business, or corporation) that is harmed, injured, killed, or has their property rights violated.

WHO ARE THE PARTIES AND WHO BRINGS THE CASE TO COURT?

In a criminal case, the party bringing the action is the people of NYS, not the victim. In other words, the People are society. The district attorney or prosecutor decides whether the case will be brought to court on behalf of the People. The victim has no control on whether a criminal case will be brought to court. If a criminal case is brought to court by the People, it will be against an accused known as the defendant. In a civil case, the victim files a lawsuit in civil court. They are known as a plaintiff. The party they file their lawsuit against, who they believe has wronged them, is known as the defendant.

IS THE CASE CAPTIONING THE SAME FOR CIVIL AND CRIMINAL CASES?

The case caption is the name of a civil or criminal case. It is not the same for criminal and civil cases. Criminal cases in NYS will have a case caption that typically reads: *THE PEOPLE OF THE STATE OF NEW YORK, v. JOHN DOE*. The State of New York is the party charging a suspect with a crime, so they are the first party named in a criminal case caption with the second name being the defendant. In NYS civil cases, it will name the parties with the first name being the plaintiff and the second name being the defendant. A typical NYS civil case caption may read: *John Doe v. EYZ Corporation.*

WHO IS SEEKING WHAT?

In a criminal case, the people of NYS (society) seek to punish the defendant, who is the perpetrator of the crime. Besides punishment, rehabilitation of the defendant, as well as deterrence from committing future crimes, is often sought by society. The defendant is seeking to have the case dismissed prior to a trial. If unsuccessful, the defendant may seek a plea bargain to lessen the charge and/or punishment or end the case before trial. If unsuccessful in obtaining a plea bargain, the defendant is seeking a not guilty verdict from the jury or judge. The vast majority of criminal cases end with a plea bargain.

In a civil lawsuit, the person suing in most instances is seeking a verdict in their favor in money damages for the wrong they suffered. This is often referred to as “making the plaintiff whole again”. So, what does making a person whole again mean? If you are injured in an automobile accident due to the negligence of a defendant and you are now a paraplegic, there is nothing a court can do to get you back to your normal physical self. However, the court can award you money damages to be paid by the defendant. This is the only way a court can make you whole again.

In some civil lawsuits, money damages may not be the best or only remedy sought by a plaintiff. The plaintiff may need an injunction to stop the defendant from doing something that is harming or wronging them or ask the court for specific performance to force the defendant to do something. For example, if your neighbor is dumping the water of his swimming pool repeatedly on your property, which is causing flooding and killing your grass, you may not only be interested in being compensated for monetary damages you have suffered, but you may also wish to prevent the dumping from happening again. In such an instance, a judge may issue an injunction, which is an order from the judge to the neighbor barring them from doing it again in the future. If you were buying a specific antique and the dealer would not deliver it to you after payment, you may ask the court to issue a specific performance order requiring the defendant to give you that specific antique you paid for.

The defendant will be seeking a dismissal of the case prior to trial. If unsuccessful, they may seek a settlement with the plaintiff. This requires a negotiated agreement between the plaintiff and the defendant on the resolution of the lawsuit. If unsuccessful in getting either a dismissal or working out a settlement, the defendant will seek a verdict in their favor from a jury or judge.

WHAT IS THE STANDARD OF PROOF AND WHO HAS THE BURDEN OF PROOF?

In criminal cases, the People of the State of New York have the burden of proof. In civil cases, the plaintiff has the burden of proof.

In a criminal case, the standard of proof is “beyond a reasonable doubt.” The District Attorney has the task of proving to the jury each and every element of the crime beyond a reasonable doubt. This is the highest, most demanding standard in any court. If the prosecutor fails to do this, the jury must come back with a verdict of “not guilty.”

The New York Pattern Jury Instructions are the official guide to judges on how to instruct or charge a jury on all civil and criminal matters. The New York Pattern Jury Instructions charge for beyond a reasonable doubt reads in part:

> What does our law mean when it requires proof of guilt “beyond a reasonable doubt”? The law uses the term, “proof beyond a reasonable doubt,” to tell you how convincing the evidence of guilt must be to permit a verdict of guilty. The law recognizes that, in dealing with human affairs, there are very few things in this world that we know with absolute certainty. Therefore, the law does not require the People to prove a defendant guilty beyond all possible doubt. On the other hand, it is not sufficient to prove that the defendant is probably guilty. In a criminal case, the proof of guilt must be stronger than that. It must be beyond a reasonable doubt.
>
> A reasonable doubt is an honest doubt of the defendant’s guilt for which a reason exists based upon the nature and quality of the evidence. It is an actual doubt, not an imaginary doubt. It is a doubt that a reasonable person, acting in a matter of this importance, would be likely to entertain because of the evidence that was presented or because of the lack of convincing evidence.
>
> Proof of guilt beyond a reasonable doubt is proof that leaves you so firmly convinced of the defendant’s guilt that you have no reasonable doubt of the existence of any element of the crime or of the defendant’s identity as the person who committed the crime.

The two standards of proof in civil litigation are a preponderance of the evidence, and clear and convincing evidence. In most civil lawsuits the plaintiff must only establish their case by a preponderance of the evidence. Preponderance of the evidence means that it is more likely than not that the defendant is legally responsible for the plaintiff’s injuries. If the plaintiff proves their case by more than 50 percent of the evidence, the jury must come back with a verdict in favor of the plaintiff.

In some civil lawsuits, the plaintiff may have to prove their case by clear and convincing evidence. This standard is sometimes required in administrative hearings, fraud cases, and in some family law cases. It is a higher standard than preponderance of the evidence, but a lower standard than beyond a reasonable doubt. Clear and convincing evidence requires a jury or judge to find that the plaintiff has proven their case so that it is highly probable that what the plaintiff claims is what happened.

The New York Pattern Jury Instructions provide the following explanation of these respective standards of proof:

> Clear and Convincing evidence means evidence that satisfies you that there is a high degree of probability that there was (e.g., fraud, malice, mistake, a gift, a contract between the plaintiff and the deceased, incompetency, addiction), as I (have defined, will define) it for you.
>
> To decide for the plaintiff, it is not enough to find that the preponderance of the evidence is in the plaintiff’s favor. A party who must prove (his, her) case by a preponderance of the evidence only need satisfy you that the

evidence supporting (his, her) case more nearly represents what actually happened than the evidence which is opposed to it. But a party who must establish (his, her) case by clear and convincing evidence must satisfy you that the evidence makes it highly probable that what (he, she) claims is what actually happened.

WHAT DO WE CALL THE ATTORNEYS IN THESE CASES AND WHO PAYS FOR THEM?

In a NYS criminal case, the person who brings the case is called the District Attorney. They are sometimes referred to as the prosecutor. The District Attorney is an elected official chosen by the voters in each county. His/her term is four years. The District Attorney will also have Assistant District Attorneys (ADAs) who actually do the bulk of the prosecuting. They are paid for by the local/state government.

In a criminal case, the defendant is represented by his own attorney, called a defense attorney. They are sometimes referred to as defense counsel. They are paid for by the defendant. If the defendant is unable to afford an attorney, the court will appoint one to represent him/her. This will usually be an attorney from the Public Defender's Office. Under this system, the Public Defender and her/his Assistants represent indigent defendants who are charged with a crime in local criminal courts. In counties that do not have a Public Defender, or in cases where there may be a conflict of interest in having the Public Defender represent an indigent criminal defendant, the court may appoint a private attorney known as assigned counsel. The Public Defender and assigned counsel are paid for by the local/state government.

A conflict of interest usually arises when there are two indigent co-defendants. The Public Defender's Office cannot represent both clients. One client would be represented by the Public Defender's Office and the trial judge would have to assign an attorney in private practice to act as assigned counsel for the other defendant.

In a civil case, the person bringing the suit is referred to as the plaintiff. Their attorney is called the plaintiff's attorney. The plaintiff's attorney is paid for by the plaintiff himself. A plaintiff or defendant who is indigent may be able to seek legal assistance from some nonprofit legal organizations such as the Legal Aid Society or from attorneys that work "pro bono" which means for free or at a substantially reduced rate.

In a civil case, the party being sued is referred to as the defendant. Their attorney is called the defense attorney. The defense attorney in a civil lawsuit is paid for by the defendant, unless the defendant is indigent and is able to obtain pro bono representation (see above). If a defendant has insurance coverage, they may be represented by an attorney paid for by their insurance carrier. For example, if you are the defendant in an automobile negligence case and have automobile insurance, your insurance carrier will provide you with and pay for your attorney.

WHAT IS THE NUMBER OF JURORS AND WHAT IS THE VERDICT REQUIRED?

In NYS a criminal defendant is always entitled to a jury trial if they face a misdemeanor or felony criminal charge. The exception is in New York City where you are not entitled to a jury trial if you are charged with a B misdemeanor. In NYS felony jury trials have 12 jurors, and misdemeanors jury trials have 6 jurors. A defendant may elect to waive a jury trial and proceed by judge alone, which is called a bench trial. In a criminal case, the verdict required by a jury must be unanimous. This means all jurors must agree to the guilty or not guilty verdict.

In a civil case, the jury will consist of 6 jurors. Their verdict does not have to be unanimous. It only requires 5 out of the 6 to find in favor of either the plaintiff or the defendant.

ARE THE COURTS AND COURT PERSONNEL THE SAME?

Generally speaking, except in certain specialized courts (like drug court), the courtrooms, the courts, and the court personnel are the same for civil and criminal cases. Most judges handle both criminal and civil cases. They use the same courtrooms for both types of cases. All courts have a court clerk. Most judges besides those in the Justice Courts have law clerks. They all have bailiffs and stenographers.

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2.2.1: Appendix B. New York Consolidated/Unconsolidated Law Index

Consolidated Laws

ABP – Abandoned Property

AGM – Agriculture & Markets

ABC – Alcoholic Beverage Control

ACG – Alternative County Government

ACA – Arts and Cultural Affairs

BNK – Banking

BVO – Benevolent Orders

BSC – Business Corporation

CAL – Canal

CVP – Civil Practice Law & Rules

CVR – Civil Rights

CVS – Civil Service

CCO – Cooperative Corporations

COR – Correction

CNT – County

CPL – Criminal Procedure

DCD – Debtor & Creditor

DOM – Domestic Relations

EDN – Education

ELD – Elder

ELN – Election

EDP – Eminent Domain Procedure

EML – Employers' Liability

ENG – Energy

ENV – Environmental Conservation

EPT – Estates, Powers & Trusts

EXC – Executive

FIS – Financial Services Law

GAS – General Associations

GBS – General Business

GCT – General City

GCN – General Construction

GMU – General Municipal

GOB – General Obligations

HAY – Highway

IND – Indian

ISC – Insurance

JUD – Judiciary

LAB – Labor

LEG – Legislative

LIE – Lien

LLC – Limited Liability Company Law

LFN – Local Finance

MHY – Mental Hygiene

MIL – Military

MDW – Multiple Dwelling

MRE – Multiple Residence

MHR – Municipal Home Rule

NAV – Navigation

PPD – New York State Printing and Public Documents

NPC – Not-For-Profit Corporation

PAR – Parks, recreation and historic preservation

PTR – Partnership

PEN – Penal

PEP – Personal Property

PVH – Private Housing Finance

PBA – Public Authorities

PBB – Public Buildings

PBH – Public Health

PBG – Public Housing

PBL – Public Lands

PBO – Public Officers

PBS – Public Service

PML – Racing, Pari-Mutuel Wagering and Breeding Law

RRD – Railroad

RAT – Rapid Transit

RPP – Real Property

RPA – Real Property Actions & Proceedings

RPT – Real Property Tax

RCO – Religious Corporations

RSS – Retirement & Social Security

REL – Rural Electric Cooperative

SCC – Second Class Cities

SOS – Social Services

SWC – Soil & Water Conservation Districts

STL – State

SAP – State Administrative Procedure Act

STF – State Finance

STT – State Technology

SLG – Statute of Local Governments

TAX – Tax

TWN – Town

TRA – Transportation

TCP – Transportation Corporations

UCC – Uniform Commercial Code

VAT – Vehicle & Traffic

VIL – Village

VAW – Volunteer Ambulance Workers' Benefit

VOL – Volunteer Firefighters' Benefit

WKC – Workers' Compensation

Unconsolidated Laws

BSW – Boxing, Sparring and Wrestling Ch. 912/20

BAT – Bridges and Tunnels New York/New Jersey 47/31

CCT – Cigarettes, Cigars, Tobacco 235/52

TRY – City of Troy Issuance of Serial Bonds

DEA – Defense Emergency Act 1951 784/51

DPN – Development of Port of New York 43/22

ETP – Emergency Tenant Protection Act 576/74

EHC – Expanded Health Care Coverage Act 703/88

FEA – NYS Financial Emergency Act for the city of NY 868/75

NYP – NYS Project Finance Agency Act7/75

YFA – Yonkers financial emergency act 103/84

YTS – Yonkers income tax surcharge

FDC – Facilities Development Corporation Act 359/68

GCM – General City Model 772/66

LEH – Local Emergency Housing Rent Control Act 21/62

ERL – Emergency Housing Rent Control Law 274/46 337/61

LSA – Lost and Strayed Animals 115/1894

MCF – Medical Care Facilities Finance Agency 392/73

NYW – N. Y. wine/grape 80/85

HHC – New York City health and hospitals corporation act 1016/69

PCM – Police Certain Municipalities 360/11

PNY – Port of New York Authority 154/21

POA – Port of Albany 192/25

PAB – Private Activity Bond 47/90

RLA – Regulation of Lobbying Act 1040/81

SNH – Special Needs Housing Act 261/88

SCT – Suffolk County Tax Act

TSF – Tobacco Settlement Financing Corporation Act

UDG – Urban development guarantee fund of New York 175/68

UDA – Urban Development Corporation Act 174/68

UDR – Urban development research corporation act 173/68

NNY – New, New York Bond Act 649/92

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2.3: Appendix A- Civil and Criminal Case Differences

Criminal and Civil Case Differences

FAQ	**Criminal**	**Civil**
What law applies?	Penal Law, various statutes, Criminal Procedure Law	Various statutes, common law, Civil Practice Law and Rules
Who is the victim?	A person or entity that is intentionally or reckless wronged, harmed, injured, killed,or had their property rights violated by the defendant.	
Who are the parties and who brings the case to court?	The People of the State of New York and Defendant.	Plaintiff and Defendant.
Who is seeking what?		Beyond a reasonable doubt.

Preponderance of the evidence or clear and conv

			including evidence.
Who has the burden of proof?	The People of the State of New York.	The plaintiff.	
What do we call the attorneys in these cases?	District Attorney/Prosecutor, or Assistant District Attorney (ADA).	Plaintiff's attorney and .defense attorney.	
Who pays for the attorney?			
What is the number of jurors?	Six (6) for a misdemeanor and twelve (12) for a felony.	Six (6).	
What verdict is required?	Verdict must be unanimous.	Verdict need not be unanimous.Only need 5 out of 6 to reach a verdict.	

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2.4: Appendix C- U.S. Code Index

Title 1 – General Provisions

Title 2 – The Congress

Title 3 – The President

Title 4 – Flag and Seal, Seat of Government, and the States

Title 5 – Government Organization and Employees

Appendix

Title 6 – Domestic Security

Title 7 – Agriculture

Title 8 – Aliens and Nationality

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Title 10 – Armed Forces

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Title 12 – Banks and Banking

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Title 24 – Hospitals and Asylums

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Title 27 – Intoxicating Liquors

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Title 30 – Mineral Lands and Mining

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Title 32 – National Guard

Title 33 – Navigation and Navigable Waters

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Title 36 – Patriotic and National Observances, Ceremonies, and Organizations

Title 37 – Pay and Allowances of the Uniformed Services

Title 38 – Veterans' Benefits

Title 39 – Postal Service

Title 40 – Public Buildings, Property, and Works

Title 41 – Public Contracts

Title 42 – The Public Health and Welfare

Title 43 – Public Lands

Title 44 – Public Printing and Documents

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Title 48 – Territories and Insular Possessions

Title 49 – Transportation

Title 50 – War and National Defense

Appendix

Title 51 – National and Commercial Space Programs

Title 52 – Voting and Elections

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Title 54 – National Park Service and Related Programs

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Find Laws, Legal Information, and Attorneys. (n.d.). Retrieved June 7, 2018, from https://www.findlaw.com/

Home | Library of Congress. (n.d.). Retrieved June 9, 2018, from https://loc.gov/

New York State. (n.d.). New York State Unified Court System. Retrieved June 7, 2018, from http://nycourts.gov/

OLRC Home. (n.d.). Retrieved June 3, 2018, from http://uscode.house.gov/

Pogue, D. L., Clifford, E., & Schwartz, A. L. (2009). *Understanding New York Law, 2013-14*. Upstate Legal Publishers

The New York State Senate. (2018, July 23). Retrieved June 8, 2018, from https://www.nysenate.gov/

Welcome to LII. (n.d.). Retrieved June 3, 2018, from https://www.law.cornell.edu/

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CHAPTER OVERVIEW

3: NEW YORK STATE AND FEDERAL COURT STRUCTURE AND SOURCES OF LAW

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3.1: NEW YORK STATE AND FEDERAL COURT STRUCTURE AND SOURCES OF LAW

INTRODUCTION

Generally, there are two types of courts – trial courts and appellate courts.

Trial Courts hear testimony from witnesses, and the judge or jury decides the outcome of a case.

Appellate Courts determine appeals from lower courts when one of the parties does not feel they received justice in the court below. No witnesses are presented in an appellate court. There is no jury. Appellate courts consist of a panel of judges that reach a decision based upon a review of the trial transcript and evidence presented during the earlier trial, as well as written and oral argument presented by attorneys for the parties.

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3.1: NEW YORK STATE AND FEDERAL COURT STRUCTURE AND SOURCES OF LAW is shared under a not declared license and was authored, remixed, and/or curated by LibreTexts.

3.2: Part I- New York and Federal Court Structure

HOW IS THE NEW YORK COURT SYSTEM STRUCTURED?

- The New York State Court System is a three-tiered court system.
- Cases start in a trial court.
- If a trial court judgment is appealed, the appeal is heard by an intermediate appellate court.
- If the decision of the intermediate trial court is appealed, and that appeal is granted, the appeal is heard by the highest court in NYS, the New York State Court of Appeals.

NEW YORK STATE TRIAL COURTS*

*Source: The Courts, (2016), Retrieved July 27, 2018 from https://www.nycourts.gov/courts

Town and Village Courts

There are nearly 1300 Town and Village Courts with approximately 2,200 Town and Village judges. These courts are often referred to collectively as the Justice Courts. They are located in NYS's towns and villages. These courts handle close to 2 million cases a year.

Civil Jurisdiction: The Town and Village Courts hear actions seeking monetary awards up to $3,000. They also hear small claims proceedings for awards up to $3,000. These courts handle landlord/tenant matters that may result in evictions, as well as money judgments for back rent and damages.

Town and Village Courts small claims proceedings are intended to provide a low-cost, simplified and informal procedure for individuals to resolve disputes involving limited monetary claims. Often, the parties to these proceedings do not use attorneys.

Criminal Jurisdiction: Town and Village courts are authorized to handle matters involving the prosecution of misdemeanors and violations that are committed within their geographic borders.
These courts also conduct arraignments and preliminary hearings in felony matters. In addition, these courts hear Vehicle and Traffic Law misdemeanors and traffic infractions.
In cases involving domestic violence, the judges are authorized to issue orders of protection.

City Court

Civil Jurisdiction: City Courts hear civil matters for monetary disputes up to $15,000. City Courts hear small claims proceedings for awards up to $5,000.

Criminal Jurisdiction: City Courts are authorized to handle matters involving the prosecution of misdemeanors and violations that are committed within their geographic borders.
These courts also conduct arraignments and preliminary hearings in felony matters. In addition, these courts hear Vehicle and Traffic Law misdemeanors and traffic infractions.
In cases involving domestic violence, the judges are authorized to issue orders of protection.

County Court

The County Court is established in each county outside New York City.

Civil Jurisdiction: The County Court also has limited jurisdiction in civil cases involving amounts up to $25,000.

Criminal Jurisdiction: County Court is authorized to handle the prosecution of all crimes committed within the county. County Courts generally handle felony cases. (Crimes are wrongdoings as described in the laws of NYS which are punishable by a fine, incarceration, or both.)

County Courts are also authorized to act as intermediate appellate courts, hearing appeals from the City Courts and the Town and Village Courts.

District Court

District Courts are located in Nassau County and parts of Suffolk County.

Civil Jurisdiction: District Courts have civil jurisdiction over claims up to $15,000 and small claims matters not in excess of $5,000.

Criminal Jurisdiction: District Courts are authorized to handle matters involving the prosecution of misdemeanors and violations that are committed within their geographic borders.
These courts also conduct arraignments and preliminary hearings in felony matters.

Surrogate's Court

Each county has a Surrogate's Court. Surrogate's Court hears cases involving the probate of wills, and the administration of estates of decedents in their county. This court also handles adoptions.

Family Court

The Family Court has jurisdiction over matters involving families and children. Family Court's jurisdiction includes: Adoption; Guardianship; Foster Care Approval and Review; Delinquency; Persons in Need of Supervision; Family Offense (domestic violence); Child Protective Proceedings (abuse and neglect); Termination of Parental Rights; Custody and Visitation; and Support. The Family Court cannot grant a divorce; only Supreme Court can grant a divorce.

New York State Supreme Court

In NYS, the Supreme Court is not the highest court in NYS, it is a trial court. This is unique to New York State. Most states call their highest courts the Supreme Court, with the exception of New York State, the State of Maryland, and the District of Columbia. While the NYS Supreme Court has unlimited, original jurisdiction, this court generally hears cases that are outside of the jurisdiction of other courts.

Civil Jurisdiction: This court hears matters beyond the monetary limits of the lower courts. This court has exclusive jurisdiction over divorce, separation, and annulment proceedings. This court also has jurisdiction over matters such as mortgage foreclosures and injunctions.

Criminal Jurisdiction: Supreme Court is authorized to handle the prosecution of all crimes committed within their jurisdiction. However, they generally handle felony cases.

Civil Court of the City of New York

Civil Jurisdiction: The Civil Court of the City of New York hears civil cases involving monetary amounts up to $25,000, and other civil matters referred to it by the Supreme Court. This court also hears small claims proceedings up to $5,000. In addition, this court also has a housing part for landlord-tenant matters and housing code violations. This court has no criminal jurisdiction.

Criminal Court of the City of New York

Criminal Jurisdiction: The Criminal Court of the City of New York is authorized to handle matters involving the prosecution of misdemeanors and violations that are committed within its geographic borders. These courts also conduct arraignments and preliminary hearings in felony matters. This court has no civil jurisdiction.

Court of Claims

The Court of Claims has jurisdiction over the entire State of New York. This court does not have jurisdiction over any individuals, including NYS employees. However, some claims against individuals and NYS employees may be maintained against NYS based on wrongful conduct of employees for which NYS is responsible for.

The Court of Claims also has jurisdiction over the following public authorities which can be sued under their own names. These include the **New York State Thruway Authority**, the **City University of New York**, the **Roswell Park Cancer Institute Corporation**, the **Olympic Regional Development Authority,** and the **Power Authority of the State of New York.**

The Court of Claims has no jurisdiction over lawsuits involving county, town, city, or village governments, agencies, or employees. Litigation against these entities is governed by the provisions of the General Municipal Law. These entities, and other public

authorities not referenced above, are sued in Supreme Court pursuant to the procedure set forth in the General Municipal Law.

NEW YORK STATE APPELLATE COURTS*

*Source: The Courts, (2016), Retrieved July 27, 2018 from https://www.nycourts.gov/courts

- After a trial, if a plaintiff or defendant feels he/she did not receive justice, he/she has the right to an appeal. The exception to this right is that the prosecutor in a criminal case cannot appeal a not guilty verdict, or its equivalent, since this would create double jeopardy, which is a violation of both the NYS and United States Constitutions.
- The NYS Appellate Courts hear and determine appeals from the decisions of the trial courts. The NYS Appellate Courts are the Court of Appeals, which is NYS's highest Court, the Appellate Divisions of the Supreme Court, the Appellate Terms of the Supreme Court, and the County Courts acting as Appellate Courts in the Third and Fourth Judicial Departments.
- There are four Appellate Divisions of the Supreme Court called the 1st, 2nd, 3rd, and 4th Departments. There is one Appellate Division of the Supreme Court in each of the State's four Judicial Departments. These Courts resolve appeals from judgments or orders of the trial courts of original jurisdiction in civil and criminal cases, and review civil appeals taken from the Appellate Terms, and the County Courts, acting as appellate courts.
- There are two Appellate Terms of the Supreme Court, one in each of the in the First and Second Departments. These courts hear appeals from civil and criminal cases originating in the Civil and Criminal Courts of the City of New York. The Second Department's Appellate Terms also have jurisdiction over appeals from civil and criminal cases originating in District, City, Town, and Village Courts, as well as non-felony appeals from the County Court.
- While the County Courts in the Third and Fourth Departments are primarily trial courts, they also hear appeals from cases originating in the City, Town, and Village Courts.
- The New York Court of Appeals is the highest court in New York State. It sits atop NYS's judicial system. Note that federal appellate courts are also called the U.S. Circuit Court of Appeals.
- The granting of an appeal to the NYS Court of Appeals is generally at the discretion of the Court. An appeal argued before the New York Court of Appeals has usually been heard by two lower courts (a trial court and the Appellate Division).
- The New York Court of Appeals is composed of a Chief Judge and six Associate Judges. They are each appointed to a 14-year term. They have a mandatory retirement age of 70 years of age.
- Except in cases involving a Federal question, where the Supreme Court of the United States has the last word, the Court of Appeals makes the final statement of the law in New York State.
- In recent years, the Court of Appeals has written opinions in about 175 cases annually, in addition to deciding approximately 1,200 motions for leave to appeal in civil cases and 2,800 criminal leave applications.

HOW IS THE FEDERAL COURT SYSTEM STRUCTURED?

- The Federal Court system is a three-tiered court system.
- Cases start in a trial court.
- If a trial court judgment is appealed, the appeal is heard by an intermediate appellate court.
- If the decision of the intermediate trial court is appealed, and that appeal is granted, the appeal is heard by the highest court in the United States, the U.S. Supreme Court

FEDERAL TRIAL COURTS*

*Source: Court Role and Structure, Retrieved July 27, 2018, from http://www.uscourts.gov/about-federal-courts/court-role-and-structure

District Courts

In the federal court system, there are 94 district trial courts called U.S. District Courts across the United States. These courts have jurisdiction over both civil and criminal federal cases. District Court judges have lifetime appointments pursuant to the U.S. Constitution. Magistrate judges assist district judges in preparing cases for trial. They may also conduct trials in misdemeanor cases.

There is at least one district court in each state, and the District of Columbia. Each district also includes a U.S. bankruptcy court as a unit of the district court. Four U.S. territories have U.S. district courts: Puerto Rico, the Virgin Islands, Guam, and the Northern

Mariana Islands.

There are also two special trial courts: The Court of International Trade addresses cases involving international trade and customs laws, while the U.S. Court of Federal Claims deals with most claims for money damages against the U.S. government.

Bankruptcy Courts

Federal courts have exclusive jurisdiction over bankruptcy cases involving personal, business, or farm bankruptcy. All bankruptcy cases are federal. There are no state bankruptcy courts.

FEDERAL APPELLATE COURTS*

*Source: Court Role and Structure, Retrieved July 27, 2018, from http://www.uscourts.gov/about-federal-courts/court-role-and-structure

U.S. Court of Appeals

There are 13 appellate courts called the U.S. Court of Appeals that sit below the U.S. Supreme Court. The 94 federal judicial districts are organized into 12 regional circuits, each of which has a U.S. Court of Appeals. New York State is in the U.S. Court of Appeals Second Circuit. The Second Circuit also includes the States of Vermont and Connecticut.

The U.S. Court of Appeals hears challenges to district court decisions located within its circuit, as well as appeals from decisions of federal administrative agencies. Appeals are heard by a panel of three judges from a total of 13 available active judges. An appeal heard *en banc* means all available judges heard the appeal. Appellate courts do not use a jury. Any plaintiff or defendant that feels they did not receive justice at their trial has the right to an appeal. The exception is that the prosecution in a criminal case cannot appeal a not guilty verdict or its equivalent because this would create double jeopardy, which is a violation of the U.S. Constitution.

In addition, the Court of Appeals for the Federal Circuit has nationwide jurisdiction to hear appeals in specialized cases such as patent laws, and cases decided by the U.S. Court of International Trade and the U.S. Court of Federal Claims.

Bankruptcy Appellate Panels

Bankruptcy Appellate Panels (BAPs) are 3-judge panels authorized to hear appeals of bankruptcy court decisions. BAPs are a unit of the federal courts of appeals established by that circuit. Only five circuits have established BAPs. They are the First Circuit, Sixth Circuit, Eighth Circuit, Ninth Circuit, and Tenth Circuit.

Article I Courts

The U.S. Congress created several Article I legislative courts that do not have full judicial power. The judicial power of these Article I courts is the authority to be the final decider in all questions of Constitutional law, all questions of federal law, and to hear claims at the core of habeas corpus issues. These Article I Courts are:

U.S. Tax Court

The United States Tax Court is a court of record established by Congress under Article I of the U.S. Constitution. When the Commissioner of Internal Revenue has determined a tax deficiency, the taxpayer may dispute the deficiency in the Tax Court before paying any disputed amount. This court also has jurisdiction over other federal tax matters.

U.S. Court of Appeals for the Armed Forces

The United States Court of Appeals for the Armed Forces exercises worldwide appellate jurisdiction over members of the armed forces on active duty, and other persons subject to the Uniform Code of Military Justice. The Court is composed of five civilian judges appointed for 15-year terms by the President. Decisions by the Court are subject to direct review by the Supreme Court of the United States.

U.S. Court of Appeals for Veterans Claims

The United States Court of Appeals for Veterans Claims has exclusive jurisdiction over decisions of the Board of Veterans Appeals. This court reviews Board decisions appealed by claimants who believe the Board's decision was improper or incorrect.

United States Supreme Court

The Supreme Court is the highest court in the United States. Article III of the U.S. Constitution created the Supreme Court and authorized Congress to pass laws establishing a system of lower courts. In the federal court system's present form, 94 district level trial courts and 13 courts of appeals sit below the Supreme Court. The U.S. Supreme Court is the final arbiter of federal constitutional questions.

The United States Supreme Court has the absolute discretion to grant an appeal. It does so by granting what is called a writ of certiorari. A writ of certiorari orders a lower court to deliver its record in a case, so the higher court may review it. The U.S. Supreme Court decides to grant a writ of certiorari by the "rule of four". This means that when reviewing the thousands of requests for appeals, at least four of the nine Supreme Court Justices must agree to grant the appeal. The Supreme Court agrees to hear about 100-150 of the more than 7,000 cases that it is asked to review each year.

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3.3: Part II- Sources of Law

INTRODUCTION

There are numerous sources of law that we as citizens need to understand and be aware of. All these various sources of law have an impact on our daily lives. Under our legal system, the following are the sources of law.

- United States Constitution
- New York Constitution
- Statutes (Federal, State, and Local)
- Administrative Rules (Federal and State)
- Common Law (Which includes case law.)

WHAT IS THE UNITED STATES CONSTITUTION?

The U.S. Constitution is a written body of laws that was ratified in 1788. It includes just 27 amendments since its inception over 200 years ago. It is the foundation for our federal government and all federal laws. It is written broadly and often needs interpretation by our federal courts to determine what it actually says and means. The US Constitution has had, and will continue to have, a huge impact on civil and criminal law, and society in general.

WHAT IS THE NEW YORK STATE CONSTITUTION?

The first New York Constitution was adopted by the Convention of Representatives of the State of New York in 1777. This was eleven years before the United States Constitution was ratified. The second New York State Constitution was adopted in 1821, a third in 1846, the fourth in 1894, and the fifth and current New York Constitution in 1938.

It is important to understand that the while there are many similarities between the United States Constitution and the New York State Constitution, there are important distinctions. First, the federal Constitution establishes the federal government structure. It also establishes the rights we have as United States citizens. The federal Constitution establishes the low bar, or minimum rights, we have as citizens that no state law or constitution can go below.

The New York Constitution establishes the New York State government. It also establishes the rights we have as New York State citizens that may be greater than those established under the federal Constitution, but not less. In other words, states can give you equal or more rights than the federal government, just not less. New York frequently offers its citizens more rights

For example:

New York's Constitution guarantees:

- The right of workers to organize and bargain collectively.
- The right of workers to receive workers' compensation.
- The right to a free public education.
- Criminal suspects have more rights regarding defense counsel.
- Criminal suspects have expanded Miranda rights.
- Criminal suspects have more protections regarding search and seizure.

WHAT ARE STATUTES?

Statutes are written laws created by an elected legislature and signed into law by the respective executive. If the US Congress enacts legislation, we call it a federal statute. This means the House of Representatives and the U.S. Senate have agreed on legislation that was signed into law by the President of the United States.

If the New York State legislature enacts legislation we called it a New York statute. This means that the Assembly (which is similar to the House of Representatives) and the New York Senate (which is similar to the U.S. Senate) have agreed on legislation that was signed by the New York Governor (which is similar to the President).

The authority for Congress' power to pass laws is written in Article II of the federal Constitution. New York State's Constitution has a similar provision applying to the New York Senate and Assembly in Article III of the New York Constitution. Examples of

federal laws include:

- Title VII of the Civil Rights Act of 1964
- The Affordable Care Act
- Tax Cut and Jobs Act of 2017
- The USA Patriot Act

WHAT ARE LOCAL ORDINANCES AND CODES?

Local laws passed by city, town, and village boards are called ordinances or codes. These laws impact our everyday life because they affect the place we usually spend the most time, where we live. These local laws are usually put together for particular purposes such as zoning and housing. Examples of local ordinances and codes include:

- Street Parking
- Noise Restrictions
- Building Permits
- Leash Laws and Pet Licensing

WHAT IS ADMINISTRATIVE LAW?

Some statutes may require more specific rules on how they will be administered. These rules are written by the administrative agencies that enforce these statutes. For example, the NYS Department of Environmental Conservation, also known as the DEC, writes the rules, administers, and enforces the New York State Environmental Conservation Law.

At a federal level, the Environmental Protection Agency, also known as the EPA, writes the rules, administers, and enforces federal environmental laws like the Clean Air Act. The Internal Revenue Service rights the rules, administers, and enforces the Tax Cut and Jobs Act of 2017.

The various administrative agencies are under the control of the executive branch, which means the President at the federal level and the Governor at the state level.

WHAT IS COMMON LAW?

Common law is also known as judicial precedent, or case law. Common is derived from the period after the Norman Conquest of 1066 in England, where the law was developed by judges and their decisions, as opposed to legislatures and their statutes. That tradition was carried over to our courts and laws by our founding fathers. It is therefore that body of law that is derived from decisions of courts which creates judicial precedent. In situations and cases where parties disagree on what the law is, courts will look to past court decisions on a same or similar matter and use that decision as precedent in making its decision.

In some situations, precedent is binding, while in others it may only be persuasive depending on the court making the precedent decision. For example, if an NY Appellate Court in the 1st Department makes a decision and a case in the 4th Department arises that is similar, the 1st Department's decision is persuasive precedent, but not binding on the 4th Department judges. On the other hand, if the New York Court of Appeals makes a decision on a same or similar issue, its decision is binding precedent on all courts in NYS.

The difference is that the 1st and 4th Department courts are equal in stature, while the Court of Appeals is the highest court in the state. Using this line of logic, all trial courts in the 4th Department will follow their department's precedent, while those trial courts in the 1st Department are bound to follow their 1st Department's rulings.

Judicial precedent makes the law predictable and more likely to be fair. If you can depend on the court that you are before to interpret the law the same as that court or previous courts have in the past, that use of judicial precedent makes it much more likely that your pursuit of justice will be fair. It also allows those who give legal advice to do so with more confidence and credibility, which in turn gives you the ability to tailor your personal or business actions to fit within the law.

Common law is an extremely important source of law. Without judicial precedent, the law and life as we know it in the Unites States would most likely be much different.

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3.4: Appendix A- New York State Judicial Departments

Judicial Departments

First	Second	Third	Fourth
Bronx NY County	Dutchess Kings Nassau Orange Putnam Queens Richmond Rockland Suffolk Westchester	Albany Broome Chemung Chenango Clinton Columbia Cortland Delaware Essex Franklin Fulton Greene Hamilton Madison Montgomery Otsego Rensselaer St. Lawrence Saratoga Schenectady Schoharie Schuyler Sullivan Tioga Tompkins Ulster Warren Washington	Allegany Cattaraugus Cayuga Chautauqua Erie Genesee Herkimer Jefferson Lewis Livingston Monroe Niagara Oneida Onondaga Ontario Orleans Oswego Seneca Steuben Wayne Wyoming Yates

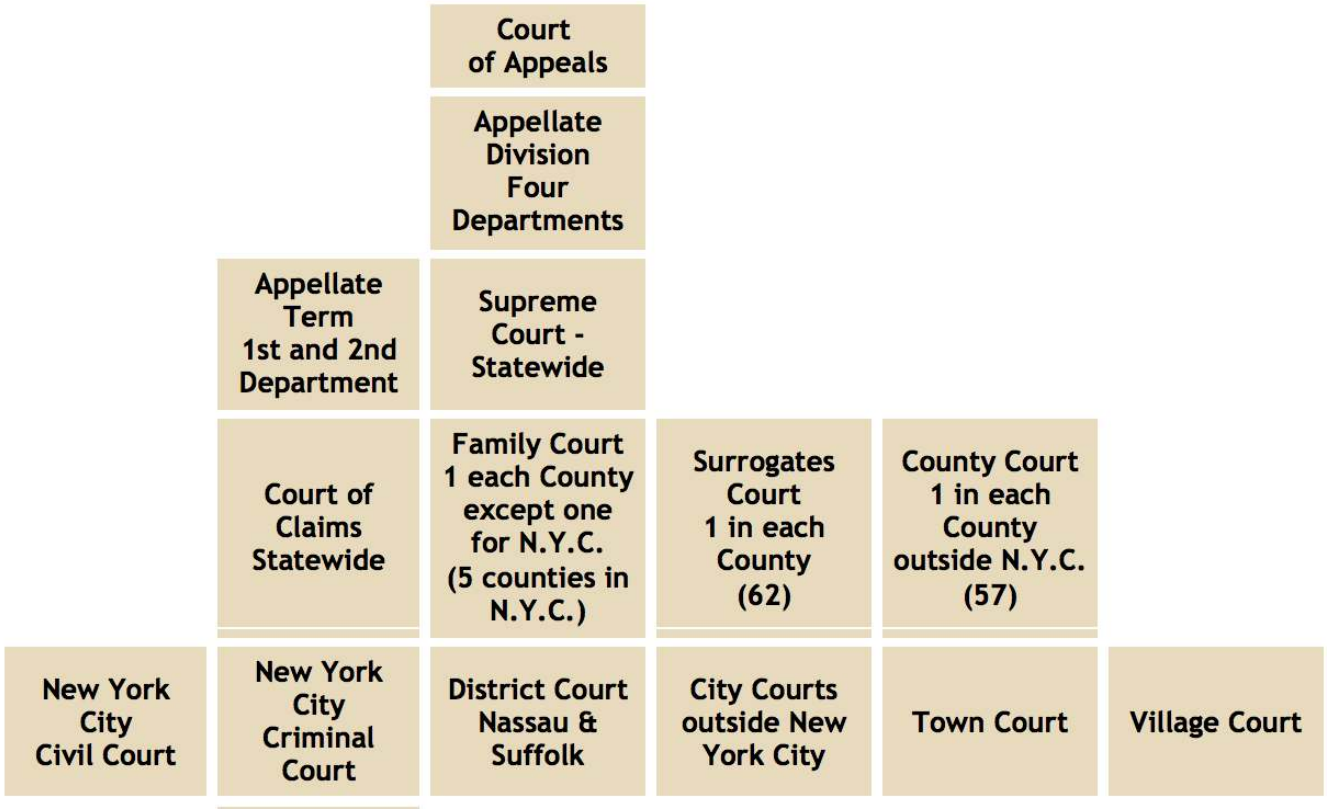
*Source: Appellate Divisions, (2013), Retrieved July 27, 2018 from https://www.nycourts.gov/courts/appellatedivisions.shtml

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3.5: Appendix B- Outline of the New York Court System



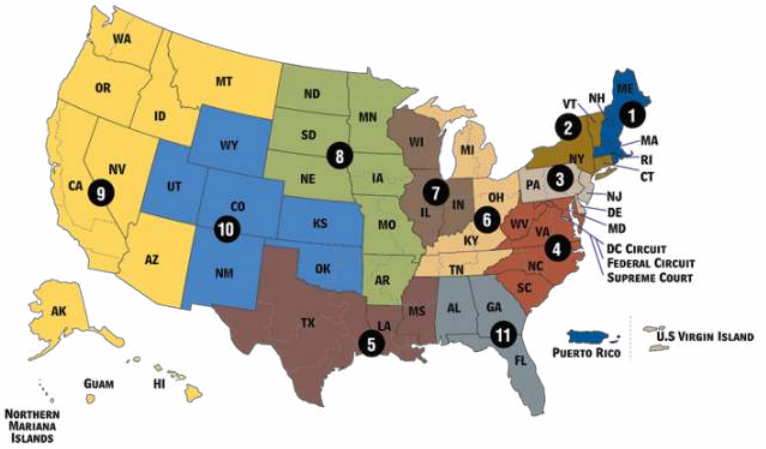
*Source: Structure of the Courts (2013) Retrieved July 27, 2018 from https://www.nycourts.gov/courts/structure.shtml

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3.6: Appendix C- United States Federal Courts Circuits Map



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3.7: Appendix D- Justices of the United States Supreme Court Biographies



John G. Roberts, Jr., Chief Justice of the United States was born in Buffalo, New York, January 27, 1955. He married Jane Marie Sullivan in 1996 and they have two children, Josephine and Jack. He received an A.B. from Harvard College in 1976 and a J.D. from Harvard Law School in 1979. He served as a law clerk for Judge Henry J. Friendly of the United States Court of Appeals for the Second Circuit from 1979–1980, and as a law clerk for then-Associate Justice William H. Rehnquist of the Supreme Court of the United States during the 1980 Term. He was Special Assistant to the Attorney General, U.S. Department of Justice from 1981–1982, Associate Counsel to President Ronald Reagan, White House Counsel's Office from 1982–1986, and Principal Deputy Solicitor General, U.S. Department of Justice from 1989–1993. From 1986–1989 and 1993–2003, he practiced law in Washington, D.C. He was appointed to the United States Court of Appeals for the District of Columbia Circuit in 2003. President George W. Bush nominated him as Chief Justice of the United States, and he took his seat September 29, 2005.



Clarence Thomas, Associate Justice, was born in the Pinpoint community near Savannah, Georgia on June 23, 1948. He attended Conception Seminary from 1967-1968 and received an A.B., cum laude, from Holy Cross College in 1971 and a J.D. from Yale Law School in 1974. He was admitted to law practice in Missouri in 1974, and served as an Assistant Attorney General of Missouri, 1974-1977; an attorney with the Monsanto Company, 1977-1979; and Legislative Assistant to Senator John Danforth, 1979-1981. From 1981–1982 he served as Assistant Secretary for Civil Rights, U.S. Department of Education, and as Chairman of the U.S. Equal Employment Opportunity Commission, 1982-1990. From 1990–1991, he served as a Judge on the United States Court of Appeals for the District of Columbia Circuit. President Bush nominated him as an Associate Justice of the Supreme Court and he took his seat October 23, 1991. He married Virginia Lamp on May 30, 1987 and has one child, Jamal Adeen, by a previous marriage.



Ruth Bader Ginsburg, Associate Justice, was born in Brooklyn, New York, March 15, 1933. She married Martin D. Ginsburg in 1954, and has a daughter, Jane, and a son, James. She received her B.A. from Cornell University, attended Harvard Law School, and received her LL.B. from Columbia Law School. She served as a law clerk to the Honorable Edmund L. Palmieri, Judge of the United States District Court for the Southern District of New York, from 1959–1961. From 1961–1963, she was a research associate and then associate director of the Columbia Law School Project on International Procedure. She was a Professor of Law at Rutgers University School of Law from 1963–1972, and Columbia Law School from 1972–1980, and a fellow at the Center for Advanced Study in the Behavioral Sciences in Stanford, California from 1977–1978. In 1971, she was instrumental in launching the Women's Rights Project of the American Civil Liberties Union and served as the ACLU's General Counsel from 1973–1980, and on the National Board of Directors from 1974–1980. She was appointed a Judge of the United States Court of Appeals for the District of Columbia Circuit in 1980. President Clinton nominated her as an Associate Justice of the Supreme Court, and she took her seat August 10, 1993.



Samuel A. Alito, Jr., Associate Justice was born in Trenton, New Jersey, April 1, 1950. He married Martha-Ann Bomgardner in 1985 and has two children – Philip and Laura. He served as a law clerk for Leonard I. Garth of the United States Court of Appeals for the Third Circuit from 1976–1977. He was Assistant U.S. Attorney, District of New Jersey, 1977–1981, Assistant to the Solicitor General, U.S. Department of Justice, 1981–1985, Deputy Assistant Attorney General, U.S. Department of Justice, 1985–1987, and U.S. Attorney, District of New Jersey, 1987–1990. He was appointed to the United States Court of Appeals for the Third Circuit in 1990. President George W. Bush nominated him as an Associate Justice of the Supreme Court, and he took his seat January 31, 2006.



S onia Sotomayor, Associate Justice, was born in Bronx, New York, on June 25, 1954. She earned a B.A. in 1976 from Princeton University, graduating summa cum laude and receiving the university's highest academic honor. In 1979, she earned a J.D. from Yale Law School where she served as an editor of the Yale Law Journal. She served as Assistant District Attorney in the New York County District Attorney's Office from 1979–1984. She then litigated international commercial matters in New York City at Pavia & Harcourt, where she served as an associate, and then partner from 1984–1992. In 1991, President George H.W. Bush nominated her to the U.S. District Court, Southern District of New York, and she served in that role from 1992–1998. She served as a judge on the United States Court of Appeals for the Second Circuit from 1998–2009. President Barack Obama nominated her as an Associate Justice of the Supreme Court on May 26, 2009, and she assumed this role August 8, 2009.



Elena Kagan, Associate Justice, was born in New York, New York, on April 28, 1960. She received an A.B. from Princeton in 1981, an M.Phil. from Oxford in 1983, and a J.D. from Harvard Law School in 1986. She clerked for Judge Abner Mikva of the U.S. Court of Appeals for the D.C. Circuit from 1986-1987, and for Justice Thurgood Marshall of the U.S. Supreme Court during the 1987 Term. After briefly practicing law at a Washington, D.C. law firm, she became a law professor, first at the University of Chicago Law School, and later at Harvard Law School. She also served for four years in the Clinton Administration, as Associate Counsel to the President and then as Deputy Assistant to the President for Domestic Policy. Between 2003 and 2009, she served as the Dean of Harvard Law School. In 2009, President Obama nominated her as the Solicitor General of the United States. A year later, the President nominated her as an Associate Justice of the Supreme Court on May 10, 2010. She took her seat on August 7, 2010.



Neil M. Gorsuch, Associate Justice, was born in Denver, Colorado, August 29, 1967. He and his wife Louise have two daughters. He received a B.A. from Columbia University, a J.D. from Harvard Law School, and a D.Phil. from Oxford University. He served as a law clerk to Judge David B. Sentelle of the United States Court of Appeals for the District of Columbia Circuit, and as a law clerk to Justice Byron White and Justice Anthony M. Kennedy of the Supreme Court of the United States. From 1995–2005, he was in private practice, and from 2005–2006 he was Principal Deputy Associate Attorney General at the U.S. Department of Justice. He was appointed to the United States Court of Appeals for the Tenth Circuit in 2006. He served on the Standing Committee on Rules for Practice and Procedure of the U.S. Judicial Conference, and as chairman of the Advisory Committee on Rules of Appellate Procedure. He taught at the University of Colorado Law School. President Donald J. Trump nominated him as an Associate Justice of the Supreme Court, and he took his seat on April 10, 2017.

Brett M. Kavanaugh, Associate Justice, was born in Washington, D.C., on February 12, 1965. He married Ashley Estes in 2004, and they have two daughters – Margaret and Liza. He received a B.A. from Yale College in 1987 and a J.D. from Yale Law School in 1990. He served as a law clerk for Judge Walter Stapleton of the U.S. Court of Appeals for the Third Circuit from 1990-1991, for Judge Alex Kozinski of the U.S. Court of Appeals for the Ninth Circuit from 1991-1992, and for Justice Anthony M. Kennedy of the U.S. Supreme Court during the 1993 Term. In 1992-1993, he was an attorney in the Office of the Solicitor General of the United States. From 1994 to 1997 and for a period in 1998, he was Associate Counsel in the Office of Independent Counsel. He was a partner at a Washington, D.C., law firm from 1997 to 1998 and again from 1999 to 2001. From 2001 to 2003, he was Associate Counsel and then Senior Associate Counsel to President George W. Bush. From 2003 to 2006, he was Assistant to the President and Staff Secretary for President Bush. He was appointed a Judge of the United States Court of Appeals for the District of Columbia Circuit in 2006. President Donald J. Trump nominated him as an Associate Justice of the Supreme Court, and he took his seat on October 6, 2018.



Stephen G. Breyer, Associate Justice, was born in San Francisco, California, August 15, 1938. He married Joanna Hare in 1967, and has three children – Chloe, Nell, and Michael. He received an A.B. from Stanford University, a B.A. from Magdalen College, Oxford, and an LL.B. from Harvard Law School. He served as a law clerk to Justice Arthur Goldberg of the Supreme Court of the United States during the 1964 Term, as a Special Assistant to the Assistant U.S. Attorney General for Antitrust, 1965–1967, as an Assistant Special Prosecutor of the Watergate Special Prosecution Force, 1973, as Special Counsel of the U.S. Senate Judiciary Committee, 1974–1975, and as Chief Counsel of the committee, 1979–1980. He was an Assistant Professor, Professor of Law, Lecturer at Harvard Law School, 1967–1994, a Professor at the Harvard University Kennedy School of Government, 1977–1980, and a Visiting Professor at the College of Law, Sydney, Australia and at the University of Rome. From 1980–1990, he served as a Judge of the United States Court of Appeals for the First Circuit, and as its Chief Judge, 1990–1994. He also served as a member of the Judicial Conference of the United States,

1990–1994, and of the United States Sentencing Commission, 1985–1989. President Clinton nominated him as an Associate Justice of the Supreme Court, and he took his seat August 3, 1994.

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3.8: Appendix F- Common Legal Words and Terms

The following are some common legal words and terms used by attorneys and courts in New York State.

Action, Case, Suit, and Lawsuit: These words mean the same thing. They refer to a legal dispute, issue, or claim.

Answer: A legal document in which the person against whom an action is brought answers the claims of the person bringing the lawsuit.

Appearance Ticket: In a criminal matter, an appearance ticket is served ordering a person to appear in court for a lesser criminal offense or traffic violation instead of arresting that person. This is also called a summons.

Argument: An attorney's presentation of evidence; summation at the end of a trial or explanation before an appellate court.

Bill of Particulars: A part of the discovery process of a lawsuit to obtain more detailed information about the case.

Charge or instruction to jury: After the attorneys are done presenting their evidence and summations, the judge gives the jurors the law relating to the issues and the evidence presented.

Civil: The rights and remedies of private persons that have been wronged and harmed in a non-criminal manner.

Claim: What a person alleges that another person did wrong.

Court Clerk: In the courtroom, the court clerk sits in front of the judge, is an officer of the court, administers the oath to jurors and to witnesses before they testify, and records orders made by the court during the trial and verdict.

Closing argument: The final statements by the attorneys to the jury or court summarizing the evidence they think they have established, and the evidence that they think the other side has failed to establish. This is also called the summation. In New York criminal cases, the defense goes first with his closing argument, and then the prosecutor closes. In New York civil cases, the plaintiff closes after the defense.

Common law: A body of principles and rules which derive their authority from usage and customs built up over many years, particularly from the unwritten law of England. It is also that of a body of law that develops from judicial decisions as distinct from statutory law.

Complaint: A legal document in which the person bringing the lawsuit states allegations or claims against the other party.

County Clerk: The County Clerk is a public office where legal documents are placed, kept, recorded, and placed on record.

Court: A branch of the government organized to administer justice. In includes both judges and juries.

Court Attendant: Also known as a bailiff, court attendants have the charge of keeping order in a courtroom, the custody of the jury, the custody of prisoners while in court, and providing courtroom security.

Cross-Examination: The examination of a witness by the party opposed to the one who produced the witness. The purpose is to test the veracity of evidence given by the witness during direct examination.

Crime: A wrongdoing described in the laws of NYS and punishable by a fine, incarceration, or both.

Defendant: A person or entity against whom a lawsuit has been started. In some legal proceedings they are called a respondent. In a criminal prosecution, this is the person who is charged with committing a crime.

Direct Examination: The first line of questioning of a witness by the party producing the witness.

Evidence: Proof legally presented at trial through witnesses, photographs, documents, exhibits, physical objects, videos, or other legal means to establish a particular fact, issue, or both.

Fact: A reality of events of which the actual occurrence is to be determined by evidence to establish the truth.

Issue: The problem or dispute which the parties seek to resolve.

Judge: A person appointed or elected to administer the law in a court.

Law Clerk: Usually a person who has completed law school. They may or may not be a fully licensed attorney. They assist a judge with various tasks, such as legal research and the writing of legal opinions.

Opening Statement: Made by the attorneys, it is the outline of the case and anticipated evidence to be presented at trial. It is presented to a judge and/or jury at the start of the trial before any evidence is submitted. In a criminal case, the district attorney is required to give an opening statement and goes first. The defense attorney is under no obligation to present an opening statement in a criminal case.

Parties: The person or entity bringing the action and the person or entity against whom the action is brought. The parties in a lawsuit are often referred to as opposing parties.

Personal Injury: A civil wrong between private persons or entities. It involves civil actions such as automobile accidents, malpractice, “slip and fall”, and libel/slander cases. Typically, plaintiffs are suing to recover money damages for medical bills, pain and suffering, or damage to their reputation. Personal injury is also called torts.

Petitioner: The person or entity bringing the action usually in a family court or surrogate court proceeding. In some proceedings, they are called the plaintiff.

Plaintiff: The person or entity bringing the lawsuit. In some proceedings they are called the petitioner.

Pleadings: These are the formal legal documents in a lawsuit. The complaint contains the claims of the plaintiff and the answer contains the response of the defendant to the plaintiff’s claims.

Reasonable Doubt: Standard used to determine the guilt or of an accused in a criminal case. (For more, see definition in Chapter 2.)

Record: All the pleadings, exhibits, and word-for-word testimony recorded during a trial by a court reporter.

Redirect Examination: The re-questioning of a witness by the direct examiner after the cross-examination of the witness.

Remedy: What a party is seeking as a result of being wronged by another party. In civil cases, this is usually money for damages or injuries suffered. In criminal cases, it is usually restitution and/or punishment as set forth by law.

Respondent: A person or entity against whom a lawsuit or legal proceeding has been started. In some legal proceedings; they are called a defendant.

Subpoena: A legal document which is served on a witness compelling the witness to present documents or evidence, and/or appear in court or at a hearing at a particular time and place.

Summation: The final statements by the attorneys to the jury or court summarizing the evidence they think they have established and the evidence they think the other side has failed to establish. This is also called the closing argument. In New York criminal cases, the defense goes first with his closing argument, and then the prosecutor closes. In New York civil cases, the plaintiff closes after the defense.

Summons: The notice served on the opposing party by the person bringing a civil lawsuit. In a criminal matter, a summons is served ordering a person to appear in court for a lesser criminal offense or traffic violation instead of arresting that person. This is also called an appearance ticket.

Testimony: Oral statements given under oath at a trial or hearing.

Tort: A civil wrong between private persons or entities. It involves civil actions such as automobile accidents, malpractice, “slip and fall”, and libel/slander cases. Typically, plaintiffs are suing to recover money damages for medical bills, pain and suffering, or damage to their reputation. Torts are often called personal injury.

Verdict: The finding made by a judge or jury on the issues submitted to them at the conclusion of a trial.

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3.9: References

Find Laws, Legal Information, and Attorneys. (n.d.). Retrieved July 27, 2018, from https://www.findlaw.com/

New York State. (n.d.). New York State Unified Court System. Retrieved July 27, 2018, from http://nycourts.gov/

New York State Court of Appeals. (n.d.). Retrieved July 27, 2018, from http://www.nycourts.gov/ctapps/

Pogue, D. L., Clifford, E., & Schwartz, A. L. (2009). *Understanding New York Law, 2013-14*. Upstate Legal Publishers

Supreme Court of the United States Home. (n.d.). Retrieved July 27, 2018, from https://www.supremecourt.gov/

United States Courts. (n.d.). Retrieved July 27, 2018, from http://www.uscourts.gov/

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4.1: HOW THE UNITED STATES AND NEW YORK STATE CONSTITUTIONS AFFECTS OUR LIVES

INTRODUCTION

This chapter will discuss two very important legal documents, the New York State Constitution and the United States Constitution. When most people mention the "Constitution" they are usually referring to the United States Constitution which was ratified in 1788. However, 11 years early, New York State had adopted its first of four Constitutions, with the last major modifications occurring back in 1938.

This chapter will discuss both Constitutions and how they impact our lives as citizens of both the United States of America and New York State.

THE **HISTORY OF THE NEW YORK STATE CONSTITUTION :**

As already mentioned above, New York's first Constitution was adopted in 1777. However, since that time, the NYS's Constitution has been rewritten three more times, in 1821, 1846, and 1894. NYS's current Constitution is from 1938. It was not rewritten but modified by amendments to the 1894 Constitution.

THE NEW YORK STATE **CONSTITUTION OF 1777:**

New York's first Constitution was drafted right after New York's Fourth Provincial Congress declared New York independent of Great Britain in 1776. It was formally adopted by the Convention of Representatives of the State of New York meeting in the upstate town of Kingston, on April 20th, 1777.

The Constitution declared the possibility of reconciliation between British and its former American colonies even if uncertain and remote. The Constitution then declared that there was now the need for the creation of a new New York government for the preservation of internal peace, virtue, and good order.

This new Constitution created three governmental branches: an executive branch, a judicial branch, and a legislative branch. The Constitution called for the election of a governor, 24 senators, and 70 assemblymen from 14 declared counties who were to be elected by eligible male inhabitants. The right to vote was tied to the ownership of a certain amount of property. The Constitution also guaranteed the right to a jury trial.

THE NEW YORK STATE **CONSTITUTION OF 1821:**

At the 1821 Convention, there was a bitter debate over the property qualifications for voting. Many at the convention felt the need to retain property ownership was a qualification for the right to vote, and was necessary to avoid as Chancellor James Kent, the state's leading legal scholar and the head of its highest Court, said "corruption, injustice, violence and tyranny".

However, Governor Daniel Tompkins, the chairman of the Convention who had led the State militias during the War of 1812, argued that all the men who fought in the war should have a right to vote. A motion to retain property qualifications for voting was defeated by a vote of 19 to 100, and with it one of the most important political developments in New York's history was established.

The New York State Constitution of 1821 had many flaws. It did not give women the right to vote. It effectively disenfranchised free African American men by requiring them to own at least $250 of property to vote. Nevertheless, it set the stage for major social and political change. As the state's economy moved from agricultural to industrial, and with influx of immigrants arriving from around the world, the right to vote without the need to own land helped establish eventual broad-based suffrage.

THE NEW YORK STATE **CONSTITUTION OF 1846:**

Several changes where established in the 1846 rewrite of the NYS Constitution. Most notably, were the abolishment of the Court of Chancery, the Court for the Correction of Errors, and the New York State Circuit Courts. Jurisdiction was moved to the New York Supreme Court, and appellate jurisdiction to the New York Court of Appeals. The Attorney General, Secretary of State, Comptroller, Treasurer, and State Engineer offices went from appointed cabinet offices to elected officials.

THE NEW YORK STATE **CONSTITUTION OF 1894:**

The rewrite of the 1894 Constitution included the reduction in the number of years in office for the governor and lieutenant governor from three to two. The number of state senators and assemblymen was increased. The year of cabinet officer elections was changed. The State Park Reserve was given perpetual protection. Convict labor was abolished. Voting machines were allowed to be used.

THE **NEW YORK STATE CONSTITUTION AL CONVENTION OF 1938:**

While the Constitution was not rewritten at this convention, 57 amendments to the 1894 Constitution were presented to the voters. Some of the notable changes approved by vote were the setting out of the rights of public works workers, the removal of a debt ceiling for NYC so the city could finance a public rapid transport system, and permission for the State legislature to provide funds for transportation to parochial schools.

THE HISTORY OF THE U.S. **CONSTITUTION :**

Perhaps the most important legal document ever written, the U.S. Constitution is the heart and soul of the experiment known as the United States of America.

The preamble, which has no legal applicability, is nevertheless important. It sets out the goals and aspirations of what the Framers of the Constitution where hoping to accomplish during the summer of 1787. It reads: “We the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.”

The U.S. Constitution was proposed, debated, and written between May 14 and September 17, 1787 at a convention held in the city of Philadelphia. Every state sent delegates to this convention, with except of the state of Rhode Island. It was ratified on June 21, 1788, when New Hampshire became the ninth and last state needed to ratify the new Constitution. So, what were the circumstances and events that brought 12 of 13 states to Philadelphia in 1787, resulting in this new Constitution and thereby creating this new form of government?

THE REVOLUTIONARY WAR:

While most of us have a basic understanding of the Revolutionary War, also known as the American Revolution, it cannot be understated how much influence that war had on the formation of our Constitution and new form of government that ensued. The war started in 1775, and effectively was over by 1781 after the Continental Army defeated the British at Yorktown, with French assistance. The fighting formally ended in 1783.

The war started due to growing tensions between the British and the 13 colonies that were only getting worse. The British were continuing to raise taxes on the colonists, while at the same time, denying them representation. Violence between the British and the colonist started in 1770 with the Boston Massacre, which resulted in five dead colonists killed by British soldiers. By 1773, we have a group of Bostonians dressed as Mohawk Indians dumping 342 chests of tea into the Boston Harbor. Shortly thereafter, the 13 American colonies created a Continental Congress. Their first meeting, in 1774, in Philadelphia was to air their grievances with the British crown. By their second meeting in 1775, they voted to create the Continental Army with George Washington as the Commander in Chief. By July 4, 1776, they adopted the Declaration of Independence, a document written by a five-man committee, including Ben Franklin and John Adams, but written primarily by Thomas Jefferson. The American Revolution was now in full swing.

THE ARTICLES OF CONFEDERATION:

Our first Constitution was actually the Articles of Confederation. The Continental Congress felt the need to create a central government due to the war. Six different drafts of the Articles of Confederation were presented to the Congress, as early as 1775. The Congress adopted the final version in 1777, but they did not go into effect until 1781.

The Articles of Confederation defined itself as “a firm league of friendship” of states “for their common defense, the security of their liberties, and their mutual and general welfare.” It had a unicameral congress, in other words, one body. Each state had one vote elected by each state’s legislature. Each state retained their “sovereignty, freedom, and independence.” The new Congress

could not levy taxes and could not regulate commerce. The Congress lacked sole control over foreign relations. While it had the authority to maintain an army and navy, it lacked the ability to collect revenue to do so. Nine states created their own armies, and several had their own navies. States created their own money. States were imposing tariffs randomly on goods, and the Congress had no power to stop any of this.

The Articles of Confederation was effectively an alliance, or treaty, between the 13 colonies and it was not working very well. By 1787, without the ability to raise revenue with taxes, it was clear that maintaining a national army and navy was impossible. There was no consistent national economic policy and the economy in general was in trouble. A convention was convened to meet in Philadelphia, on May 14th, 1787, to address these issues and amend the Articles of Confederation. Twelve of the thirteen states sent delegates to the convention. Rhode Island was the sole holdout. Long known for the fierce independence, they feared the convention would lead to a stronger more centralized government, something they were long opposed to, and they therefore refused to participate.

THE **CONSTITUTION CONVENTION:**

The meeting was to start on May14th, but travel was difficult, and many arrived late. Almost all the delegates had taken part in the Revolution. Twenty-nine of the fifty-four in attendance had served in the Continental forces. Over half were trained as attorneys. About 80% of them served in the Congress. Almost all had political experience. Twenty-five of them owned slaves. Most were landowners with wealth. For example, George Washington, who was in attendance, was one of the wealthiest men in the country.

Several important Founders were not in attendance. Thomas Jefferson was serving as the minister to France. He was not in favor of this convention. John Adams was serving as the minister to Britain. He was in favor of this convention and expressed such in writings to the delegates. John Hancock and Samuel Adams were absent. Patrick Henry did not attend stating he “smelt a rat in Philadelphia, tending toward monarchy.”

However, there were important Founders in attendance. As mentioned above, George Washington was in attendance, as was Benjamin Franklin. Also in attendance was James Madison, who eventually will be known as the father of our Constitution. Washington’s attendance is crucial, since he is seen as a national hero and leader, giving credibility to the convention. But Madison was perhaps the most prepared delegate. He was determined not to amend the Articles of Confederation, but to create an entirely new government. He is one of the first to arrive, and he keeps copious notes during the entire convention. He is one of the delegates from Virginia, and he presents to the convention delegates what is known as the Virginia Plan. He does so first, and this is not by accident. It was planned.

WHAT IS THE VIRGINIA PLAN?

The Virginia plan proposed three separate branches of government; legislative, executive, and judicial. It proposed separation of powers between these three branches, with checks and balances built in. It proposed a bicameral legislature, which meant a legislative branch of government consisting of two chambers. Representation would be based on the number of free inhabitants in each state. Thus, it favored larger states. Overall, it reflected a strong national form of government.

WHAT IS THE PINCKNEY PLAN?

Proposed by Charles Pinckney of South Carolina, it advanced a bicameral legislature with a House of Delegates and a Senate. The House of Delegates would have one member for each 1,000 inhabitants of a state. The House would then elect Senators who would serve four terms in rotation with Senators representing one of four regions of the country. The House would then meet to elect a President and appoint the cabinet members. The Congress would also serve as a court of appeal to resolve disputes between the states. The plan also called for a federal court system. While resembling the Virginia plan in many aspects, Pinckney did not have a coalition of support behind him that Madison had, and therefore his plan was not debated by the delegates.

WHAT IS HAMILTON’S PLAN?

Proposed by Alexander Hamilton, he advocated for doing away with state sovereignty and consolidation into one nation. It called for a bicameral legislature with one chamber elected by the people for three-year terms, and the other chamber members elected by electors chosen by the people, with life time terms. It also called for an executive again elected by electors who would also have a

life time term. While well thought out, it was felt by the delegates to be too close a resemblance of the British system, and therefore a non-starter.

WHAT IS THE **NEW JERSEY PLAN?**

After the Virginia Plan was proposed, William Paterson from New Jersey proposed a rebuttal plan that favored smaller states like New Jersey. Under the New Jersey Plan, the legislature would remain unicameral with one vote per state, as was already the case under the Articles of Confederation. This plan also advocated for the belief that states were independent entities that remained so, even upon agreement to join the United States of America.

WHICH PLAN PREVAILED?

Ultimately, our current Constitution resembles more of the Virginia Plan proposed by James Madison than any of the others. It was modified with ideas from the New Jersey Plan to obtain compromise between the small and large states. However, much of the debate and compromise needed to create the Constitution was over the presidency, the judiciary, and slavery.

THE PRESIDENCY DEBATE **AND THE ELECTORAL COLLEGE:**

One of the most contentious debates was over the election of the president. There was widespread concern over a direct election of the president by the people. Many felt that information was passed along too slowly across the country, leading to the people only voting for those from their state or region. The Virginia Plan proposed the election of the president by the legislature. Some wanted the president chosen by the state governors. Others proposed that state legislatures elect the president. Others proposed that special members of Congress chosen by lot elect the president. The compromise was the Electoral College.

The compromise gave each state a number of electors equal to the number of members of the House of Representatives for each state, plus its two senators. These electors would then vote, and thereby elect the president. The election of the president would require a majority of the Electoral College vote, and if that did not happen, the house would then vote based on state block voting, not as individual members.

There is evidence to believe that the founders assumed the electors would be independent agents voting for the presidential candidate based on their merits, not necessarily on the popular vote of its states voters. Within the first decade under the Constitution, the electors were regarded more as agents of the will of the people and were expected, although not required, to vote for the presidential candidate that garnered the popular vote in their respective states. State legislatures were allowed to decide on how their electors were selected.

THE JUDICIARY DEBATE:

The debate over the judiciary centered on whether judges should be chosen by the legislature or by the president. Madison felt strongly that the link between the current judiciary and the state executives fostered corruption and patronage. He wanted the judiciary to be an independent branch of the government, and therefore felt it would be best if the legislature chose judges. However, many felt this should be the function of the president. A compromise was reached where the president would nominate judges, with the senate confirming them.

THE SLAVERY DEBATE **AND COMPROMISES:**

Slavery was one, if not the most controversial issues at the convention. Slavery was widespread. Twenty-five of the fifty-five delegates owned slaves, including all the delegates from Virginia. It was such an intense debate that several of the southern states made it clear they would not join this new Union if slavery was abolished.

Delegates from states opposed to slavery that wanted it outlawed felt the need and pressure to compromise. A close look at the Constitution shows the intention that the Framers neither authorized, nor prohibited slavery. Slavery is dealt with three times in the original Constitution.

It is first implied in Article 1, Section 2. It reads: “Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a term of years, and excluding Indians not taxed, three-fifths of all other Persons.”

This is known as the Three-Fifths Compromise. It is a compromise between the northern and southern states where the enumerated population of slaves would not count one-for-one in the distribution of taxes and apportionment of the House of Representatives. This was a compromise proposed and supported by the northern states to suppress the power of the southern states in the House of Representatives.

Slavery is again implied in Article 1, Section 9 which reads: “The Migration and Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.”

This section deals with the issues of importation and taxation of the slave trade. It prohibits Congress from acting on the issue of the slave trade until 1808 and limits the tax imposed on the importation of slaves to no more than ten dollars per slave.

The third reference to slavery is in Article IV, Section 2. It reads: “No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom Service or Labour may be due.”

This clause essential says that once a slave, always a slave, unless released by his master. It required that slaves who escape and move to a free state must be returned to their owners.

PROVIDE FOR **THE COMMON DEFENSE:**

Mentioned in the preamble are the words “provide for the common defense.” Why? The winning of the American Revolution by common everyday citizens against the greatest military force on the planet, the British, was viewed by some as unlikely to happen again if the United States of America was ever attacked. The French Navy was no longer protecting the Americans. At that time, the British, French, and Spanish were all strong militarily and all three had colonial ambitions. Today you can see the remnants of these ambitions in our neighbors, Canada and Mexico.

The Founders were aware of the need to establish a strong military. They realized that only a professional organized military could deter, and if need be, respond to a foreign threat. The Articles of Confederation did not make this possible. The Constitution put the responsibility of the national defense solely on the new federal government. The states would no longer have separate armies and navies. The Founders also made the common defense a shared responsibility between the Congress and the President. The President would be the commander-in-chief, but only the Congress can declare war. Congress also controls the funding.

It cannot be understated how important the common defense was to the Founders. As mentioned earlier, almost all were involved in the American Revolution in some capacity. Over half of them served in the Continental forces. For the Founders, a primary and central job of the federal government was for the common defense. Thomas Jefferson once said that “the power of making war often prevents it.”

THE UNITED STATES **CONSTITUTION EXPLAINED:**

The following are the highlights of the Constitution.

The Preamble:

- Has no force in law.
- Explains why the Constitution exists.
- It reflects the desire of the Founders to allow the people the power to “form a more perfect union”.

Article 1:

Establishes the first of the three branches of government, the Legislature.

Article 1, Section 1:

- The legislature is called the Congress.
- The Congress is a two-part body.
- Article 1, Section 2:
- One part is the lower house, and it is called House of Representatives.
- To be a member of the House you must be at least 25-years-old.

- The members must also be citizens for at least seven years.
- The members must also be an inhabitant of the state from which they are elected.
- Members of the House are elected to two-year terms.
- The members of the House of Representatives are divided among the states proportionally based on each states population. This means the larger states have more House members.
- The leader of the House is called the Speaker of the House, chosen by the members.

Article 1, Section 3:

- The upper house is called the Senate.
- To be a member of the Senate, you must be at least 30-years-old.
- The members of the Senate must also be citizens for nine years.
- The Senators must also be inhabitants of their states.
- The Senators are appointed by their state legislatures.
- The Senators serve six-year terms.
- Each state shall have two senators regardless of their population size.
- The Vice-President is the President of the Senate.
- The Vice-President only votes if there is a tie.

Article 1, Section 4:

- Each state establishes its method of electing members.
- It mandates that Congress shall meet at least once per year.

Article 1, Section 5:

- Sets the minimum number of members that must be present in order to meet.
- Sets fines for those who do not attend.
- It allows for members to be expelled.
- It requires both houses to record proceedings and votes.
- It requires both houses to agree to an adjournment.

Article 1, Section 6:

- Members of Congress will be paid.
- Members of Congress cannot be detained while traveling to and from Congress.
- Members of Congress cannot hold any other office of government while in the Congress.

Article 1, Section 7:

- Details how a bill becomes law.
- Requires any bill that raises money to start in the House.
- Bills passed by both houses are sent to the President.
- The President can either sign the bill or veto it.
- If the President vetoes a bill, it is sent back to Congress, and if passed by both houses by a two-thirds majority, the bill becomes law over the President’s veto.
- If the President does not sign the bill, but also does not veto it, it becomes law after 10 days.
- If the bill is sent to the President, he does not sign it, and the Congress adjourns before the 10 days, the bill does not become law.

Article 1, Section 8:

- Congress has the power to establish and maintain an army and navy.
- Congress has the power to establish post offices.
- Congress has the power to create courts.
- Congress has the power to regulate commerce between the states.
- Congress has the power to declare war.
- Congress has the power to raise money.

- Congress has the power to pass any law necessary for carrying out these powers. This is known as the Elastic Clause.

Article 1, Section 9:

- Congress cannot suspend habeas corpus.
- Congress cannot issue bills of attainder.
- Ex post facto laws are prohibited.
- No law can give preference to one state over another.
- No money can be taken from the treasury, except by law.
- No titles of nobility are allowed.

Article 1, Section 10:

- States cannot make their own money.
- States cannot declare war.
- States cannot tax goods from other states.
- States cannot have navies.
- States cannot pass ex post facto laws
- States cannot grant titles of nobility
- States cannot impair the obligation of contracts

Article 2:

Establishes the second of three branches of government, the Executive.

Article 2, Section 1:

- Establishes the offices of the President and the Vice-President.
- Their terms are four-years.
- The President is elected by the Electoral College.
- Each state gets one vote for each member of Congress in the Electoral College.
- Whoever gets the most Electoral College votes is President.
- Whoever comes in second is Vice-President.
- To be President, you must be at least 35-years-old.
- Presidents must be natural-born-citizens of the United States.
- The President is paid a salary that cannot be changed while in office.

Article 2, Section 2:

- The President is Commander-in-Chief of the armed forces and the militia of all states.
- The President has a Cabinet to assist him.
- The President can pardon criminals.
- The President makes treaties with other countries that must be approved by the Senate.
- The President chooses judges that must be approved by the Senate.

Article 2, Section 3:

- The President must give a State of the Union address each year.
- The President can make suggestions to Congress.
- The President, as head of state, receives ambassadors and heads of other countries.
- The President is required to make sure laws of the United States are carried out.

Article 2, Section 4:

- The President, Vice-President, and all civil officers of the United States can be removed from office by impeachment.
- Impeachment is allowed on of the above are convicted of treason, bribery, or other high crimes and misdemeanors.

Article 3:

Establishes the third of three branches of government, the Judiciary.

Article 3, Section1:

- Establishes the Supreme Court as the highest court in the United States.
- Gives Congress the power to establish inferior, or lower, courts.
- Terms of judges are as long as they are on good behavior, which means for life.
- Judges shall be paid and their pay cannot be lowered.

Article 3, Section 2:

- Established the Supreme Court's original jurisdiction for disputes in which a state is a party, or in cases involving representatives of foreign nations.
- In all other matters, the Supreme Court has only appellate jurisdiction.
- Requires the right to a jury trial for all crimes, except for impeachment.

Article 3, Section 3:

- Defines treason as levying war against the United States, or giving adherence to its enemies, or providing them aid and comfort.
- To be convicted, there must be two witnesses to the same act or confession in open court.

Article 4:

Establishes state obligations.

Article 4, Section 1:

- Provides that Full Faith and Credit to the laws of other states.

Article 4, Section 2:

- It requires that citizens of one state be treated the equally and fairly as other citizens from other states.
- Requires extradition for those fleeing from states where they committed a crime.
- Requires that slaves who escape be returned to their owners.

Article 4, Section 3:

- Concerns the admittance of new states into the Union.
- Concerns the control of federal lands.

Article 4, Section 4:

- Guarantees each state a Republican (representative democracy) form of government.
- Guarantees the federal government will protect the states from all invasions and insurrection.

Article 5:

- Establishes how to amend the Constitution.
- One way is for a bill to pass both houses of the legislature, by a two-thirds majority in each. Once the bill has passed both houses, it goes on to the states where it must be approved or ratified by three-fourths of the states. This is the method taken for all current amendments.
- Another way is for a Constitutional Convention to be called by two-thirds of the legislatures of the States, and for that Convention to propose one or more amendments. These amendments are then sent to the states to be approved by three-fourths of the legislatures or conventions. This method has never been used.
- Provides that no amendment could be made prior to 1808 that would affect the 1st and 4th clauses in Section 9 of Article 1.
- Provides that equal representation of the states in the Senate could not be amended without the state's consent.

Article 6:

- Establishes certain obligations of the United States.
- All debts incurred under the Articles of Confederation will be honored by the new government.
- All laws and treaties of the United States shall be the supreme law of the land.

- It requires all officers of the United States and the states to swear an oath of allegiance to the United States and the upholding of the Constitution when taking office.

Article 7:

- Required that at least nine of the thirteen states would have to ratify the Constitution before it would be applied to all the states.
- Delaware ratified the Constitution on December 7, 1787.
- Pennsylvania ratified the Constitution on December 12, 1787.
- New Jersey ratified the Constitution on December 18, 1787.
- Georgia ratified the Constitution on January 2, 1788.
- Connecticut ratified the Constitution on January 9, 1788.
- Massachusetts ratified the Constitution on February 6, 1788.
- Maryland ratified the Constitution on April 28, 1788.
- South Carolina ratified the Constitution on May 23, 1788.
- New Hampshire ratified the Constitution on June 21, 1788.
- Virginia ratified the Constitution on June 25, 1788.
- New York ratified the Constitution on July 26, 1788.
- North Carolina ratified the Constitution on November 21, 1789.

Rhode Island ratified the Constitution on May 29, 1790.

WHAT'S MISSING?

When most people think or talk about the Constitution, they most often go right to the Bill of Rights. However, the Bills of Rights were not part of the original Constitution. The original Constitution was about forming a new government. It said little about individual rights under this new government.

During the ratification process, there was much debate between the federalist, those who favored the ratification of the Constitution, and the anti-federalist, those who were opposed to the Constitution, feeling that so much centralized power would eventually lead to tyranny. Leading federalists included Alexander Hamilton, John Jay, and James Madison. Together, the three wrote 85 essays making the philosophical case for ratifying the Constitution. These essays are known as the Federalist Papers.

However, anti-federalists like George Mason, Patrick Henry, and Samuel Adams were not in favor of ratification because of the lack individual liberty protections. As the ratification process moved forward, some states refused to ratify the Constitution without adding a declaration of rights.

Amending the Constitution after it had already been ratified by several states was not seen as a practical solution. Instead, the leading federalists like James Madison promised to propose amendments to the Constitution that would provide rights of liberty to the citizenry once it was ratified. Soon after the Constitution was ratified, James Madison made good on this promise. and proposed twelve Amendments to the Constitution known as the Bill of Rights. Ten were passed and ratified by the states on December 15, 1791.

There were two amendments of the twelve that did not get ratified originally. One did in 1992, the Twenty-Seventh Amendment to the Constitution. The other has never been ratified. It would have required each congressional district not to exceed a population of 50,000 citizens.

AMENDMENTS TO THE UNITED STATES CONSTITUTION:

Amendment 1 establishes: (Ratified 1791)

Freedom of religion.

Freedom of the press.

Freedom of speech.

Freedom to assemble.

Freedom to petition the government.

Amendment 2 establishes: (Ratified 1791)

The right to own a firearm.

Amendment 3 establishes: (Ratified 1791)

That the government cannot force a homeowner to provide room and board to the military.

Amendment 4 establishes: (Ratified 1791)

Protection from the government from unreasonable search and seizure of their person or property without a warrant based on probable cause.

Amendment 5 establishes: (Ratified 1791)

Due process of law.

The requirement of an indictment for charged crimes.

That one cannot be charged twice for the same crime.

That one cannot be forced to testify against themselves.

That your property cannot be taken by the government without just compensation.

Amendment 6 establishes: (Ratified 1791)

The right to a fair and impartial jury.

The right to a speedy trial.

The right to an attorney.

The right to compel witnesses to testify on your behalf.

The right to confront witnesses testifying against you.

Amendment 7 establishes: (Ratified 1791)

The right to a civil jury trial in federal court.

Amendment 8 establishes: (Ratified 1791)

That punishment must be fair and not cruel.

That fines and bail will be fair.

Amendment 9: (Ratified 1791)

Makes the statement that rights may exist that are not stated, and just because they are not listed, does not mean they cannot be violated by the government.

Amendment 10: (Ratified 1791)

Provides that power not granted to the federal government belongs to the states.

Amendment 11: (Ratified 1795)

Changed a portion of Article 3, Section 2.

Federal Courts are prohibited from hearing certain lawsuits between the states and between citizens of different states.

State courts do not have to hear certain suits against the state, if those suits are based on federal law.

Amendment 12: (Ratified 1804)

Redefines how the Vice-President is chosen. It would now be cooperative, not who comes in second place.

Amendment 13: (Ratified 1865)

Abolishes slavery throughout entire United States.

Amendment 14: (Ratified 1868)

Granted citizenship to all persons born or naturalized in the United States which included freed slaves.

Prohibits the states from denying any person life, liberty, and property without due process of law.

Requires the states to provide equal protection under the law.

Removed the three-fifths counting of slaves in the census.

Stated that the United States would not pay the debts of the rebellious states.

It set out loyalty requirements of legislators that participated in the Confederacy.

Amendment 15: (Ratified 1870)

Granted freed male slaves the right to vote.

Amendment 16: (Ratified 1913)

Allowed the federal government the right to base and collect taxes on incomes.

Amendment 17: (Ratified 1913)

Modified Article I, Section 3, of the Constitution by allowing voters to cast direct votes for U.S. Senators.

Amendment 18: (Ratified 1919)

Prohibited the manufacturing, transportation, and sale of alcohol within the United States.

Amendment 19: (Ratified 1920)

Granted all women the right to vote.

Amendment 20: (Ratified 1933)

Moved the beginning and ending of the terms of the president and vice-president from March 4 to January 20, and of members of Congress from March 4 to January 3.

States that the vice-president shall be sworn in as president if the president-elect dies before being sworn in.

Allows the Congress to pass legislation on a more detailed succession plan if the vice-president cannot assume the office of the president-elect.

Amendment 21: (Ratified 1933)

Repeals the 18th Amendment, and therefore Prohibition.

Amendment 22: (Ratified 1951)

Limits the presidency to two terms of four years.

Amendment 23: (Ratified 1961)

Extends voting rights in presidential elections to the District of Columbia residents by granting them three electors.

Amendment 24: (Ratified 1964)

Prohibits any poll taxes for voting in federal elections.

Amendment 25: (Ratified 1967)

Clarifies that the vice-president becomes president in the event of death, resignation, removal from office, or impairment of the president.

Establishes rules for removal of a president who can no longer perform his or her duties.

Amendment 26: (Ratified 1971)

Grants the right to vote to eighteen-year-olds.

Amendment 27: (Ratified 1992)

Changes in congressional pay must take place after the current term of those representatives.

WHAT IS THE ROLE OF THE U.S. SUPREME COURT?

The U.S. Supreme Court interprets the laws that Congress makes and evaluates, whether the laws of Congress, or the laws of any of the states, violate the Constitution, Bill of Rights, or other amendments.

The United States Supreme Court website states: “The Court is the highest tribunal in the Nation for all cases and controversies arising under the Constitution or the laws of the United States. As the final arbiter of the law, the Court is charged with ensuring the American people the promise of equal justice under law and, thereby, also functions as guardian and interpreter of the Constitution.”

The same website also states: “The complex role of the Supreme Court in this system derives from its authority to invalidate legislation or executive actions which, in the Court’s considered judgment, conflict with the Constitution. This power of “judicial review” has given the Court a crucial responsibility in assuring individual rights, as well as in maintaining a “living Constitution” whose broad provisions are continually applied to complicated new situations.”

MARBURY V. MADISION, **5 U.S. 137 (1803) AND JUDICIAL REVIEW:**

John Adams and Thomas Jefferson ran against each other for president after George Washington’s two terms. John Adams was President Washington’s Vice President. At the time, under the Constitution, the candidate who had the second most votes was the Vice President. John Adams and Thomas Jefferson where initially great friends, but over the years, that friendship waned, and by the time they ran for president against each other, their friendship was over. Their bids for the presidency against each other were nasty and ugly.

After losing his bid for a second term to his then Vice President Jefferson, President John Adams made several lame duck judicial appointments. However, his administration failed to deliver the required documents commissioning William Marbury as Justice of the Peace in the District of Columbia. After President Thomas Jefferson was sworn in, he told James Madison, his Secretary of State, to not deliver the documents to Marbury. Marbury then sued James Madison asking the Supreme Court to issue a writ requiring him to deliver the documents necessary to officially make Marbury Justice of the Peace.

Chief Justice John Marshall issued the opinion of the Court. While the issue before the Court was important, Justice Marshall recognized that the future role of the Supreme Court itself was in question. Was it an equal branch of government? It was clear that the appointment itself was legal, and the Commission should be delivered to Marbury by President Jefferson. But what if the Court ordered Jefferson to deliver the Commission and he refused to do so? This was a real possibility considering the cantankerous relationship between Adams and Jefferson, not to mention the fact that Jefferson was head of the Democratic Party and Justice Marshall and Marbury were federalists. The Court has no enforcement powers. The executive branch, which is the President, enforces Supreme Court orders. Then what?

Justice Marshall also was concerned about how this case was before the Court in the first place. The Supreme Court is an Appellate Court. It is supposed to decide which cases it hears on appeal. However, this case was before it based on the Judiciary Act of 1789. It was brought directly to the Supreme Court without their say.

The Court ruled that Marbury was entitled to his commission, but that according to the Constitution, the Court did not have the authority to require Madison to deliver the commission to Marbury in this case. They found that the Judiciary Act of 1789 conflicted with the Constitution because it gave the Supreme Court more authority than it was given under the Constitution, and therefore, the statute was unconstitutional. The court decision established judicial review.

As a side note, twelve years after the vicious election of 1800, Adams and Jefferson began writing letters to each other. They eventually became friends again. They remained friends for the rest of their lives. As destiny would have it, they passed away on the same day, July 4, 1826, which was the 50th anniversary of the Declaration of Independence.

HOW MANY MEMBERS ARE ON THE SUPREME COURT?

There are nine. However, that has not always been the number of Supreme Court judges. The Constitution gives Congress the power to decide on the number. It has been as few as six and as many as ten. It has had nine members since 1869.

WHAT IS THE PROCESS FOR NOMINATING AND CONFIRMING A NEW JUSTICE?

The President of the United States nominates a member to the Court. The Senate of the United States must confirm the nominee.

IS THE NOMINATING AND CONFIRMATION PROCESS POLITICAL?

The answer clearly is yes. The appointment of a Supreme Court Justice is for life. They typically are chosen based on their legal ideology. Are they strict constructionists that base decisions on the exact words in the Constitution? Or, do they believe the Constitution is a living document that can be interpreted differently based on current circumstances? Or, are they somewhere in-between? Presidents often nominate those individuals that they believe will interpret the Constitution based on their personal politics, and the Senators who must confirm, do the same.

WHAT ARE THE REQUIRED QUALIFICATIONS FOR A SUPREME COURT JUDGE?

The Constitution does not mention or require any particular qualifications. To date, all have practiced law. Forty have never been judges before becoming a United States Supreme Court Judge.

WHAT IS A WRIT OF CERTIORARI?

The losing party in a case often wishes to appeal. If everybody could appeal to the United States Supreme Court, the Supreme Court would be overloaded with tens of thousands of cases each term. The Supreme Court grants a person permission to appeal by granting them a writ of certiorari. This way the Supreme Court can pick cases to hear involving interesting and significant issues of law.

WHAT IS THE RULE OF FOUR?

After parties appeal their cases to the United States Supreme Court, four of the nine Supreme Court justices must agree to grant the writ of certiorari.

HOW DOES A CASE ARISING IN A NEW YORK **TRIAL COURT MAKE ITS WAY UP THE APPELLATE PROCESS ALL THE WAY TO THE UNITED STATES SUPREME COURT?**

Only a small percentage of cases ever reach the U.S. Supreme Court each year, even if they are appealed. The process to get a NYS trial court case to U.S. Supreme Court would be as follows:

First there would be a trial court verdict. The losing party (other than the government in a criminal case) would have a right to have their appeal heard by the Appellate Division of the N.Y. Supreme Court. The losing party could then appeal again to the N.Y. Court of Appeals. That appeal is discretionary. If the N.Y. Court of Appeals grants such an appeal, the losing party could then appeal to the U.S. Supreme Court on the basis that there is a U.S. Constitutional question. The U.S. Supreme Court decides on whether to grant a writ of certiorari.

WHAT IS STARE DECISIS AND CASE LAW PRECEDENT?

Stare decisis is a Latin term meaning “to stand by things decided”. It is a legal principle in which courts generally follow the application of the law as decided in similar prior cases. This is referred to as following case law precedent. Stare decisis makes the law predictable.

The general requirement is that a lower court must follow the precedent of a higher court within its jurisdiction. Decisions of lower courts are not binding on higher courts. Decisions of higher courts are not binding on courts not within their jurisdiction, although it may be what they call persuasive. Lawyers will try to persuade judges to follow their line of case precedents.

Sometimes there is no case precedent for a particular case. This is often referred to as a “case of first impression.” Judges then must do their best to interpret how the law should be interpreted or applied.

WHAT IS MEANT BY THE TERM “LANDMARK CASE ” ?

The term “Landmark Case” usually refers to highly significant decision rendered by the Court that then impact our society.

HOW TO BRIEF A CASE :

Court decisions can be very long and complicated. Students, paralegals, law enforcement, lawyers, and judges read cases to understand the law. A case brief is a summary of the important points of a case. There are many ways to brief a case. The following is one of the more common:

Citation: How the case is legally cited so others can find it.

Facts: A brief summary of what happened.

Procedural History: A summary of the lower court decisions before it reached this court.

Issue: This is the question the appellate court is being asked to answer.

Holding: This is the decision of the appellate court to the issue of question being asked.

Rationale/Reasoning: How and why the court came to its decision.

WHAT IS A CITATION?

A citation is the way to find cases in law books. All appellate cases are published in specific law books call reporters. These cases are now also found online through various legal online research services. Trial court cases are not published. So, how does one interpret a citation? What does *Texas v. Johnson*, 491 U.S. 397 (1989) mean?

Texas v. Johnson = The name of the parties of the case.

491 = Volume number of the reporter.

U.S. = The initials represent the name of the reporter

397 = Page number within the volume of the reporter.

(1989) = Year in which the case was decided.

HOW DO I SUMMARIZE THE FACTS?

Answering the following questions may help you summarize the facts.

- What happened in this case?
- Who are the people/organizations/companies involved?
- What are the motives the people involved on why they acted as they did?
- Which facts are most important?

WHAT IS THE PROCEDURAL HISTORY OF A CASE?

- Identify the lower court decisions mentioned in case.
- Include both the trial and appeals court decisions.

WHAT IS THE ISSUE OR QUESTION BEFORE THE COURT?

Answering the following four questions may be helpful in determining the issue.

- Who are the actors doing something?
- Who are the recipients of the action?
- What was the action that caused the controversy?
- What is the specific part of the Constitution/statute that is involved?

Once you determine what the issue or issue are, present it as a question, hopefully with an answer that elicits a yes or no answer.

WHAT IS THE COURT ' S HOLDING OR DECISION?

In a brief sentence or two, answer the question(s) you wrote for the issue. Courts often provide you with hints using words like “held”, “we hold”, “we find”, or “the holding of the court is.”

HOW DO I DET ERMINE WHAT THE RATIONAL/REASON ING IS?

Focus in on why the court made its decision to the question and who it affects.

WHAT IS A MAJORITY OPINION?

The majority opinion is the only opinion of the court that counts and has any legal bearing. If you are briefing a case, this is the opinion of the case you are concerned with. For a United States Supreme Court decision, this generally means at least five of the nine justices support the decision.

WHAT IS A CONCURRING OPINION?

A concurring opinion is when a justice agrees with the result of the majority opinion, but for a different reason. It has no legal bearing. Only the majority opinion does.

WHAT IS A DISSENTING OPINION?

A dissenting opinion is when judges disagree with the majority opinion, and write their own separate opinion attacking the legal reasoning of the main opinion and giving their own legal justification why the rule should be otherwise. It also has no legal bearing.

SAMPLE CASES AND CASE BRIEFS:

The following are two landmark First Amendment cases. They are edited for easier reading, which is called a case syllabus. The original texts of these cases are much longer and more difficult to read. Following each the case is a sample case brief.

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4.2: TEXAS v. JOHNSON

SAMPLE CASES AND CASE BRIEFS:

The following is one of two landmark First Amendment cases. It is edited for easier reading, which is called a case syllabus. The original texts of this case is much longer and more difficult to read. Following is a sample case brief.

Texas v. Johnson

491 U.S. 397 (1989)

(Case Syllabus edited by the Author)

During the 1984 Republican National Convention, respondent Johnson participated in a political demonstration to protest the policies of the Reagan administration and some Dallas-based corporations. After a march through the city streets, Johnson burned an American flag while protesters chanted. No one was physically injured or threatened with injury, although several witnesses were seriously offended by the flag burning. Johnson was convicted of desecration of a venerated object in violation of a Texas statute, and a state court of appeals affirmed.

However, the Texas Court of Criminal Appeals reversed, holding that the State, consistent with the First Amendment, could not punish Johnson for burning the flag in these circumstances. The court first found that Johnson's burning of the flag was expressive conduct protected by the First Amendment. The court concluded that the State could not criminally sanction flag desecration in order to preserve the flag as a symbol of national unity. It also held that the statute did not meet the State's goal of preventing breaches of the peace, since it was not drawn narrowly enough to encompass only those flag burnings that would likely result in a serious disturbance, and since the flag burning in this case did not threaten such a reaction. Further, it stressed that another Texas statute prohibited breaches of the peace and could be used to prevent disturbances without punishing this flag desecration.

Held: Johnson's conviction for flag desecration is inconsistent with the First Amendment.

(a) Under the circumstances, Johnson's burning of the flag constituted expressive conduct, permitting him to invoke the First Amendment. The State conceded that the conduct was expressive. Occurring as it did at the end of a demonstration coinciding with the Republican National Convention, the expressive, overtly political nature of the conduct was both intentional and overwhelmingly apparent.

(b) Texas has not asserted an interest in support of Johnson's conviction that is unrelated to the suppression of expression and would therefore permit application of the test set forth in *United States v. O'Brien*, 391 U.S. 367, whereby an important governmental interest in regulating non-speech can justify incidental limitations on First Amendment freedoms when speech and non-speech elements are combined in the same course of conduct. An interest in preventing breaches of the peace is not implicated on this record. Expression may not be prohibited on the basis that an audience that takes serious offense to the expression may disturb the peace, since the Government cannot assume that every expression of a provocative idea will incite a riot but must look to the actual circumstances surrounding the expression. Johnson's expression of dissatisfaction with the Federal Government's policies also does not fall within the class of "fighting words" likely to be seen as a direct personal insult or an invitation to exchange fisticuffs.

This Court's holding does not forbid a State to prevent "imminent lawless action" and, in fact, Texas has a law specifically prohibiting breaches of the peace. Texas' interest in preserving the flag as a symbol of nationhood and national unity is related to expression in this case and, thus, falls outside the O'Brien test.

(c) The latter interest does not justify Johnson's conviction. The restriction on Johnson's political expression is content-based, since the Texas statute is not aimed at protecting the physical integrity of the flag in all circumstances, but is designed to protect it from intentional and knowing abuse that causes serious offense to others. It is therefore subject to "the most exacting scrutiny." *Boos v. Barry*, 485 U.S. 312.

The Government may not prohibit the verbal or nonverbal expression of an idea merely because society finds the idea offensive or disagreeable, even where our flag is involved. Nor may a State foster its own view of the flag by prohibiting expressive conduct

relating to it, since the Government may not permit designated symbols to be used to communicate a limited set of messages. Moreover, this Court will not create an exception to these principles protected by the First Amendment for the American flag alone.

755 S.W.2d 92, affirmed.

BRENNAN, J., delivered the opinion of the Court, in which MARSHALL, BLACKMUN, SCALIA, and KENNEDY, JJ., joined. KENNEDY, J., filed a concurring opinion. REHNQUIST, C.J., filed a dissenting opinion, in which WHITE and O'CONNOR, JJ., joined. STEVENS, J., filed a dissenting opinion.

SAMPLE CASE BRIEF FOR ***TEXAS V. JOHNSON*** **:**

CITATION:

Texas v. Johnson, 491 U.S. 397 (1989)

FACTS:

Mr. Johnson publicly burned an American flag during a political demonstration. He was arrested and convicted by of violating a Texas penal code prohibiting the desecration of "a venerated object", in other words the American Flag.

PROCEDURAL HISTORY:

The Texas Court of Appeals affirmed the trial court verdict. The Texas Court of Criminal Appeals reversed. The U.S. Supreme Court granted certiorari.

ISSUE:

Whether the First Amendment, which protects freedom of speech, is violated when a person is convicted for burning an American flag during a political demonstration?

HOLDING:

Yes. The First Amendment, which protects freedom of speech, is violated when a person is convicted for burning an American flag during a political demonstration.

REASONING: While the First Amendment literally forbids the abridgment only of "speech," the Court has previously held that it also protects conduct when conduct is "sufficiently imbued with elements of communication." Here Johnson's flag burning was part of a political demonstration, and therefore was the type of conduct meant to be protected as speech. The Court also rejected the state's two arguments. First, there was no evidence on the record that Johnson's conviction was necessary to prevent a breach of the peace. No breach of the peace actually occurred, and his conduct did not fall into the "fighting words" exception. Second, the state claimed that it has an interest in preserving the flag as a symbol of national unity. However, if that means prohibiting the type of expression that occurred in this case, then the government is enforcing its own political preferences, something the First Amendment prohibits. The Court actually suggested that its holding will strengthen, and not weaken, our loyalty to the flag.

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4.3: WISCONSIN v. YODER

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Wisconsin v. Yoder

406 U.S. 205 (1972)

(Case Syllabus edited by the Author)

Respondents, members of the Old Order Amish religion and the Conservative Amish Mennonite Church, were convicted of violating Wisconsin's compulsory school attendance law which requires a child's school attendance until age 16. They did so by declining to send their children to public or private school after they had graduated from the eighth grade.

The evidence showed that the Amish provide continuing informal vocational education to their children designed to prepare them for life in the rural Amish community. The evidence also showed that respondents sincerely believed that high school attendance was contrary to the Amish religion and way of life, and that they would endanger their own salvation and that of their children by complying with the law.

The Wisconsin Supreme Court sustained respondents' claim that application of the compulsory school attendance law to them violated their rights under the Free Exercise Clause of the First Amendment, made applicable to the States by the Fourteenth Amendment.

Held:

The State's interest in universal education is not totally free from a balancing process when it impinges on other fundamental rights, such as those specifically protected by the Free Exercise Clause of the First Amendment and the traditional interest of parents with respect to the religious upbringing of their children.

Respondents have amply supported their claim that enforcement of the compulsory formal education requirement after the eighth grade would gravely endanger if not destroy the free exercise of their religious beliefs.

Aided by a history of three centuries as an identifiable religious sect, and a long history as a successful and self-sufficient segment of American society, the Amish have demonstrated the sincerity of their religious beliefs, the interrelationship of belief with their mode of life, the vital role that belief and daily conduct play in the continuing survival of Old Order Amish communities, and the hazards presented by the State's enforcement of a statute generally valid as to others. Beyond this, they have carried the difficult burden of demonstrating the adequacy of their alternative mode of continuing informal vocational education in terms of the overall interest that the State relies on in support of its program of compulsory high school education.

In light of this showing and weighing the minimal difference between what the State would require and what the Amish already accept, it was incumbent on the State to show with more particularity how its admittedly strong interest in compulsory education would be adversely affected by granting an exemption to the Amish.

The State's claim that it is empowered, as *parens patriae*, to extend the benefit of secondary education to children regardless of the wishes of their parents cannot be sustained against a free exercise claim of the nature revealed by this record, for the Amish have introduced convincing evidence that accommodating their religious objections by forgoing one or two additional years of compulsory education will not impair the physical or mental health of the child, or result in an inability to be self-supporting, or to discharge the duties and responsibilities of citizenship, or in any other way materially detract from the welfare of society.

49 Wis.2d 430, 182 N.W.2d 539, affirmed.

BURGER, C.J., delivered the opinion of the Court, in which BRENNAN, STEWART, WHITE, MARSHALL, and BLACKMUN, JJ., joined. STEWART, J., filed a concurring opinion, in which BRENNAN, J., joined. WHITE, J., filed a concurring opinion, in which BRENNAN and STEWART, JJ., joined. DOUGLAS, J., filed an opinion dissenting in part. POWELL and REHNQUIST, JJ., took no part in the consideration or decision of the case.

SAMPLE CASE BRIEF FOR ***WISCONSIN V. YODER*** :

CITATION:

Wisconsin v. Yoder, 406 U.S. 205 (1972)

FACTS:

Jonas Yoder and Wallace Miller, both members of the Old Order Amish religion, and Adin Yutzy, a member of the Conservative Amish Mennonite Church, were prosecuted and convicted of violating a Wisconsin law that required all children to attend public schools until age 16. The three parents refused to send their children to such schools after the eighth grade, arguing that high school attendance was contrary to their religious beliefs.

PROCEDURAL HISTORY:

The Wisconsin Supreme Court reversed the lower court decisions.

ISSUE: Did Wisconsin's requirement that all parents send their children to school at least until age 16 violate the First Amendment by criminalizing the conduct of parents who refused to send their children to school for religious reasons?

HOLDING: Yes. In a unanimous decision, the Court held that individual's interests in the free exercise of religion under the First Amendment outweighed the State's interests in compelling school attendance beyond the eighth grade.

REASONING: In the majority opinion by Chief Justice Warren E. Burger, the Court found that the values and programs of secondary school were "in sharp conflict with the fundamental mode of life mandated by the Amish religion," and that an additional one or two years of high school would not produce the benefits of public education cited by Wisconsin to justify the law. While Justice William O. Douglas filed a partial dissent, he did join with the majority making the majority decision unanimous. Justices Rehnquist and Powell did not take part in the case.

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4.4: MIRANDA v. ARIZONA

COURT CASES:

The following are landmark cases that have had an impact various aspects of our lives:

Miranda v. Arizona

384 U.S. 436 (1966)

(Case Syllabus edited by the Author)

In each of these cases, the defendant, while in police custody, was questioned by police officers, detectives, or a prosecuting attorney in a room in which he was cut off from the outside world. None of the defendants was given a full and effective warning of his rights at the outset of the interrogation process. In all four cases, the questioning elicited oral admissions, and, in three of them, signed statements as well, which were admitted at their trials. All defendants were convicted, and all convictions, except in No. 584, were affirmed on appeal.

Held:

1. The prosecution may not use statements, whether exculpatory or inculpatory, stemming from 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, unless it demonstrates the use of procedural safeguards effective to secure the Fifth Amendment's privilege against self-incrimination.

- The atmosphere and environment of incommunicado interrogation as it exists today is inherently intimidating and works to undermine the privilege against self-incrimination. Unless adequate preventive measures are taken to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice.
- The privilege against self-incrimination, which has had a long and expansive historical

  development is the essential mainstay of our adversary system and guarantees to the individual the "right to remain silent unless he chooses to speak in the unfettered exercise of his own will," during a period of custodial interrogation, as well as in the courts or during the course of other official investigations.

- The decision in *Escobedo v. Illinois*, 378 U. S. 478, stressed the need for protective devices to make the process of police interrogation conform to the dictates of the privilege.
- In the absence of other effective measures, the following procedures to safeguard the Fifth Amendment privilege must be observed: the person in custody must, prior to interrogation, be clearly informed that he has the right to remain silent, and that anything he says will be used against him in court; he must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation, and that, if he is indigent, a lawyer will be appointed to represent him.
- If the individual indicates, prior to or during questioning, that he wishes to remain silent, the interrogation must cease; if he states that he wants an attorney, the questioning must cease until an attorney is present.
- Where an interrogation is conducted without the presence of an attorney, and a statement is taken, a heavy burden rests on the Government to demonstrate that the defendant knowingly and intelligently waived his right to counsel.
- Where the individual answers some questions during in-custody interrogation, he has not waived his privilege, and may invoke his right to remain silent thereafter.
- The warnings required, and the waiver needed are, in the absence of a fully effective equivalent, prerequisites to the admissibility of any statement, inculpatory or exculpatory, made by a defendant.

2. The limitations on the interrogation process required for the protection of the individual's constitutional rights should not cause an undue interference with a proper system of law enforcement, as demonstrated by the procedures of the FBI and the safeguards afforded in other jurisdictions.

3. In all of these cases the statements were obtained under circumstances that did not meet constitutional standards for protection of the privilege against self-incrimination.

98 Ariz.18; 15 N.Y.2d 970; 16 N.Y.2d 614; 342 F.2d 684, reversed; 62 Cal.2d 571, affirmed.

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4.5: ROE v. WADE

COURT CASES:

The following are landmark cases that have had an impact various aspects of our lives:

Roe v. Wade

410 U.S. 113 (1973)

(Case Syllabus edited by the Author)

A pregnant single woman (Roe) brought a class action challenging the constitutionality of the Texas criminal abortion laws, which proscribe procuring or attempting an abortion except on medical advice for the purpose of saving the mother's life. A licensed physician (Hallford), who had two state abortion prosecutions pending against him, was permitted to intervene. A childless married couple (the Does), the wife not being pregnant, separately attacked the laws, basing alleged injury on the future possibilities of contraceptive failure, pregnancy, unpreparedness for parenthood, and impairment of the wife's health.

A three-judge District Court, which consolidated the actions, held that Roe and Hallford, and members of their classes, had standing to sue and presented justiciable controversies. Ruling that declaratory, though not injunctive, relief was warranted, the court declared the abortion statutes void as vague and over broadly infringing those plaintiffs' Ninth and Fourteenth Amendment rights. The court ruled the Does' complaint not justiciable. Appellants directly appealed to this Court on the injunctive rulings, and appellee cross-appealed from the District Court's grant of declaratory relief to Roe and Hallford.

Held:

1. While 28 U.S.C. § 1253 authorizes no direct appeal to this Court from the grant or denial of declaratory relief alone, review is not foreclosed when the case is properly before the Court on appeal from specific denial of injunctive relief and the arguments as to both injunctive and declaratory relief are necessarily identical.

2. Roe has standing to sue; the Does and Hallford do not.

- Contrary to appellee's contention, the natural termination of Roe's pregnancy did not moot her suit. Litigation involving pregnancy, which is "capable of repetition, yet evading review," is an exception to the usual federal rule that an actual controversy must exist at review stages, and not simply when the action is initiated.
- The District Court correctly refused injunctive, but erred in granting declaratory, relief to Hallford, who alleged no federally protected right not assertible as a defense against the good faith state prosecutions pending against him. *Samuels v. Mackell*, 401 U. S. 66.
- The Does' complaint, based as it is on contingencies, any one or more of which may not occur, is too speculative to present an actual case or controversy.

3. State criminal abortion laws, like those involved here, that except from criminality only a life-saving procedure on the mother's behalf without regard to the stage of her pregnancy and other interests involved violate the Due Process Clause of the Fourteenth Amendment, which protects against state action the right to privacy, including a woman's qualified right to terminate her pregnancy. Though the State cannot override that right, it has legitimate interests in protecting both the pregnant woman's health and the potentiality of human life, each of which interests grows and reaches a "compelling" point at various stages of the woman's approach to term.

- For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.
- For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.
- For the stage subsequent to viability, the State, in promoting its interest in the potentiality of human life, may, if it chooses, regulate, and even proscribe, abortion except where necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.

4. The State may define the term “physician” to mean only a physician currently licensed by the State and may proscribe any abortion by a person who is not a physician as so defined.

5. It is unnecessary to decide the injunctive relief issue, since the Texas authorities will doubtless fully recognize the Court’s ruling that the Texas criminal abortion statutes are unconstitutional.

314 F.Supp. 1217, affirmed in part and reversed in part.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C.J., and DOUGLAS, BRENNAN, STEWART, MARSHALL, and POWELL, JJ., joined. BURGER, C.J., DOUGLAS, J., and STEWART, J., filed concurring opinions. WHITE, J., filed a dissenting opinion, in which REHNQUIST, J., joined. REHNQUIST, J., filed a dissenting opinion.

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4.6: PLANNED PARENTHOOD OF SOUTHEASTERN PA. v. CASEY

COURT CASES:

The following are landmark cases that have had an impact various aspects of our lives:

Planned Parenthood of Southeastern Pa. v. Casey

505 U.S. 833 (1992)

(Case Syllabus edited by the Author)

At issue are five provisions of the Pennsylvania Abortion Control Act of 1982:

§ 3205 requires that a woman seeking an abortion give her informed consent prior to the procedure, and specifies that she be provided with certain information at least 24 hours before the abortion is performed;

§ 3206 mandates the informed consent of one parent for a minor to obtain an abortion, but provides a judicial bypass procedure;

§ 3209 commands that, unless certain exceptions apply, a married woman seeking an abortion must sign a statement indicating that she has notified her husband;

§ 3203 defines a "medical emergency" that will excuse compliance with the foregoing requirements;

§§ 3207(b), 3214(a), and 3214(f) impose certain reporting requirements on facilities providing abortion services.

Before any of the provisions took effect, the petitioners, five abortion clinics and a physician representing himself and a class of doctors who provide abortion services, brought this suit seeking a declaratory judgment that each of the provisions was unconstitutional on its face, as well as injunctive relief. The District Court held all the provisions unconstitutional and permanently enjoined their enforcement. The Third Circuit Court of Appeals affirmed in part and reversed in part, striking down the husband notification provision, but upholding the others.

Held: The Third Circuit Court of Appeals decision is affirmed.

Justice O'Connor, Justice Kennedy, and Justice Souter delivered the opinion of the Court with respect to Parts I, II, and III, concluding that:

1. Consideration of the fundamental constitutional question resolved by *Roe v. Wade*, 410 U.S. 113, principles of institutional integrity, and the rule of stare decisis require that Roe's essential holding be retained and reaffirmed as to each of its three parts:

(1) a recognition of a woman's right to choose to have an abortion before fetal viability and to obtain it without undue interference from the State, whose pre-viability interests are not strong enough to support an abortion prohibition or the imposition of substantial obstacles to the woman's effective right to elect the procedure;

(2) a confirmation of the State's power to restrict abortions after viability, if the law contains exceptions for pregnancies endangering a woman's life or health; and

(3) the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child.

(a) A reexamination of the principles that define the woman's rights and the State's authority regarding abortions is required by the doubt this Court's subsequent decisions have cast upon the meaning and reach of Roe's central holding, by the fact that The Chief Justice would overrule Roe, and by the necessity that state and federal courts and legislatures have adequate guidance on the subject.

(b) Roe determined that a woman's decision to terminate her pregnancy is a "liberty" protected against state interference by the substantive component of the Due Process Clause of the Fourteenth Amendment. Neither the Bill of Rights, nor the specific practices of States at the time of the Fourteenth Amendment's adoption, marks the outer limits of the substantive sphere of such "liberty." Rather, the adjudication of substantive due process claims may require this Court to exercise its reasoned judgment in determining the boundaries between the individual's liberty and the demands of organized society.

(c) Application of the doctrine of stare decisis confirms that Roe's essential holding should be reaffirmed.

(d) Although Roe has engendered opposition, it has in no sense proven unworkable, representing as it does a simple limitation beyond which a state law is unenforceable.

(e) The Roe rule's limitation on state power could not be repudiated without serious inequity to people who, for two decades of economic and social developments, have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail. The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives. The Constitution serves human values, and while the effect of reliance on Roe cannot be exactly measured, neither can the certain costs of overruling Roe for people who have ordered their thinking and living around that case be dismissed.

(f) No evolution of legal principle has left Roe's central rule a doctrinal anachronism discounted by society. If Roe is placed among the cases exemplified by *Griswold v. Connecticut*, 381 U.S. 479, it is clearly in no jeopardy, since subsequent constitutional developments have neither disturbed, nor do they threaten to diminish, the liberty recognized in such cases. Similarly, if Roe is seen as stating a rule of personal autonomy and bodily integrity, akin to cases recognizing limits on governmental power to mandate medical treatment or to bar its rejection, this Court's post-Roe decisions accord with Roe's view that a State's interest in the protection of life falls short of justifying any plenary override of individual liberty claims.

(g) No change in Roe's factual underpinning has left its central holding obsolete, and none supports an argument for its overruling. Although subsequent maternal health care advances allow for later abortions safe to the pregnant woman, and post-Roe neonatal care developments have advanced viability to a point somewhat earlier, these facts go only to the scheme of time limits on the realization of competing interests. Thus, any later divergences from the factual premises of Roe have no bearing on the validity of its central holding, that viability marks the earliest point at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions.

(h) A comparison between Roe and two decisional lines of comparable significance — the line identified with *Lochner v. New York*, 198 U.S. 45, and the line that began with *Plessy v. Ferguson*, 163 U.S. 537 — confirms the result reached here. Those lines were overruled by, respectively, *West Coast Hotel Co. v. Parrish*, 330 U.S. 379, and *Brown v. Board of Education*, 347 U.S. 483 — on the basis of facts, or an understanding of facts, changed from those which furnished the claimed justifications for the earlier constitutional resolutions. The overruling decisions were comprehensible to the Nation, and defensible, as the Court's responses to changed circumstances.

(i) Overruling Roe's central holding would not only reach an unjustifiable result under stare decisis principles, but would seriously weaken the Court's capacity to exercise the judicial power and to function as the Supreme Court of a Nation dedicated to the rule of law.

Justice O'Connor, Justice Kennedy, and Justice Souter concluded in Part IV that an examination of *Roe v. Wade*, 410 U.S. 113, and subsequent cases, reveals a number of guiding principles that should control the assessment of the Pennsylvania statute:

(a) To protect the central right recognized by Roe, while at the same time accommodating the State's profound interest in potential life, the undue burden standard should be employed. An undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place substantial obstacles in the path of a woman seeking an abortion before the fetus attains viability.

(b) Roe's rigid trimester framework is rejected. To promote the State's interest in potential life throughout pregnancy, the State may take measures to ensure that the woman's choice is informed. Measures designed to advance this interest should not be invalidated if their purpose is to persuade the woman to choose childbirth over abortion. These measures must not be an undue burden on the right.

(c) As with any medical procedure, the State may enact regulations to further the health or safety of a woman seeking an abortion, but may not impose unnecessary health regulations that present a substantial obstacle to a woman seeking an abortion.

(d) Adoption of the undue burden standard does not disturb Roe's holding that regardless of whether exceptions are made for particular circumstances, a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability.

(e) Roe's holding that "subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother" is also reaffirmed.

Justice O'Connor, Justice Kennedy, and Justice Souter delivered the opinion of the Court with respect to Parts V-A and V-C, concluding that:

1. As construed by the Court of Appeals, § 3203's medical emergency definition is intended to assure that compliance with the State's abortion regulations would not in any way pose a significant threat to a woman's life or health, and thus does not violate the essential holding of Roe.

2. Section 3209's husband notification provision constitutes an undue burden and is therefore invalid. A significant number of women will likely be prevented from obtaining an abortion just as surely as if Pennsylvania had outlawed the procedure entirely. The fact that § 3209 may affect fewer than one percent of women seeking abortions does not save it from facial invalidity, since the proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom it is irrelevant. Furthermore, it cannot be claimed that the father's interest in the fetus' welfare is equal to the mother's protected liberty, since it is an inescapable biological fact that state regulation with respect to the fetus will have a far greater impact on the pregnant woman's bodily integrity than it will on the husband.

Justice O'Connor, Justice Kennedy, and Justice Souter, joined by Justice Stevens, concluded in Part V-E that all of the statute's recordkeeping and reporting requirements, except that relating to spousal notice, are constitutional. The reporting provision relating to the reasons a married woman has not notified her husband that she intends to have an abortion must be invalidated because it places an undue burden on a woman's choice.

Justice O'Connor, Justice Kennedy, and Justice Souter concluded in Parts V-B and V-D that:

1. Section 3205's informed consent provision is not an undue burden on a woman's constitutional right to decide to terminate a pregnancy. Requiring that the woman be informed of the availability of information relating to the consequences to the fetus does not interfere with a constitutional right of privacy between a pregnant woman and her physician, since the doctor-patient relation is derivative of the woman's position, and does not underlie or override the abortion right.

The premise behind Akron I's invalidation of a waiting period between the provisions of the information deemed necessary to informed consent, and the performance of an abortion, is also wrong. Although § 3205's 24-hour waiting period may make some abortions more expensive and less convenient, it cannot be said that it is invalid on the present record and in the context of this facial challenge.

2. Section 3206's one parent consent requirement and judicial bypass procedure are constitutional.

Justice Blackmun concluded that application of the strict scrutiny standard of review required by this Court's abortion precedents results in the invalidation of all the challenged provisions in the Pennsylvania statute, including the reporting requirements, and therefore concurred in the judgment that the requirement that a pregnant woman report her reasons for failing to provide spousal notice is unconstitutional.

The Chief Justice, joined by Justice White, Justice Scalia, and Justice Thomas, concluded that:

1. Although *Roe v. Wade*, 410 U.S. 113, is not directly implicated by the Pennsylvania statute, which simply regulates and does not prohibit abortion, a reexamination of the "fundamental right" Roe accorded to a woman's decision to abort a fetus, with the concomitant requirement that any state regulation of abortion survive "strict scrutiny," is warranted by the confusing and uncertain state of this Court's post-Roe decisional law.

2. The Roe Court reached too far when it analogized the right to abort a fetus to the rights involved in *Pierce v. Society of Sisters*, 268 U.S. 510; *Meyer v. Nebraska*, 262 U.S. 390; *Loving v. Virginia*, 388 U.S. 1; and *Griswold v. Connecticut*, 381 U.S. 479, and thereby deemed the right to abortion to be "fundamental." None of these decisions endorsed an all-encompassing "right of privacy," as Roe claimed.

3. The undue burden standard adopted by the joint opinion of Justices O'Connor, Kennedy, and Souter has no basis in constitutional law, and will not result in the sort of simple limitation, easily applied, which the opinion anticipates. The standard

presents nothing more workable than the trimester framework the joint opinion discards, and will allow the Court, under the guise of the Constitution, to continue to impart its own preferences on the States in the form of a complex abortion code.

4. The correct analysis is that set forth by the plurality opinion in *Webster*: A woman's interest in having an abortion is a form of liberty protected by the Due Process Clause, but States may regulate abortion procedures in ways rationally related to a legitimate state interest.

5. Section 3205's requirements are rationally related to the State's legitimate interest in assuring that a woman's consent to an abortion be fully informed. The requirement that a physician disclose certain information about the abortion procedure and its risks and alternatives is not a large burden, and is clearly related to maternal health and the State's interest in informed consent. The requirement that information be provided about the availability of paternal child support and state-funded alternatives is also related to the State's informed consent interest and furthers the State's interest in preserving unborn life. The waiting period helps ensure that a woman's decision to abort is a well-considered one, and rationally furthers the State's legitimate interest in maternal health and in unborn life. It may delay, but does not prohibit, abortions; and both it and the informed consent provisions do not apply in medical emergencies.

6. The statute's parental consent provision is entirely consistent with this Court's previous decisions involving such requirements.

7. Section 3214(a)'s requirement that abortion facilities file a report on each abortion is constitutional because it rationally furthers the State's legitimate interests in advancing the state of medical knowledge concerning maternal health and prenatal life, in gathering statistical information with respect to patients, and in ensuring compliance with other provisions of the Act, while keeping the reports completely confidential.

Justice Scalia, joined by The Chief Justice, Justice White, and Justice Thomas, concluded that a woman's decision to abort her unborn child is not a constitutionally protected "liberty" because (1) the Constitution says absolutely nothing about it, and (2) the longstanding traditions of American society have permitted it to be legally proscribed.

O'Connor, Kennedy, and Souter, JJ., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, III, V-A, V-C, and VI, in which Blackmun and Stevens, JJ., joined, an opinion with respect to Part V-E, in which Stevens, J., joined, and an opinion with respect to Parts IV, V-B, and V-D. Stevens, J., filed an opinion concurring in part and dissenting in part. Blackmun, J., filed an opinion concurring in part, concurring in the judgment in part, and dissenting in part. Rehnquist, C. J., filed an opinion concurring in the judgment in part and dissenting in part, in which White, Scalia, and Thomas, JJ., joined. Scalia, J., filed an opinion concurring in the judgment in part and dissenting in part, in which Rehnquist, C. J., and White and Thomas, JJ., joined.

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4.7: TINKER v. DES MOINES INDEPENDENT COMMUNITY SCHOOL DISTRICT

COURT CASES:

The following are landmark cases that have had an impact various aspects of our lives:

Tinker v. Des Moines Independent Community School District

393 U.S. 503 (1969)

(Case Syllabus edited by the Author)

MR. JUSTICE FORTAS delivered the opinion of the Court.

Petitioner John F. Tinker, 15 years old, and petitioner Christopher Eckhardt, 16 years old, attended high schools in Des Moines, Iowa. Petitioner Mary Beth Tinker, John's sister, was a 13-year-old student in junior high school.

In December 1965, a group of adults and students in Des Moines held a meeting at the Eckhardt home. The group determined to publicize their objections to the hostilities in Vietnam and their support for a truce by wearing black armbands during the holiday season and by fasting on December 16 and New Year's Eve. Petitioners and their parents had previously engaged in similar activities, and they decided to participate in the program.

The principals of the Des Moines schools became aware of the plan to wear armbands. On December 14, 1965, they met and adopted a policy that any student wearing an armband to school would be asked to remove it, and, if he refused, he would be suspended until he returned without the armband. Petitioners were aware of the regulation that the school authorities adopted.

On December 16, Mary Beth and Christopher wore black armbands to their schools. John Tinker wore his armband the next day. They were all sent home and suspended from school until they would come back without their armbands. They did not return to school until after the planned period for wearing armbands had expired — that is, until after New Year's Day.

This complaint was filed in the United States District Court by petitioners, through their fathers, under § 1983 of Title 42 of the United States Code. It prayed for an injunction restraining the respondent school officials and the respondent members of the board of directors of the school district from disciplining the petitioners, and it sought nominal damages. After an evidentiary hearing, the District Court dismissed the complaint. It upheld the constitutionality of the school authorities' action on the ground that it was reasonable in order to prevent disturbance of school discipline. 258 F.Supp. 971 (1966). The court referred to, but expressly declined to follow, the Fifth Circuit's holding in a similar case that the wearing of symbols like the armbands cannot be prohibited unless it "materially and substantially interfere[s] with the requirements of appropriate discipline in the operation of the school." *Burnside v. Byars*, 363 F.2d 744, 749 (1966).

On appeal, the Court of Appeals for the Eighth Circuit considered the case en banc. The court was equally divided, and the District Court's decision was accordingly affirmed without opinion. 383 F.2d 988 (1967). We granted certiorari. 390 U.S. 942 (1968).

I

The District Court recognized that the wearing of an armband for the purpose of expressing certain views is the type of symbolic act that is within the Free Speech Clause of the First Amendment. See *West Virginia v. Barnette*, 319 U.S. 624 (1943); *Stromberg v. California*, 283 U.S. 359 (1931). *Cf. Thornhill v. Alabama*, 310 U.S. 88(1940); *Edwards v. South Carolina*, 372 U.S. 229 (1963); *Brown v. Louisiana*, 383 U.S. 131 (1966).

As we shall discuss, the wearing of armbands in the circumstances of this case was entirely divorced from actually or potentially disruptive conduct by those participating in it. It was closely akin to "pure speech" which, we have repeatedly held, is entitled to comprehensive protection under the First Amendment. *Cf. Cox v. Louisiana*, 379 U.S. 536, 555 (1965); *Adderley v. Florida*, 385 U.S. 39 (1966).

First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.

In *West Virginia v. Barnette*, *supra*, this Court held that, under the First Amendment, the student in public school may not be compelled to salute the flag. Speaking through Mr. Justice Jackson, the Court said:

The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures — Boards of Education not accepted.

On the other hand, the Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools.

II

The problem posed by the present case does not relate to regulation of the length of skirts or the type of clothing, to hair style, or deportment. It does not concern aggressive, disruptive action, or even group demonstrations. Our problem involves direct, primary First Amendment rights akin to "pure speech." The school officials banned, and sought to punish, petitioners for a silent, passive expression of opinion, unaccompanied by any disorder or disturbance on the part of petitioners. There is here no evidence whatever of petitioners' interference, actual or nascent, with the schools' work or of collision with the rights of other students to be secure and to be let alone. Accordingly, this case does not concern speech or action that intrudes upon the work of the schools or the rights of other students.

Only a few of the 18,000 students in the school system wore the black armbands. Only five students were suspended for wearing them. There is no indication that the work of the schools or any class was disrupted. Outside the classrooms, a few students made hostile remarks to the children wearing armbands, but there were no threats or acts of violence on school premises.

The District Court concluded that the action of the school authorities was reasonable because it was based upon their fear of a disturbance from the wearing of the armbands. But, in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk, *Terminiello v. Chicago*, 337 U.S. 1 (1949); and our history says that it is this sort of hazardous freedom — this kind of openness — that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.

In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint

In the present case, the District Court made no such finding, and our independent examination of the record fails to yield evidence that the school authorities had reason to anticipate that the wearing of the armbands would substantially interfere with the work of the school or impinge upon the rights of other students.

On the contrary, the action of the school authorities appears to have been based upon an urgent wish to avoid the controversy which might result from the expression, even by the silent symbol of armbands, of opposition to this Nation's part in the conflagration in Vietnam. It is revealing, in this respect, that the meeting at which the school principals decided to issue the contested regulation was called in response to a student's statement to the journalism teacher in one of the schools that he wanted to write an article on Vietnam and have it published in the school paper. (The student was dissuaded.)

It is also relevant that the school authorities did not purport to prohibit the wearing of all symbols of political or controversial significance. The record shows that students in some of the schools wore buttons relating to national political campaigns, and some even wore the Iron Cross, traditionally a symbol of Nazism. The order prohibiting the wearing of armbands did not extend to these. Instead, a particular symbol — black armbands worn to exhibit opposition to this Nation's involvement in Vietnam — was singled out for prohibition.

School officials do not possess absolute authority over their students. Students in school, as well as out of school, are "persons" under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State. In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. In the

absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views.

Under our Constitution, free speech is not a right that is given only to be so circumscribed that it exists in principle, but not in fact. Freedom of expression would not truly exist if the right could be exercised only in an area that a benevolent government has provided as a safe haven for crackpots. The Constitution says that Congress (and the States) may not abridge the right to free speech. This provision means what it says. We properly read it to permit reasonable regulation of speech-connected activities in carefully restricted circumstances. But we do not confine the permissible exercise of First Amendment rights to a telephone booth or the four corners of a pamphlet, or to supervised and ordained discussion in a school classroom.

We express no opinion as to the form of relief which should be granted, this being a matter for the lower courts to determine. We reverse and remand for further proceedings consistent with this opinion.

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4.7: TINKER v. DES MOINES INDEPENDENT COMMUNITY SCHOOL DISTRICT is shared under a not declared license and was authored, remixed, and/or curated by LibreTexts.

4.8: NEW JERSEY v. T.L.O.

COURT CASES:

The following are landmark cases that have had an impact various aspects of our lives:

New Jersey v. T.L.O.

469 U.S. 325 (1985)

(Case Syllabus edited by the Author)

A teacher at a New Jersey high school, upon discovering respondent, then a 14-year-old freshman, and her companion, smoking cigarettes in a school lavatory in violation of a school rule, took them to the Principal's office, where they met with the Assistant Vice Principal. When respondent, in response to the Assistant Vice Principal's questioning, denied that she had been smoking and claimed that she did not smoke at all, the Assistant Vice Principal demanded to see her purse. Upon opening the purse, he found a pack of cigarettes and also noticed a package of cigarette rolling papers that are commonly associated with the use of marihuana. He then proceeded to search the purse thoroughly and found some marihuana, a pipe, plastic bags, a fairly substantial amount of money, an index card containing a list of students who owed respondent money, and two letters that implicated her in marihuana dealing.

Thereafter, the State brought delinquency charges against respondent in the Juvenile Court, which, after denying respondent's motion to suppress the evidence found in her purse, held that the Fourth Amendment applied to searches by school officials, but that the search in question was a reasonable one, and adjudged respondent to be a delinquent. The Appellate Division of the New Jersey Superior Court affirmed the trial court's finding that there had been no Fourth Amendment violation but vacated the adjudication of delinquency and remanded on other grounds. The New Jersey Supreme Court reversed and ordered the suppression of the evidence found in respondent's purse, holding that the search of the purse was unreasonable.

Held:

The Fourth Amendment's prohibition on unreasonable searches and seizures applies to searches conducted by public school officials, and is not limited to searches carried out by law enforcement officers. Nor are school officials exempt from the Amendment's dictates by virtue of the special nature of their authority over schoolchildren.

In carrying out searches and other functions pursuant to disciplinary policies mandated by state statutes, school officials act as representatives of the State, not merely as surrogates for the parents of students, and they cannot claim the parents' immunity from the Fourth Amendment's strictures.

Schoolchildren have legitimate expectations of privacy. They may find it necessary to carry with them a variety of legitimate, non-contraband items, and there is no reason to conclude that they have necessarily waived all rights to privacy in such items by bringing them onto school grounds. But striking the balance between schoolchildren's legitimate expectations of privacy, and the school's equally legitimate need to maintain an environment in which learning can take place, requires some easing of the restrictions to which searches by public authorities are ordinarily subject. Thus, school officials need not obtain a warrant before searching a student who is under their authority. Moreover, school officials need not be held subject to the requirement that searches be based on probable cause to believe that the subject of the search has violated or is violating the law. Rather, the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search.

Determining the reasonableness of any search involves a determination of whether the search was justified at its inception and whether, as conducted, it was reasonably related in scope to the circumstances that justified the interference in the first place. Under ordinary circumstances, the search of a student by a school official will be justified at its inception where there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated, or is violating, either the law or the rules of the school. And such a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search, and not excessively intrusive in light of the student's age and sex and the nature of the infraction.

Under the above standard, the search in this case was not unreasonable for Fourth Amendment purposes. First, the initial search for cigarettes was reasonable. The report to the Assistant Vice Principal that respondent had been smoking warranted a reasonable

suspicion that she had cigarettes in her purse, and thus the search was justified despite the fact that the cigarettes, if found, would constitute “mere evidence” of a violation of the no-smoking rule. Second, the discovery of the rolling papers then gave rise to a reasonable suspicion that respondent was carrying marihuana as well as cigarettes in her purse, and this suspicion justified the further exploration that turned up more evidence of drug-related activities.

94 N.J. 331, 463 A.2d 934, reversed.

WHITE, J., delivered the opinion of the Court, in which BURGER, C.J., and POWELL, REHNQUIST, and O’CONNOR, JJ., joined, and in Part II of which BRENNAN, MARSHALL, and STEVENS, JJ., joined. POWELL, J., filed a concurring opinion, in which O’CONNOR, J., joined, BLACKMUN, J., filed an opinion concurring in the judgment, BRENNAN, J., filed an opinion concurring in part and dissenting in part, in which MARSHALL, J., joined, STEVENS, J., filed an opinion concurring in part and dissenting in part, in which MARSHALL, J., joined, and in Part I of which BRENNAN, J., joined,.

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4.9: MORSE v. FREDERICK

MORSE v. FREDERICK

551 U.S. 393 (2007)

(Case Syllabus edited by the Author)

At a school-sanctioned and school-supervised event, petitioner Morse, the high school principal, saw students unfurl a banner stating, "BONG HITS 4 JESUS," which she regarded as promoting illegal drug use. Consistent with established school policy prohibiting such messages at school events, Morse directed the students to take down the banner. When one of the students who had brought the banner to the event — respondent Frederick — refused, Morse confiscated the banner and later suspended him. The school superintendent upheld the suspension, explaining, inter alia, that Frederick was disciplined because his banner appeared to advocate illegal drug use in violation of school policy. Petitioner school board also upheld the suspension.

Frederick filed suit under 42 U. S. C. § 1983, alleging that the school board and Morse had violated his First Amendment rights. The District Court granted petitioner's summary judgment, ruling that they were entitled to qualified immunity, and that they had not infringed Frederick's speech rights. The Ninth Circuit reversed. Accepting that Frederick acted during a school-authorized activity and that the banner expressed a positive sentiment about marijuana use, the court nonetheless found a First Amendment violation because the school punished Frederick without demonstrating that his speech threatened substantial disruption. It also concluded that Morse was not entitled to qualified immunity because Frederick's right to display the banner was so clearly established that a reasonable principal in Morse's position would have understood that her actions were unconstitutional.

Held:

Because schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use, the school officials in this case did not violate the First Amendment by confiscating the pro-drug banner and suspending Frederick.

(a) Frederick's argument that this is not a school speech case is rejected. The event in question occurred during normal school hours and was sanctioned by Morse as an approved social event at which the district's student-conduct rules expressly applied. Teachers and administrators were among the students and were charged with supervising them. Frederick stood among other students across the street from the school and directed his banner toward the school, making it plainly visible to most students. Under these circumstances, Frederick cannot claim he was not at school.

(b) The Court agrees with Morse that those who viewed the banner would interpret it as advocating or promoting illegal drug use, in violation of school policy. At least two interpretations of the banner's words — that they constitute an imperative encouraging viewers to smoke marijuana or, alternatively, that they celebrate drug use — demonstrate that the sign promoted such use. This pro-drug interpretation gains further plausibility from the paucity of alternative meanings the banner might bear.

(c) A principal may, consistent with the First Amendment, restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use. In *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, the Court declared, in holding that a policy prohibiting high school students from wearing antiwar armbands violated the First Amendment, that student expression may not be suppressed unless school officials reasonably conclude that it will "materially and substantially disrupt the work and discipline of the school." The Court in *Bethel School Dist. No. 403 v. Fraser*, 478 U. S. 675, however, upheld the suspension of a student who delivered a high school assembly speech employing "an elaborate, graphic, and explicit sexual metaphor.

Analyzing the case under *Tinker*, the lower courts had found no disruption, and therefore no basis for discipline. 478 U. S., at 679–680. This Court reversed, holding that the school was "within its permissible authority in imposing sanctions … in response to [the student's] offensively lewd and indecent speech."

Two basic principles may be distilled from *Fraser*. First, it demonstrates that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings." Had Fraser delivered the same speech in a public forum outside the school context, he would have been protected. In school, however, his First Amendment rights were circumscribed "in light of the special characteristics of the school environment." *Tinker*, *supra*.

Second, *Fraser* established that *Tinker's* mode of analysis is not absolute, since the *Fraser* Court did not conduct the "substantial disruption" analysis. Subsequently, the Court has held in the Fourth Amendment context that "while children assuredly do not 'shed their constitutional rights … at the schoolhouse gate,' … the nature of those rights is what is appropriate for children in school," *Vernonia School Dist. 47J v. Acton*, 515 U. S. 646, and has recognized that deterring drug use by schoolchildren is an "important — indeed, perhaps compelling" interest.

Drug abuse by the Nation's youth is a serious problem. For example, Congress has declared that part of a school's job is educating students about the dangers of drug abuse, see, e.g., the Safe and Drug-Free Schools and Communities Act of 1994, and petitioners and many other schools have adopted policies aimed at implementing this message. Student speech celebrating illegal drug use at a school event, in the presence of school administrators and teachers, poses a particular challenge for school officials working to protect those entrusted to their care. The "special characteristics of the school environment," *Tinker*, 393 U. S., at 506, and the governmental interest in stopping student drug abuse allow schools to restrict student expression that they reasonably regard as promoting such abuse. *Id.*, at 508, 509, distinguished. The issue regarding qualified immunity does not need to be resolved since the principal did not violate the student's rights.

439 F. 3d 1114, reversed and remanded.

Roberts, C. J., delivered the opinion of the Court, in which Scalia, Kennedy, Thomas, and Alito, JJ., joined. Thomas, J., filed a concurring opinion. Alito, J., filed a concurring opinion, in which Kennedy, J., joined. Breyer, J., filed an opinion concurring in the judgment in part and dissenting in part. Stevens, J., filed a dissenting opinion, in which Souter and Ginsburg, JJ., joined.

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4.10: SAFFORD UNIFIED SCHOOL DISTRICT #1 et al. v. REDDING

SAFFORD UNIFIED SCHOOL DISTRICT #1 et al. v. REDDING

557 US 364 (2009)

(Cases Syllabus edited by the Author)

After escorting 13-year-old Savana Redding from her middle school classroom to his office, Assistant Principal Wilson showed her a day planner containing knives and other contraband. She admitted owning the planner, but said that she had lent it to her friend Marissa and that the contraband was not hers. He then produced four prescription-strength, and one over-the-counter, pain relief pills, all of which are banned under school rules without advance permission. She denied knowledge of them, but Wilson said that he had a report that she was giving pills to fellow students. She denied it and agreed to let him search her belongings.

He and Helen Romero, an administrative assistant, searched Savana's backpack, finding nothing. Wilson then had Romero take Savana to the school nurse's office to search her clothes for pills. After Romero and the nurse, Peggy Schwallier, had Savana remove her outer clothing, they told her to pull her bra out and shake it, and to pull out the elastic on her underpants, thus exposing her breasts and pelvic area to some degree. No pills were found.

Savana's mother filed suit against petitioner school district (Safford), Wilson, Romero, and Schwallier, alleging that the strip search violated Savana's Fourth Amendment rights.

Claiming qualified immunity, the individuals (hereinafter petitioners) moved for summary judgment. The District Court granted the motion, finding that there was no Fourth Amendment violation, and the *en banc* Ninth Circuit reversed. Following the protocol for evaluating qualified immunity claims, see *Saucier v. Katz*, 533 U. S. 194, the court held that the strip search was unjustified under the Fourth Amendment test for searches of children by school officials set out in *New Jersey v. T. L. O.*, 469 U. S. 325. It then applied the test for qualified immunity. Finding that Savana's right was clearly established at the time of the search, it reversed the summary judgment as to Wilson, but affirmed as to Schwallier and Romero because they were not independent decision makers.

Held:

The search of Savana's underwear violated the Fourth Amendment.

1. For school searches, "the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause." *T.L.O.*, 469 U. S., at 341. Under the resulting reasonable suspicion standard, a school search "will be permissible … when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction." The required knowledge component of reasonable suspicion for a school administrator's evidence search is that it raises a moderate chance of finding evidence of wrongdoing.

Wilson had sufficient suspicion to justify searching Savana's backpack and outer clothing. A week earlier, a student, Jordan, had told the principal and Wilson that students were bringing drugs and weapons to school and that he had gotten sick from some pills. On the day of the search, Jordan gave Wilson a pill that he said came from Marissa. Learning that the pill was prescription strength, Wilson called Marissa out of class and was handed the day planner. Once in his office, Wilson, with Romero present, had Marissa turn out her pockets and open her wallet, producing, inter alia, an over-the-counter pill that Marissa claimed was Savana's. She also denied knowing about the day planner's contents. Wilson did not ask her when she received the pills from Savana or where Savana might be hiding them.

After a search of Marissa's underwear by Romero and Schwallier revealed no additional pills, Wilson called Savana into his office. He showed her the day planner and confirmed her relationship with Marissa. He knew that the girls had been identified as part of an unusually rowdy group at a school dance, during which alcohol and cigarettes were found in the girls' bathroom. He had other reasons to connect them with this contraband, for Jordan had told the principal that before the dance, he had attended a party at Savana's house where alcohol was served. Thus, Marissa's statement that the pills came from Savana was sufficiently plausible to warrant suspicion that Savana was involved in pill distribution. A student who is reasonably suspected of giving out contraband pills is reasonably suspected of carrying them on her person and in her backpack. Looking into Savana's bag, in her presence and in the relative privacy of Wilson's office, was not excessively intrusive, any more than Romero's subsequent search of her outer clothing.

Because the suspected facts pointing to Savana did not indicate that the drugs presented a danger to students or were concealed in her underwear, Wilson did not have sufficient suspicion to warrant extending the search to the point of making Savana pull out her underwear. Romero and Schwallier said that they did not see anything when Savana pulled out her underwear, but a strip search and its Fourth Amendment consequences are not defined by who was looking and how much was seen. Savana's actions in their presence necessarily exposed her breasts and pelvic area to some degree, and both subjective and reasonable societal expectations of personal privacy support the treatment of such a search as categorically distinct, requiring distinct elements of justification on the part of school authorities for going beyond a search of outer clothing and belongings.

Savana's subjective expectation of privacy is inherent in her account of it as embarrassing, frightening, and humiliating. The reasonableness of her expectation is indicated by the common reaction of other young people similarly searched, whose adolescent vulnerability intensifies the exposure's patent intrusiveness. Its indignity does not outlaw the search, but it does implicate the rule that "the search [be] 'reasonably related in scope to the circumstances which justified the interference in the first place.'" *T. L.O.*, *supra*, at 341. Here, the content of the suspicion failed to match the degree of intrusion. Because Wilson knew that the pills were common pain relievers, he must have known of their nature and limited threat and had no reason to suspect that large amounts were being passed around, or that individual students had great quantities. Nor could he have suspected that Savana was hiding common painkillers in her underwear.

When suspected facts must support the categorically extreme intrusiveness of a search down to an adolescent's body, petitioners' general belief that students hide contraband in their clothing falls short; a reasonable search that extensive calls for suspicion that it will succeed. Non-dangerous school contraband does not conjure up the specter of stashes in intimate places, and there is no evidence of such behavior at the school; neither Jordan nor Marissa suggested that Savana was doing that, and the search of Marissa yielded nothing. Wilson also never determined when Marissa had received the pills from Savana; had it been a few days before, that would weigh heavily against any reasonable conclusion that Savana presently had the pills on her person, much less in her underwear.

2. Although the strip search violated Savana's Fourth Amendment rights, petitioners Wilson, Romero, and Schwallier are protected from liability by qualified immunity because "clearly established law [did] not show that the search violated the Fourth Amendment ," *Pearson v. Callahan*, 555 U. S. 223, The intrusiveness of the strip search here cannot, under *T.L O.*, be seen as justifiably related to the circumstances, but lower court cases viewing school strip searches differently are numerous enough, with well-reasoned majority and dissenting opinions, to counsel doubt about the clarity with which the right was previously stated.

3. The issue of petitioner Safford's liability under *Monell v. New York City Dept. of Social Servs.*, 436 U. S. 658, should be addressed on remand.

531 F. 3d 1071, affirmed in part, reversed in part, and remanded.

Souter, J., delivered the opinion of the Court, in which Roberts, C. J., and Scalia, Kennedy, Breyer, and Alito, JJ., joined, and in which Stevens and Ginsburg, JJ., joined as to Parts I–III. Stevens, J., filed an opinion concurring in part and dissenting in part, in which Ginsburg, J., joined. Ginsburg, J., filed an opinion concurring in part and dissenting in part. Thomas, J., filed an opinion concurring in the judgment in part and dissenting in part.

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4.11: DISTRICT OF COLUMBIA v. HELLER

DISTRICT OF COLUMBIA v. HELLER

554 US 570 (2008)

(Syllabus Version edited by the Author)

District of Columbia law bans handgun possession by making it a crime to carry an unregistered firearm and prohibiting the registration of handguns; provides separately that no person may carry an unlicensed handgun, but authorizes the police chief to issue 1-year licenses; and requires residents to keep lawfully owned firearms unloaded and dissembled or bound by a trigger lock or similar device.

Respondent Heller, a D. C. special policeman, applied to register a handgun he wished to keep at home, but the District refused. He filed this suit seeking, on Second Amendment grounds, to enjoin the city from enforcing the ban on handgun registration, the licensing requirement insofar as it prohibits carrying an unlicensed firearm in the home, and the trigger-lock requirement insofar as it prohibits the use of functional firearms in the home.

The District Court dismissed the suit, but the D. C. Circuit reversed, holding that the Second Amendment protects an individual's right to possess firearms, and that the city's total ban on handguns, as well as its requirement that firearms in the home be kept nonfunctional even when necessary for self-defense, violated that right.

Held:

1. The Second Amendment protects an individual's right to possess a firearm unconnected with service in a militia, and to use that arm for traditionally lawful purposes, such as self-defense within the home.

The Amendment's prefatory clause announces a purpose, but does not limit or expand the scope of the second part, the operative clause. The operative clause's text and history demonstrate that it connotes an individual right to keep and bear arms.

The prefatory clause comports with the Court's interpretation of the operative clause. The "militia" comprised all males physically capable of acting in concert for the common defense. The Antifederalists feared that the Federal Government would disarm the people in order to disable this citizens' militia, enabling a politicized standing army or a select militia to rule. The response was to deny Congress power to abridge the ancient right of individuals to keep and bear arms, so that the ideal of a citizens' militia would be preserved.

The Court's interpretation is confirmed by analogous arms-bearing rights in state constitutions that preceded and immediately followed the Second Amendment.

The Second Amendment 's drafting history, while of dubious interpretive worth, reveals three state Second Amendment proposals that unequivocally referred to an individual right to bear arms. Interpretation of the Second Amendment by scholars, courts, and legislators, from immediately after its ratification through the late 19th century, also supports the Court's conclusion.

None of the Court's precedents forecloses the Court's interpretation. Neither *United States v. Cruikshank*, 92 U. S. 542, nor *Presser v. Illinois*, 116 U. S. 252, refutes the individual-rights interpretation. *United States v. Miller*, 307 U. S. 174, does not limit the right to keep and bear arms to militia purposes, but rather limits the type of weapon to which the right applies to those used by the militia, i.e., those in common use for lawful purposes.

2. Like most rights, the Second Amendment right is not unlimited. It is not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose: For example, concealed weapons prohibitions have been upheld under the Amendment or state analogues. The Court's opinion should not be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms. Miller's holding that the sorts of weapons protected are those "in common use at the time" finds support in the historical tradition of prohibiting the carrying of dangerous and unusual weapons.

3. The handgun ban and the trigger-lock requirement (as applied to self-defense) violate the Second Amendment. The District's total ban on handgun possession in the home amounts to a prohibition on an entire class of "arms" that Americans overwhelmingly

choose for the lawful purpose of self-defense. Under any of the standards of scrutiny the Court has applied to enumerated constitutional rights, this prohibition — in the place where the importance of the lawful defense of self, family, and property is most acute — would fail constitutional muster. Similarly, the requirement that any lawful firearm in the home be disassembled or bound by a trigger lock makes it impossible for citizens to use arms for the core lawful purpose of self-defense and is hence unconstitutional. Because Heller conceded at oral argument that the D. C. licensing law is permissible if it is not enforced arbitrarily and capriciously, the Court assumes that a license will satisfy his prayer for relief and does not address the licensing requirement. Assuming he is not disqualified from exercising Second Amendment rights, the District must permit Heller to register his handgun and must issue him a license to carry it in the home.

478 F. 3d 370, affirmed.

Scalia, J., delivered the opinion of the Court, in which Roberts, C. J., and Kennedy, Thomas, and Alito, JJ., joined. Stevens, J., filed a dissenting opinion, in which Souter, Ginsburg, and Breyer, JJ., joined. Breyer, J., filed a dissenting opinion, in which Stevens, Souter, and Ginsburg, JJ., joined.

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4.12: McDONALD v. CITY OF CHICAGO, ILLINOIS

McDONALD v. CITY OF CHICAGO, ILLINOIS

561 US 742 (2010)

(Case Syllabus edited by the Author)

Justice Alito delivered the opinion of the Court.

Two years ago, in *District of Columbia v. Heller*, 554 U. S. 570 (2008), this Court held that the Second Amendment protects the right to keep and bear arms for the purpose of self-defense, and struck down a District of Columbia law that banned the possession of handguns in the home. Chicago (hereinafter City) and the village of Oak Park, a Chicago suburb, have laws effectively banning handgun possession by almost all private citizens.

After *Heller*, petitioners filed this federal suit against the City, which was consolidated with two related actions, alleging that the City's handgun ban has left them vulnerable to criminals. They sought a declaration that the bans, and several related City ordinances, violate the Second and Fourteenth Amendments. Rejecting petitioners' argument that the ordinances are unconstitutional, the court noted that the Seventh Circuit previously had upheld the constitutionality of a handgun ban, that *Heller* had explicitly refrained from opining on whether the Second Amendment applied to the States, and that the court had a duty to follow established Circuit precedent. The Seventh Circuit affirmed.

Held:

The Seventh Circuit judgment is reversed, and the case is remanded. The Fourteenth Amendment incorporates the Second Amendment right, recognized in *Heller*, to keep and bear arms for the purpose of self-defense.

(a) Petitioners contend that the Fourteenth Amendment's Due Process Clause incorporates the Second Amendment right. Chicago and Oak Park (municipal respondents) maintain that a right set out in the Bill of Rights applies to the States only when it is an indispensable attribute of any "civilized" legal system. If it is possible to imagine a civilized country that does not recognize the right, municipal respondents assert, that right is not protected by due process. And since there are civilized countries that ban or strictly regulate the private possession of handguns, they maintain that due process does not preclude such measures.

(b) The Bill of Rights, including the Second Amendment, originally applied only to the Federal Government, not to the States, but the Constitutional Amendments adopted in the Civil War's aftermath fundamentally altered the federal system.

(c) Whether the Second Amendment right to keep and bear arms applies to the States is considered in light of the Court's precedents applying the Bill of Rights' protections to the States.

(1) In the late 19th century, the Court began to hold that the Due Process Clause prohibits the States from infringing Bill of Rights protections.

(2) Justice Black championed the alternative theory that the Fourteenth Amendment totally incorporated all of the Bill of Rights' provisions, but the Court never has embraced that theory.

(3) The Court eventually moved in the direction of adopting a theory of selective incorporation by which the Due Process Clause incorporates particular rights contained in the first eight Amendments. The Court clarified that the governing standard is whether a particular Bill of Rights protection is fundamental to our Nation's particular scheme of ordered liberty and system of justice. The Court eventually held that almost all of the Bill of Rights' guarantees met the requirements for protection under the Due Process Clause. The Court also held that Bill of Rights protections must "all … be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment." Under this approach, the Court overruled earlier decisions holding that particular Bill of Rights guarantees or remedies did not apply to the States.

(d) The Fourteenth Amendment makes the Second Amendment right to keep and bear arms fully applicable to the States.

(1) The Court must decide whether that right is fundamental to the Nation's scheme of ordered liberty, or, as the Court has said in a related context, whether it is "deeply rooted in this Nation's history and tradition,". *Heller* points unmistakably to the answer. Self-defense is a basic right, recognized by many legal systems from ancient times to the present, and the *Heller* Court held

that individual self-defense is “the central component” of the Second Amendment right. Explaining that “the need for defense of self, family, and property is most acute” in the home, the Court found that this right applies to handguns because they are “the most preferred firearm in the nation to ‘keep’ and use for protection of one’s home and family,”. It thus concluded that citizens must be permitted “to use [handguns] for the core lawful purpose of self-defense.” *Heller* also clarifies that this right is “deeply rooted in this Nation’s history and traditions,” *Heller* explored the right’s origins in English law and noted the esteem with which the right was regarded during the colonial era and at the time of the ratification of the Bill of Rights. This is powerful evidence that the right was regarded as fundamental in the sense relevant here. That understanding persisted in the years immediately following the Bill of Rights’ ratification and is confirmed by the state constitutions of that era, which protected the right to keep and bear arms.

(2) A survey of the contemporaneous history also demonstrates clearly that the Fourteenth Amendment’s Framers and ratifiers counted the right to keep and bear arms among those fundamental rights necessary to the Nation’s system of ordered liberty.

(i) By the 1850’s, the fear that the National Government would disarm the universal militia had largely faded, but the right to keep and bear arms was highly valued for self-defense. Abolitionist authors wrote in support of the right, and attempts to disarm “Free-Soilers” in “Bloody Kansas,” met with outrage that the constitutional right to keep and bear arms had been taken from the people. After the Civil War, the Southern States engaged in systematic efforts to disarm and injure African Americans, see *Heller*. These injustices prompted the 39th Congress to pass the Freedmen’s Bureau Act of 1866, and the Civil Rights Act of 1866 to protect the right to keep and bear arms. Congress, however, ultimately deemed these legislative remedies insufficient, and approved the Fourteenth Amendment. Today, it is generally accepted that that Amendment was understood to provide a constitutional basis for protecting the rights set out in the Civil Rights Act. In Congressional debates on the proposed Amendment, its legislative proponents in the 39th Congress referred to the right to keep and bear arms as a fundamental right deserving of protection. Evidence from the period immediately following the Amendment’s ratification confirms that that right was considered fundamental.

(ii) The right to keep and bear arms must be regarded as a substantive guarantee, not a prohibition that could be ignored so long as the States legislated in an evenhanded manner.

567 F. 3d 856, reversed and remanded.

Alito, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II–A, II–B, II–D, III–A, and III–B, in which Roberts, C. J., and Scalia, Kennedy, and Thomas, JJ., joined, and an opinion with respect to Parts II–C, IV, and V, in which Roberts, C. J., and Scalia and Kennedy, JJ., join. Scalia, J., filed a concurring opinion. Thomas, J., filed an opinion concurring in part and concurring in the judgment. Stevens, J., filed a dissenting opinion. Breyer, J., filed a dissenting opinion, in which Ginsburg and Sotomayor, JJ., joined.

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4.13: PATRICK KENNEDY v. LOUISIANA

PATRICK KENNEDY v. LOUISIANA

554 U.S. 407 (2008)

(Case Syllabus edited by the Author)

Louisiana charged petitioner with the aggravated rape of his then-8-year-old stepdaughter. He was convicted and sentenced to death under a state statute authorizing capital punishment for the rape of a child under 12. The State Supreme Court affirmed, rejecting petitioner's reliance on *Coker v. Georgia*, 433 U. S. 584, which barred the use of the death penalty as punishment for the rape of an adult woman, but left open the question which, if any, other non-homicide crimes can be punished by death consistent with the Eighth Amendment. Reasoning that children are a class in need of special protection, the state court held child rape to be unique in terms of the harm it inflicts upon the victim and society and concluded that, short of first-degree murder, there is no crime more deserving of death. The court acknowledged that petitioner would be the first person executed since the state law was amended to authorize the death penalty for child rape in 1995, and that Louisiana is in the minority of jurisdictions authorizing death for that crime. However, emphasizing that four more States had capitalized child rape since 1995, and at least eight others had authorized death for other non-homicide crimes, as well as that, under *Roper v. Simmons*, 543 U. S. 551, and *Atkins v. Virginia*, 536 U. S. 304, it is the direction of change rather than the numerical count that is significant, the court held petitioner's death sentence to be constitutional.

Held:

The Eighth Amendment bars Louisiana from imposing the death penalty for the rape of a child where the crime did not result, and was not intended to result, in the victim's death.

The Amendment's Cruel and Unusual Punishment Clause "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U. S. 86. The standard for extreme cruelty "itself remains the same, but its applicability must change as the basic mores of society change." *Furman v. Georgia*, 408 U. S. 238. Under the precept of justice that punishment is to be graduated and proportioned to the crime, informed by evolving standards, capital punishment must "be limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'" *Roper*.

Applying this principle, the Court held in *Roper* and *Atkins* that the execution of juveniles and mentally retarded persons violates the Eighth Amendment because the offender has a diminished personal responsibility for the crime. The Court also has found the death penalty disproportionate to the crime itself where the crime did not result, or was not intended to result, in the victim's death. See, e.g., *Coker*, *supra*; *Enmund v. Florida*, 458 U. S. 782. In making its determination, the Court is guided by "objective indicia of society's standards, as expressed in legislative enactments and state practice with respect to executions." *Roper*.

Consensus is not dispositive, however. Whether the death penalty is disproportionate to the crime also depends on the standards elaborated by controlling precedents and on the Court's own understanding and interpretation of the Eighth Amendment's text, history, meaning, and purpose.

A review of the authorities informed by contemporary norms, including the history of the death penalty for this and other non-homicide crimes, current state statutes and new enactments, and the number of executions since 1964, demonstrates a national consensus against capital punishment for the crime of child rape.

The Court follows the approach of cases in which objective indicia of consensus demonstrated an opinion against the death penalty for juveniles, see *Roper*, *supra*, mentally retarded offenders, see *Atkins*, *supra*, and vicarious felony murderers, and see *Enmund*, *supra*. Thirty-seven jurisdictions—36 States plus the Federal Government—currently impose capital punishment, but only six States authorize it for child rape. In 45 jurisdictions, by contrast, petitioner could not be executed for child rape of any kind. That number surpasses the 30 States in *Atkins* and *Roper* and the 42 in *Enmund* that prohibited the death penalty under the circumstances those cases considered.

Respondent's argument that *Coker's* general discussion contrasting murder and rape, has been interpreted too expansively, leading some States to conclude that *Coker* applies to child rape when in fact it does not, is unsound. *Coker's* holding was narrower than

some of its language read in isolation indicates. The *Coker* plurality framed the question as whether, "with respect to rape of an adult woman," the death penalty is disproportionate punishment, and it repeated the phrase "adult woman" or "adult female" eight times in discussing the crime or the victim.

The distinction between adult and child rape was not merely rhetorical; it was central to *Coker's* reasoning, including its analysis of legislative consensus. There is little evidence to support respondent's contention that state legislatures have understood *Coker* to state a broad rule that covers minor victims, and state courts have uniformly concluded that *Coker* did not address that crime. Accordingly, the small number of States that have enacted the death penalty for child rape is relevant to determining whether there is a consensus against capital punishment for the rape of a child.

A consistent direction of change in support of the death penalty for child rape might counterbalance an otherwise weak demonstration of consensus, but no showing of consistent change has been made here. That five States may have had pending legislation authorizing death for child rape is not dispositive because it is not this Court's practice, nor is it sound, to find contemporary norms based on legislation proposed but not yet enacted. Indeed, since the parties submitted their briefs, the legislation in at least two of the five States has failed.

The fact that only six States have made child rape a capital offense is not an indication of a trend or change in direction comparable to the one in *Roper*. The evidence bears a closer resemblance to that in *Enmund*, where the Court found a national consensus against death for vicarious felony murder despite eight jurisdictions having authorized it.

Execution statistics also confirm that there is a social consensus against the death penalty for child rape. Nine States have permitted capital punishment for adult or child rape for some length of time between the Court's 1972 *Furman* decision and today; yet no individual has been executed for the rape of an adult or child since 1964, and no execution for any other non-homicide offense has been conducted since 1963. Louisiana is the only State since 1964 that has sentenced an individual to death for child rape, and petitioner and another man so sentenced are the only individuals now on death row in the United States for non-homicide offenses.

Informed by its own precedents and its understanding of the Constitution and the rights it secures, the Court concludes, in its independent judgment, that the death penalty is not a proportional punishment for the crime of child rape.

The Court's own judgment should be brought to bear on the death penalty's acceptability under the Eighth Amendment. Rape's permanent and devastating impact on a child suggests moral grounds for questioning a rule barring capital punishment simply because the crime did not result in the victim's death, but it does not follow that death is a proportionate penalty for child rape. The constitutional prohibition against excessive or cruel and unusual punishments mandates that punishment "be exercised within the limits of civilized standards."

The Court's decision is consistent with the justifications offered for the death penalty, retribution, and deterrence, see, e.g., *Gregg v. Georgia*, 428 U. S. 153. Among the factors for determining whether retribution is served, the Court must look to whether the death penalty balances the wrong to the victim in non-homicide cases. *Roper*. It is not at all evident that the child rape victim's hurt is lessened when the law permits the perpetrator's death, given that capital cases require a long-term commitment by those testifying for the prosecution. Society's desire to inflict death for child rape by enlisting the child victim to assist it over the course of years in asking for capital punishment forces a moral choice on the child, who is not of mature age to make that choice. There are also relevant systemic concerns in prosecuting child rape, including the documented problem of unreliable, induced, and even imagined child testimony, which creates a "special risk of wrongful execution" in some cases. *Atkins*. As to deterrence, the evidence suggests that the death penalty may not result in more effective enforcement, but may add to the risk of non-reporting of child rape out of fear of negative consequences for the perpetrator, especially if he is a family member. And, by in effect making the punishment for child rape and murder equivalent, a State may remove a strong incentive for the rapist not to kill his victim.

The concern that the Court's holding will effectively block further development of a consensus favoring the death penalty for child rape overlooks the principle that the Eighth Amendment is defined by "the evolving standards of decency that mark the progress of a maturing society," *Trop*. Confirmed by the Court's repeated, consistent rulings, this principle requires that resort to capital punishment be restrained, limited in its instances of application, and reserved for the worst of crimes, those that, in the case of crimes against individuals, take the victim's life.

957 So. 2d 757, reversed and remanded.

Kennedy, J., delivered the opinion of the Court, in which Stevens, Souter, Ginsburg, and Breyer, JJ., joined. Alito, J., filed a dissenting opinion, in which Roberts, C. J., and Scalia and Thomas, JJ., joined.

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4.14: ARIZONA v. GANT

Arizona v. Gant

566 U.S. 332 (2009)

(Case Syllabus edited by the Author)

Respondent Gant was arrested for driving on a suspended license, handcuffed, and locked in a patrol car before officers searched his car and found cocaine in a jacket pocket. The Arizona trial court denied his motion to suppress the evidence, and he was convicted of drug offenses.

Reversing, the State Supreme Court distinguished *New York v. Belton*, 453 U. S. 454 which held that police may search the passenger compartment of a vehicle, and any containers therein, as a contemporaneous incident of a recent occupant's lawful arrest on the ground that it concerned the scope of a search incident to arrest, but did not answer the question whether officers may conduct such a search once the scene has been secured. Because *Chimel v. California*, 395 U. S. 752, requires that a search incident to arrest be justified by either the interest in officer safety or the interest in preserving evidence and the circumstances of Gant's arrest implicated neither of those interests, the State Supreme Court found the search unreasonable.

Held:

Police may search the passenger compartment of a vehicle incident to a recent occupant's arrest only if it is reasonable to believe that the arrestee might access the vehicle at the time of the search or that the vehicle contains evidence of the offense of arrest.

(a) Warrantless searches "are per se unreasonable," "subject only to a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U. S. 347. The exception for a search incident to a lawful arrest applies only to "the area from within which [an arrestee] might gain possession of a weapon or destructible evidence." *Chimel*, 395 U. S., at 763. This Court applied that exception to the automobile context in *Belton*, the holding of which rested in large part on the assumption that articles inside a vehicle's passenger compartment are "generally … within 'the area into which an arrestee might reach.'" 453 U.S., at 460.

(b) This Court rejects a broad reading of *Belton* that would permit a vehicle search incident to a recent occupant's arrest even if there were no possibility the arrestee could gain access to the vehicle at the time of the search. The safety and evidentiary justifications underlying *Chimel's* exception authorize a vehicle search only when there is a reasonable possibility of such access. Although it does not follow from *Chimel*, circumstances unique to the automobile context also justify a search incident to a lawful arrest when it is "reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle." *Thornton v. United States*, 541 U. S. 615.

Neither *Chimel's* reaching-distance rule nor *Thornton's* allowance for evidentiary searches authorized the search in this case. In contrast to *Belton*, which involved a single officer confronted with four unsecured arrestees, five officers handcuffed and secured Gant and the two other suspects in separate patrol cars before the search began. Gant clearly could not have accessed his car at the time of the search. An evidentiary basis for the search was also lacking. Belton and Thornton were both arrested for drug offenses, but Gant was arrested for driving with a suspended license—an offense for which police could not reasonably expect to find evidence in Gant's car. The search in this case was therefore unreasonable.

(c) This Court is unpersuaded by the State's argument that its expansive reading of *Belton* correctly balances law enforcement interests with an arrestee's limited privacy interest in his vehicle. The State seriously undervalues the privacy interests at stake, and it exaggerates both the clarity provided by a broad reading of *Belton* and its importance to law enforcement interests. A narrow reading of *Belton* and *Thornton*, together with this Court's other Fourth Amendment decisions, e.g., *Michigan v. Long*, 463 U.S. 103, and *United States v. Ross*, 456 U.S. 798, permit an officer to search a vehicle when safety or evidentiary concerns demand.

(d) Stare decisis does not require adherence to a broad reading of *Belton*. The experience of the 28 years since *Belton* has shown that the generalization underpinning the broad reading of that decision is unfounded, and blind adherence to its faulty assumption would authorize myriad unconstitutional searches.

216 Ariz. 1, 162 P. 3d 640, affirmed.

Stevens, J., delivered the opinion of the Court, in which Scalia, Souter, Thomas, and Ginsburg, JJ., joined. Scalia, J., filed a concurring opinion. Breyer, J., filed a dissenting opinion. Alito, J., filed a dissenting opinion, in which Roberts, C. J., and Kennedy, J., joined, and in which Breyer, J., joined except as to Part II–E.

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4.15: DOES THE NEW YORK CONSTITUTION OFFER MORE RIGHTS THAN THE UNITED STATES CONSTITUTION?

Generally, the answer is yes. The New York Constitution has been interpreted to grant stronger protections regarding self-incrimination, double jeopardy, due process, religious liberty, freedom of speech, freedom of the press, and the rights of immigrants. Below are some of the more specific examples.

JURY TRIALS:

The N.Y. Constitution requires twelve jurors for a felony criminal trial.

The U.S. Constitution allows for as few as six for felony criminal trials.

The N.Y. Constitution requires a unanimous verdict.

The U.S. Constitution does not specify, although federal cases require such.

The N.Y. Constitution requires the defendant to sign a jury waiver in open court.

The U.S. Constitution does not.

GRAND JURYS:

The N.Y. Constitution requires the defendant to sign a grand jury waiver in open court in the presence of his/her attorney.

The U.S. Constitution does not require the presence of an attorney to waive the grand jury.

RIGHT TO COUNSEL:

The N.Y. Constitution treats the right to an attorney indelible once it attaches. It then cannot be waived without the presence of counsel.

The U.S. Constitution allows a defendant who is represented to waive that representation without counsel being present.

The N.Y. Constitution asserts the right to counsel upon the commencement of a criminal proceeding. In N.Y., commencement starts upon the filing of the felony complaint, regardless if the suspect requests an attorney, and the police cannot question the suspect without the presence of an attorney.

Under the U.S. Constitution, the commencement does not necessarily occur upon the filing of a felony complaint or the issuance of a warrant.

The New York Court of Appeals has interpreted the N.Y. Constitution to extend a suspect's right to counsel well beyond the U.S. Constitution to:

- A defendant in custody who is not yet represented by counsel but who has requested counsel. *People v. Cunningham*, 49 N.Y.2d 203 (1980)
- A defendant not in custody and who is questioned about a matter under investigation, where officials know counsel has been retained. *People v. Skinner*, 52 N.Y.2d 24 (1980)
- A defendant whose attorney in other matters appeared at the police station and identified himself, even though he had not been retained by the defendant before his arrival at the police station and took no steps to protect the defendant's rights upon his arrival. *People v. Arthur*, 22 N.Y.2d 325 (1968)
- Once a defendant who is in custody is either represented by or requests counsel, custodial interrogation about any subject, whether related or unrelated to the charge upon which representation is sought must cease. *People v. Rogers*, 48 N.Y.2d 167 (1979)

COMPETENT COUNSEL

The N.Y. Court of Appeals does not require a defendant challenging his conviction on the basis of ineffective counsel to prove the probability that the outcome would have been different. *People v. Benevento*, 91 N.Y.2d 708 (1998)

The U.S. Supreme Court does. *Strickland v. Washington*, 466 U.S. 668 (1984)

SEARCH AND SEIZURE:

The N.Y. Court of Appeals does not recognize the "good faith" exception to the exclusionary rule. *People v. Bigelow*, 66 N.Y.2d 417 (1985), *People v. Stith*, 69 N.Y.2d 313 (1987)

The U.S. Supreme Court does.

The N.Y. Court of Appeals does not allow for full searches of a person for a traffic violation arrest. *People v. Adams*, 32 N.Y.2d 451 (1973)

The U.S. Supreme Court does.

The N.Y. Court of Appeals requires a showing of "exigent circumstances" for the warrantless search of a closed container found during the incident to an arrest. *People v. Jimenez*, 22 N.Y.3d 717 (2014)

Federal law allows for such searches.

The N.Y. Court of Appeals does not allow for warrantless searches of open fields. *People v. Scott*, 79 N.Y.2d 474 (1992)

The U.S. Supreme Court does.

The New York Court of Appeals requires the evaluation of both basis of an informant's knowledge and the reliability or veracity of the informant himself. *People v. Johnson*, 66 N.Y.2d 398 (1985)

The U.S. Supreme Court requires a lower standard of the "totality-of-circumstances" test.

The New York Court of Appeals rejects warrantless administrative searches of businesses to uncover evidence of criminality. *People v. Scott*, 79 N.Y.2d 474 (1992)

The U.S. Supreme Court does not find such protection in the Fourth Amendment.

The New York Court of Appeals rejects the "plain touch doctrine." which allows officers to make warrantless seizures based on recognizing evidence by touch during a pat down.

The U.S. Supreme Court does. *People v. Diaz*, 81 N.Y.2d 106 (1993)

The New York Court of Appeals considers canine sniffs as searches. *People v. Dunn*, 77 N.Y.2d 19 (1990)

The U.S. Supreme Court does not.

The New York Court of Appeals requires the police to have probable cause before they can search a vehicle after a protective frisk. *People v. Torres*, 74 N.Y.2d 224 (1989)

The U.S. Supreme Court does not.

The New York Court of Appeals requires the police to have a reason to stop and request identifying information. The police need suspicion of criminal activity to question a citizen of such. Refusal to answer police questions or citizen flight is not enough to trigger search and seizure. *People v. De Bour*, 40 N.Y.2d 210 (1976) and *People v. Howard*, 50 N.Y.2d 583 (1980)

The U.S. Supreme Court does not.

The New York Court of Appeals does not allow statements obtained after a warrantless arrest of a suspect's home at trial. *People v. Harris*, 77 N.Y.2d 434 (1991)

The U.S. Supreme Court does.

The New York Constitution also provides protections that have no United States Constitution parallels.

PUBLIC EDUCATION:

The New York Constitution requires free public school education. It also prohibits the use of public funds to support religious school education except for examination, inspection, and transportation.

SOCIAL WELFARE:

The New York Constitution mandates that the state provide aid, care and support for the needy.

PUBLIC HOUSING:

The New York Constitution gives the legislature the authority to provide terms and conditions for the development of low income housing and nursing home accommodations. However, it is not a mandate.

CONSERVATION:

The New York Constitution "forever wild" clause facilitates and protects over three million acres of Forest Preserve in both the Catskills and Adirondacks.

(Source: *Protections in the New York State Constitution Beyond the Federal Bill of Rights*,

Edited by Scott N. Fein and Andrew B. Ayers with contributions invited by the Government Law Center at Albany Law School and the Rockefeller Institute of Government, April 18, 2017)

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4.16: Appendix A- Declaration of Independence

IN CONGRESS, JULY 4, 1776

The unanimous Declaration of the thirteen united States of America

When in the Course of human events it becomes necessary for one people to dissolve the political bands which have connected them with another and to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. — That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, — That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness. Prudence, indeed, will dictate that Governments long established should not be changed for light and transient causes; and accordingly all experience hath shewn that mankind are more disposed to suffer, while evils are sufferable than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security. — Such has been the patient sufferance of these Colonies; and such is now the necessity which constrains them to alter their former Systems of Government. The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States. To prove this, let Facts be submitted to a candid world.

He has refused his Assent to Laws, the most wholesome and necessary for the public good.

He has forbidden his Governors to pass Laws of immediate and pressing importance, unless suspended in their operation till his Assent should be obtained; and when so suspended, he has utterly neglected to attend to them.

He has refused to pass other Laws for the accommodation of large districts of people, unless those people would relinquish the right of Representation in the Legislature, a right inestimable to them and formidable to tyrants only.

He has called together legislative bodies at places unusual, uncomfortable, and distant from the depository of their Public Records, for the sole purpose of fatiguing them into compliance with his measures.

He has dissolved Representative Houses repeatedly, for opposing with manly firmness his invasions on the rights of the people.

He has refused for a long time, after such dissolutions, to cause others to be elected, whereby the Legislative Powers, incapable of Annihilation, have returned to the People at large for their exercise; the State remaining in the mean time exposed to all the dangers of invasion from without, and convulsions within.

He has endeavoured to prevent the population of these States; for that purpose obstructing the Laws for Naturalization of Foreigners; refusing to pass others to encourage their migrations hither, and raising the conditions of new Appropriations of Lands.

He has obstructed the Administration of Justice by refusing his Assent to Laws for establishing Judiciary Powers.

He has made Judges dependent on his Will alone for the tenure of their offices, and the amount and payment of their salaries.

He has erected a multitude of New Offices, and sent hither swarms of Officers to harass our people and eat out their substance.

He has kept among us, in times of peace, Standing Armies without the Consent of our legislatures.

He has affected to render the Military independent of and superior to the Civil Power.

He has combined with others to subject us to a jurisdiction foreign to our constitution, and unacknowledged by our laws; giving his Assent to their Acts of pretended Legislation:

For quartering large bodies of armed troops among us:

For protecting them, by a mock Trial from punishment for any Murders which they should commit on the Inhabitants of these States:

For cutting off our Trade with all parts of the world:

For imposing Taxes on us without our Consent:

For depriving us in many cases, of the benefit of Trial by Jury:

For transporting us beyond Seas to be tried for pretended offences:

For abolishing the free System of English Laws in a neighbouring Province, establishing therein an Arbitrary government, and enlarging its Boundaries so as to render it at once an example and fit instrument for introducing the same absolute rule into these Colonies

For taking away our Charters, abolishing our most valuable Laws and altering fundamentally the Forms of our Governments:

For suspending our own Legislatures, and declaring themselves invested with power to legislate for us in all cases whatsoever.

He has abdicated Government here, by declaring us out of his Protection and waging War against us.

He has plundered our seas, ravaged our coasts, burnt our towns, and destroyed the lives of our people.

He is at this time transporting large Armies of foreign Mercenaries to compleat the works of death, desolation, and tyranny, already begun with circumstances of Cruelty & Perfidy scarcely paralleled in the most barbarous ages, and totally unworthy the Head of a civilized nation.

He has constrained our fellow Citizens taken Captive on the high Seas to bear Arms against their Country, to become the executioners of their friends and Brethren, or to fall themselves by their Hands.

He has excited domestic insurrections amongst us, and has endeavoured to bring on the inhabitants of our frontiers, the merciless Indian Savages whose known rule of warfare, is an undistinguished destruction of all ages, sexes and conditions.

In every stage of these Oppressions We have Petitioned for Redress in the most humble terms: Our repeated Petitions have been answered only by repeated injury. A Prince, whose character is thus marked by every act which may define a Tyrant, is unfit to be the ruler of a free people.

Nor have We been wanting in attentions to our British brethren. We have warned them from time to time of attempts by their legislature to extend an unwarrantable jurisdiction over us. We have reminded them of the circumstances of our emigration and settlement here. We have appealed to their native justice and magnanimity, and we have conjured them by the ties of our common kindred to disavow these usurpations, which would inevitably interrupt our connections and correspondence. They too have been deaf to the voice of justice and of consanguinity. We must, therefore, acquiesce in the necessity, which denounces our Separation, and hold them, as we hold the rest of mankind, Enemies in War, in Peace Friends.

We, therefore, the Representatives of the united States of America, in General Congress, Assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions, do, in the Name, and by Authority of the good People of these Colonies, solemnly publish and declare, That these united Colonies are, and of Right ought to be Free and Independent States, that they are Absolved from all Allegiance to the British Crown, and that all political connection between them and the State of Great Britain, is and ought to be totally dissolved; and that as Free and Independent States, they have full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do. — And for the support of this Declaration, with a firm reliance on the protection of Divine Providence, we mutually pledge to each other our Lives, our Fortunes, and our sacred Honor.

New Hampshire:

Josiah Bartlett, William Whipple, Matthew Thornton

Massachusetts:

John Hancock, Samuel Adams, John Adams, Robert Treat Paine, Elbridge Gerry

Rhode Island:

Stephen Hopkins, William Ellery

Connecticut:

Roger Sherman, Samuel Huntington, William Williams, Oliver Wolcott

New York:

William Floyd, Philip Livingston, Francis Lewis, Lewis Morris

New Jersey:

Richard Stockton, John Witherspoon, Francis Hopkinson, John Hart, Abraham Clark

Pennsylvania:

Robert Morris, Benjamin Rush, Benjamin Franklin, John Morton, George Clymer, James Smith, George Taylor, James Wilson, George Ross

Delaware:

Caesar Rodney, George Read, Thomas McKean

Maryland:

Samuel Chase, William Paca, Thomas Stone, Charles Carroll of Carrollton

Virginia:

George Wythe, Richard Henry Lee, Thomas Jefferson, Benjamin Harrison, Thomas Nelson, Jr., Francis Lightfoot Lee, Carter Braxton

North Carolina:

William Hooper, Joseph Hewes, John Penn

South Carolina:

Edward Rutledge, Thomas Heyward, Jr., Thomas Lynch, Jr., Arthur Middleton

Georgia:

Button Gwinnett, Lyman Hall, George Walton

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4.17: Appendix B- New York State Constitution's Table of Contents and Bill of Rights

THE CONSTITUTION

OF THE

STATE OF NEW YORK

As Revised, with Amendments adopted by the

Constitutional Convention of 1938 and Approved

by Vote of the People on November 8, 1938

and

Amendments subsequently adopted by the

Legislature and Approved by Vote of the People.

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THE CONSTITUTION

(1)[Preamble] We The People of the State of New York, grateful to Almighty God for our Freedom, in order to secure its blessings, DO ESTABLISH THIS CONSTITUTION.

ARTICLE I

Bill Of Rights

[Rights, privileges and franchise secured; power of legislature to dispense with primary elections in certain cases]

Section 1. No member of this state shall be disfranchised, or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land, or the judgment of his or her peers, except that the legislature may provide that there shall be no primary election held to nominate candidates for public office or to elect persons to party positions for any political party or parties in any unit of representation of the state from which such candidates or persons are nominated or elected whenever there is no contest or contests for such nominations or election as may be prescribed by general law. (Amended by vote of the people November 3, 1959; November 6, 2001.) (2)

[Trial by jury; how waived]

Section 2. Trial by jury in all cases in which it has heretofore been guaranteed by constitutional provision shall remain inviolate forever; but a jury trial may be waived by the parties in all civil cases in the manner to be prescribed by law. The legislature may provide, however, by law, that a verdict may be rendered by not less than five-sixths of the jury in any civil case. A jury trial may be waived by the defendant in all criminal cases, except those in which the crime charged may be punishable by death, by a written instrument signed by the defendant in person in open court before and with the approval of a judge or justice of a court having jurisdiction to try the offense. The legislature may enact laws, not inconsistent herewith, governing the form, content, manner and time of presentation of the instrument effectuating such waiver. (Amended by Constitutional Convention of 1938 and approved by vote of the people November 8, 1938.)

[Freedom of worship; religious liberty]

Section 3. The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this state to all humankind; and no person shall be rendered incompetent to be a witness on account of his or her opinions on matters of religious belief; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this state. (Amended by vote of the people November 6, 2001.)

[Habeas corpus]

Section 4. The privilege of a writ or order of habeas corpus shall not be suspended, unless, in case of rebellion or invasion, the public safety requires it. (Amended by Constitutional Convention of 1938 and approved by vote of the people November 8, 1938.)

[Bail; fines; punishments; detention of witnesses]

Section 5. Excessive bail shall not be required nor excessive fines imposed, nor shall cruel and unusual punishments be inflicted, nor shall witnesses be unreasonably detained.

[Grand jury; protection of certain enumerated rights; duty of public officers to sign waiver of immunity and give testimony; penalty for refusal]

Section 6. No person shall be held to answer for a capital or otherwise infamous crime (except in cases of impeachment, and in cases of militia when in actual service, and the land, air and naval forces in time of war, or which this state may keep with the consent of congress in time of peace, and in cases of petit larceny under the regulation of the legislature), unless on indictment of a grand jury, except that a person held for the action of a grand jury upon a charge for such an offense, other than one punishable by death or life imprisonment, with the consent of the district attorney, may waive indictment by a grand jury and consent to be prosecuted on an information filed by the district attorney; such waiver shall be evidenced by written instrument signed by the defendant in open court in the presence of his or her counsel. In any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions and shall be informed of the nature and cause of the accusation and be confronted with the witnesses against him or her. No person shall be subject to be twice put in jeopardy for the same offense; nor shall he or she be compelled in any criminal case to be a witness against himself or herself, providing, that any public officer who, upon being called before a grand jury to testify concerning the conduct of his or her present office or of any public office held by him or her within five years prior to such grand jury call to testify, or the performance of his or her official duties in any such present or prior offices, refuses to sign a waiver of immunity against subsequent criminal prosecution, or to answer any relevant question concerning such matters before such grand jury, shall by virtue of such refusal, be disqualified from holding any other public office or public employment for a period of five years from the date of such refusal to sign a waiver of immunity against subsequent prosecution, or to answer any relevant question concerning such matters before such grand jury, and shall be removed from his or her present office by the appropriate authority or shall forfeit his or her present office at the suit of the attorney-general.

The power of grand juries to inquire into the wilful misconduct in office of public officers, and to find indictments or to direct the filing of informations in connection with such inquiries, shall never be suspended or impaired by law. No person shall be deprived of life, liberty or property without due process of law. (Amended by Constitutional Convention of 1938 and approved by vote of the people November 8, 1938; further amended by vote of the people November 8, 1949; November 3, 1959; November 6, 1973; November 6, 2001.)

[Compensation for taking private property; private roads; drainage of agricultural lands]

Section 7 (a)Private property shall not be taken for public use without just compensation.

(b) Private roads may be opened in the manner to be prescribed by law; but in every case the necessity of the road and the amount of all damage to be sustained by the opening thereof shall be first determined by a jury of freeholders, and such amount, together with the expenses of the proceedings, shall be paid by the person to be benefitted.

(c)The use of property for the drainage of swamp or agricultural lands is declared to be a public use, and general laws may be passed permitting the owners or occupants of swamp or agricultural lands to construct and maintain for the drainage thereof, necessary drains, ditches and dykes upon the lands of others, under proper restrictions, on making just compensation, and such compensation together with the cost of such drainage may be assessed, wholly or partly, against any property benefitted thereby; but no special laws shall be enacted for such purposes. (Amended by Constitutional Convention of 1938 and approved by vote of the people November 8, 1938. Subdivision (e) repealed by vote of the people November 5, 1963. Subdivision (b) repealed by vote of the people November 3, 1964.)

[Freedom of speech and press; criminal prosecutions for libel]

Section 8. Every citizen may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions or indictments for libels, the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact. (Amended by vote of the people November 6, 2001.)

[Right to assemble and petition; divorce; lotteries; pool-selling and gambling; laws to prevent; pari-mutual betting on horse races permitted; games of chance, bingo or lotto authorized under certain restrictions]

§9.1. No law shall be passed abridging the rights of the people peaceably to assemble and to petition the government, or any department thereof; nor shall any divorce be granted otherwise than by due judicial proceedings; except as hereinafter provided, no lottery or the sale of lottery tickets, pool-selling, book-making, or any other kind of gambling, except lotteries operated by the state and the sale of lottery tickets in connection therewith as may be authorized and prescribed by the legislature, the net proceeds of which shall be applied exclusively to or in aid or support of education in this state as the legislature may prescribe, and except pari-mutual betting on horse races as may be prescribed by the legislature and from which the state shall derive a reasonable revenue for the support of government, shall hereafter be authorized or allowed within this state; and the legislature shall pass appropriate laws to prevent offenses against any of the provisions of this section.

2. Notwithstanding the foregoing provisions of this section, any city, town or village within the state may by an approving vote of the majority of the qualified electors in such municipality voting on a proposition therefor submitted at a general or special election authorize, subject to state legislative supervision and control, the conduct of one or both of the following categories of games of chance commonly known as: (a) bingo or lotto, in which prizes are awarded on the basis of designated numbers or symbols on a card conforming to numbers or symbols selected at random; (b) games in which prizes are awarded on the basis of a winning number or numbers, color or colors, or symbol or symbols determined by chance from among those previously selected or played, whether determined as the result of the spinning of a wheel, a drawing or otherwise by chance. If authorized, such games shall be subject to the following restrictions, among others which may be prescribed by the legislature: (1) only bona fide religious, charitable or non-profit organizations of veterans, volunteer firefighter and similar non-profit organizations shall be permitted to conduct such games; (2) the entire net proceeds of any game shall be exclusively devoted to the lawful purposes of such organizations; (3) no person except a bona fide member of any such organization shall participate in the management or operation of such game; and (4) no person shall receive any remuneration for participating in the management or operation of any such game. Unless otherwise provided by law, no single prize shall exceed two hundred fifty dollars, nor shall any series of prizes on one occasion aggregate more than one thousand dollars. The legislature shall pass appropriate laws to effectuate the purposes of this subdivision, ensure that such games are rigidly regulated to prevent commercialized gambling, prevent participation by criminal and other undesirable elements and the diversion of funds from the purposes authorized hereunder and establish a method by which a municipality which has authorized such games may rescind or revoke such authorization. Unless permitted by the legislature, no municipality shall have the power to pass local laws or ordinances relating to such games. Nothing in this section shall prevent the legislature from passing laws more restrictive than any of the provisions of this section. (Amendment approved by vote of the people November 7, 1939; further amended by vote of the people November 5, 1957; November 8, 1966; November 4, 1975; November 6, 1984; November 6, 2001.)

[Section 10 which dealt with ownership of lands, yellowtail tenures and escheat was repealed by amendment approved by vote of the people November 6, 1962]

[Equal protection of laws; discrimination in civil rights prohibited]

Section 11. 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 or her 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. (New. Adopted by Constitutional Convention of 1938 and approved by vote of the people November 8, 1938; amended by vote of the people November 6, 2001.)

[Security against unreasonable searches, seizures and interceptions]

Section 12. The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The right of the people to be secure against unreasonable interception of telephone and telegraph communications shall not be violated, and ex parte orders or warrants shall issue only upon oath or affirmation that there is reasonable ground to believe that evidence of crime may be thus obtained, and identifying the particular means of communication, and particularly describing the person or persons whose communications are to be intercepted and the purpose thereof. (New. Adopted by Constitutional Convention of 1938 and approved by vote of the people November 8, 1938.)

[Section 13 which dealt with purchase of lands of Indians was repealed by amendment approved by vote of the people November 6, 1962]

[Common law and acts of the colonial and state legislatures]

Section 14. Such parts of the common law, and of the acts of the legislature of the colony of New York, as together did form the law of the said colony, on the nineteenth day of April, one thousand seven hundred seventy-five, and the resolutions of the congress of the said colony, and of the convention of the State of New York, in force on the twentieth day of April, one thousand seven hundred seventy-seven, which have not since expired, or been repealed or altered; and such acts of the legislature of this state as are now in force, shall be and continue the law of this state, subject to such alterations as the legislature shall make concerning the same. But all such parts of the common law, and such of the said acts, or parts thereof, as are repugnant to this constitution, are hereby abrogated. (Formerly §16. Renumbered and amended by Constitutional Convention of 1938 and approved by vote of the people November 8, 1938.)

[Section 15 which dealt with certain grants of lands and of charters made by the king of Great Britain and the state and obligations and contracts not to be impaired was repealed by amendment approved by vote of the people November 6, 1962]

[Damages for injuries causing death]

Section 16. The right of action now existing to recover damages for injuries resulting in death, shall never be abrogated; and the amount recoverable shall not be subject to any statutory limitation. (Formerly §18. Renumbered by Constitutional Convention of 1938 and approved by vote of the people November 8, 1938.)

[Labor not a commodity; hours and wages in public work; right to organize and bargain collectively]

Section 17. Labor of human beings is not a commodity nor an article of commerce and shall never be so considered or construed.

No laborer, worker or mechanic, in the employ of a contractor or sub-contractor engaged in the performance of any public work, shall be permitted to work more than eight hours in any day or more than five days in any week, except in cases of extraordinary emergency; nor shall he or she be paid less than the rate of wages prevailing in the same trade or occupation in the locality within the state where such public work is to be situated, erected or used.

Employees shall have the right to organize and to bargain collectively through representatives of their own choosing. (New. Adopted by Constitutional Convention of 1938 and approved by vote of the people November 8, 1938; amended by vote of the people November 6, 2001.)

[Workers' compensation]

Section 18. Nothing contained in this constitution shall be construed to limit the power of the legislature to enact laws for the protection of the lives, health, or safety of employees; or for the payment, either by employers, or by employers and employees or otherwise, either directly or through a state or other system of insurance or otherwise, of compensation for injuries to employees or for death of employees resulting from such injuries without regard to fault as a cause thereof, except where the injury is occasioned by the wilful intention of the injured employee to bring about the injury or death of himself or herself or of another, or where the injury results solely from the intoxication of the injured employee while on duty; or for the adjustment, determination and settlement, with or without trial by jury, of issues which may arise under such legislation; or to provide that the right of such compensation, and the remedy therefor shall be exclusive of all other rights and remedies for injuries to employees or for death resulting from such injuries; or to provide that the amount of such compensation for death shall not exceed a fixed or determinable sum; provided that all moneys paid by an employer to his or her employees or their legal representatives, by reason of the enactment of any of the laws herein authorized, shall be held to be a proper charge in the cost of operating the business of the employer. (Formerly §19. Renumbered by Constitutional Convention of 1938 and approved by vote of the people November 8, 1938; amended by vote of the people November 6, 2001.)

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4.18: Appendix C- The United States Constitution

(Spelling is from the original document.)

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

Article. I.

Section. 1.

All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section. 2.

The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New-York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

Section. 3.

The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.

Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one third may be chosen every second Year; and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.

No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.

The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States.

The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

Section. 4.

The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.

Section. 5.

Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.

Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

Section. 6.

The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

Section. 7.

All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

Section. 8.

The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

To establish Post Offices and post Roads;

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

To constitute Tribunals inferior to the supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;—And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Section. 9.

The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

No Bill of Attainder or ex post facto Law shall be passed.

No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or enumeration herein before directed to be taken.

No Tax or Duty shall be laid on Articles exported from any State.

No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.

No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

Section. 10.

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

Article. II.

Section. 1.

The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote; A quorum for this Purpose shall consist of a Member or Members from two thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice President.

The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be encreased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:—"I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

Section. 2.

The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

Section. 3.

He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

Section. 4.

The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

Article III.

Section. 1.

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section. 2.

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;— between a State and Citizens of another State,—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Section. 3.

Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

Article. IV.

Section. 1.

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Section. 2.

The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

Section. 3.

New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

Section. 4.

The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened), against domestic Violence.

Article. V.

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

Article. VI.

All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

Article. VII.

The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.

Amendments to the Constitution

ARTICLES IN ADDITION TO, AND AMENDMENTS OF, THE CONSTITUTION OF THE UNITED STATES OF AMERICA, PROPOSED BY CONGRESS, AND RATIFIED BY THE LEGISLATURES OF THE SEVERAL STATES, PURSUANT TO THE FIFTH ARTICLE OF THE ORIGINAL CONSTITUTION

Amendment 1

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment 2

A well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

Amendment 3

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

Amendment 4

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; 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; nor shall private property be taken for public use, without just compensation.

Amendment 6

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment 7

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Amendment 8

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment 9

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Amendment 10

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Amendment 11

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Amendment 12

The Electors shall meet in their respective states, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;–The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;–The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President. –The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

Amendment 13

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

Amendment 14

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or

the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Amendment 15

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

Amendment 16

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

Amendment 17

The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: Provided, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

Amendment 18

Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

Section. 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

Section. 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

Amendment 19

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

Congress shall have power to enforce this article by appropriate legislation.

Amendment 20

Section 1. The terms of the President and Vice President shall end at noon on the 20th day of January, and the terms of Senators and Representatives at noon on the 3d day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin.

Section. 2. The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.

Section. 3. If, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice President elect shall become President. If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified.

Section. 4. The Congress may by law provide for the case of the death of any of the persons from whom the House of Representatives may choose a President whenever the right of choice shall have devolved upon them, and for the case of the death of any of the persons from whom the Senate may choose a Vice President whenever the right of choice shall have devolved upon them.

Section. 5. Sections 1 and 2 shall take effect on the 15th day of October following the ratification of this article.

Section. 6. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission.

Amendment 21

Section 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

Section 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

Amendment 22

Section 1. No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of the President more than once. But this Article shall not apply to any person holding the office of President when this Article was proposed by the Congress, and shall not prevent any person who may be holding the office of President, or acting as President, during the term within which this Article becomes operative from holding the office of President or acting as President during the remainder of such term.

Section. 2. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission to the States by the Congress.

Amendment 23

Section 1. The District constituting the seat of Government of the United States shall appoint in such manner as the Congress may direct:

A number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a State, but in no event more than the least populous State; they shall be in addition to those appointed by the States, but they shall be considered, for the purposes of the election of President and Vice President, to be electors appointed by a State; and they shall meet in the District and perform such duties as provided by the twelfth article of amendment.

Section. 2. The Congress shall have power to enforce this article by appropriate legislation.

Amendment 24

Section 1. The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.

Section. 2. The Congress shall have power to enforce this article by appropriate legislation.

Amendment 25

Section 1. In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.

Section. 2. Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.

Section. 3. Whenever the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that he is unable to discharge the powers and duties of his office, and until he transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the Vice President as Acting President.

Section. 4. Whenever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

Thereafter, when the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority of either the principal officers of the executive department or of such other body as Congress may by law provide, transmit within four days to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall decide the issue, assembling within forty-eight hours for that purpose if not in session. If the Congress, within twenty-one days after receipt of the latter written declaration, or, if Congress is not in session, within twenty-one days after Congress is required to assemble, determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office.

Amendment 26

Section 1. The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.

Section. 2. The Congress shall have power to enforce this article by appropriate legislation.

Amendment 27

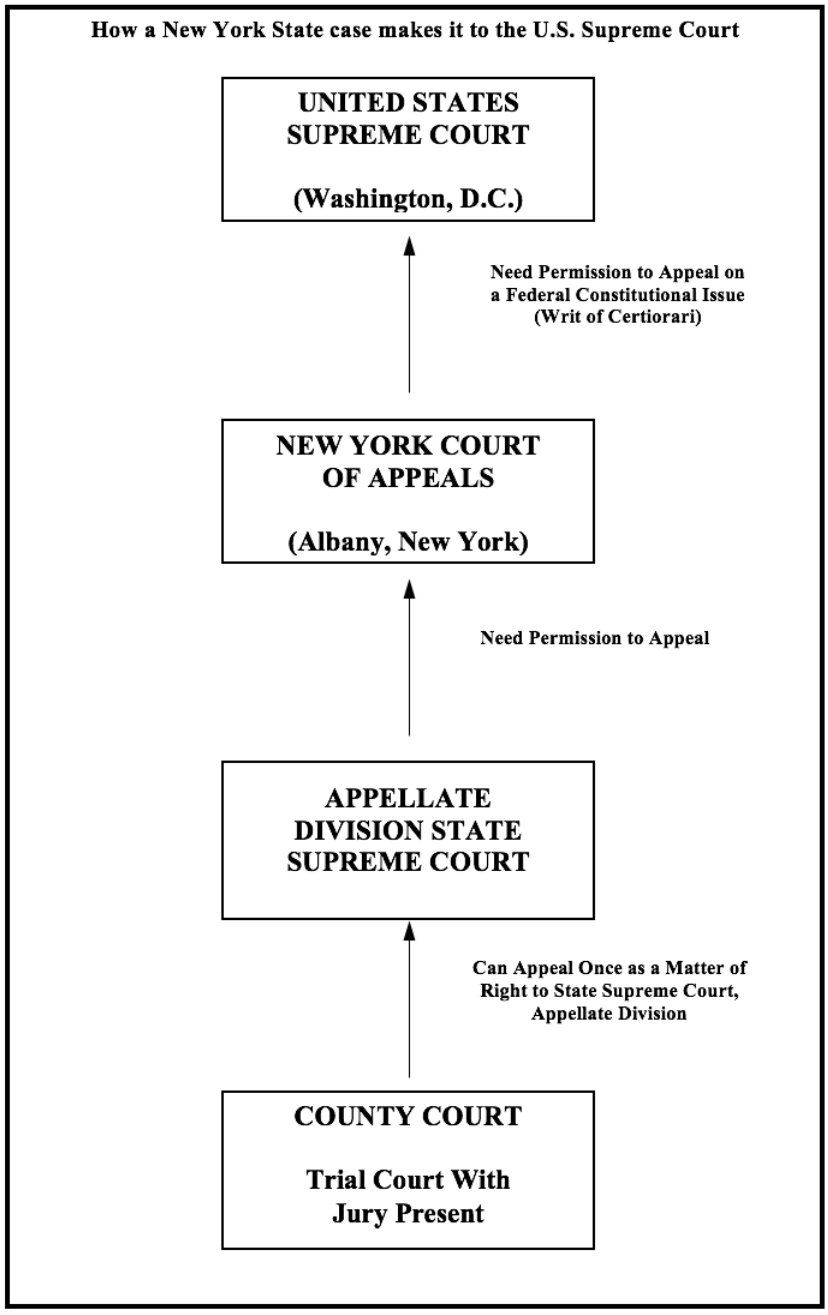
No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened.

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4.20: References

(n.d.). Retrieved June 22, 2018, from https://www.archives.gov/

Fein, S. N., & Ayers, A. B. (Eds.). (2017, April 18). Protections in the New York State Constitution Beyond the Federal Bill of Rights. Retrieved June 24, 2018, from http://www.albanylaw.edu/centers/government-law-center/stateconstitution

Find Laws, Legal Information, and Attorneys. (n.d.). Retrieved June 11, 2018, from https://www.findlaw.com/

HISTORY | Watch Full Episodes of Your Favorite Shows. (n.d.). Retrieved June 23, 2018, from https://www.history.com/

Home Page. (n.d.). Retrieved July 23, 2018, from https://www.whitehouse.gov/

Justia Law. (n.d.). Retrieved July 23, 2018, from https://law.justia.com/

Main Page. (n.d.). Retrieved June 22, 2018, from https://ballotpedia.org/Main_Page

Mount, S. (n.d.). The Constitution Explained – The U.S. Constitution Online. Retrieved June 24, 2018, from https://www.usconstitution.net/constquick.html

New York State. (n.d.). New York State Unified Court System. Retrieved June 11, 2018, from http://nycourts.gov/

New York State Department of State. (n.d.). Retrieved June 23, 2018, from http://www.dos.ny.gov/

Pogue, D. L., Clifford, E., & Schwartz, A. L. (2009). *Understanding New York Law, 2013-14*. Upstate Legal Publishers

Supreme Court of the United States Home. (n.d.). Retrieved June 23, 2018, from https://www.supremecourt.gov/

Welcome to LII. (n.d.). Retrieved July 23, 2018, from https://www.law.cornell.edu/

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CHAPTER OVERVIEW

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5.1: THE PATH OF A NEW YORK STATE CRIMINAL CASE

INTRODUCTION:

When many people think of the law, they gravitate to criminal law. An abundance of books, movies, documentaries, and television shows are based on criminal law storylines. However, it is the rare movie or television show that portrays criminal cases as they really are. This chapter will explain the path from arrest to trial to appeal of a New York State criminal case. To better facilitate an understanding of a criminal trial, one must also understand the basics of the NY Penal Law and Criminal Procedure Law (CPL).

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5.2: PART I- HOW DOES THE PENAL LAW CLASSIFY CRIMES?

NYS classifies crimes first by category which is based on the amount of possible incarceration time. There are three categories; felonies, where possible incarceration is more than one year, misdemeanors, where possible incarceration is one year or less, and violations, which technically are not crimes. NYS then classifies these three categories first by class and then by degree.

Felonies

These are the most serious of all crimes and are punishable by more than one year in prison. They are classified from Class A-1 felonies being the most serious to Class E. felonies being the least serious. Below are the general guidelines for the possible incarceration sentence for these felonies when there is no previous criminal history.

Offense	Sentence
'A-I & II' Violent Felony	Life, 20-25 years
'B' Violent Felony	5-25 years
'B' Non Violent Felony	1-3, Max 25 years
'C' Violent Felony	3 1/2 to 15 years
'C' Non Violent Felony	No Incarceration, Probation, 1-2 years to 15 years
'D' Violent Felony	2-7 years
'D' Non Violent Felony	No incarceration, Probation, 1-3 to 7 years
'E' Violent Felony	No incarceration, Probation, 1 1/2 to 4 years
'E' Non Violent Felony	No incarceration, Probation, 1 1/3 to 4 years

A-I

- Murder in the First Degree
- Murder in the Second Degree
- Criminal sale of a controlled substance in the first degree

A-II

- Predatory sexual assault
- Predatory sexual assault against a child
- Criminal possession of a controlled substance in the second degree

B (Violent)

- Assault in the first degree
- Aggravated assault upon a police officer or a peace officer
- Burglary in the first degree

B (Non-Violent)

- Grand larceny in the first degree
- Aggravated vehicular homicide
- Sex trafficking

C (Violent)

- Burglary in the second degree
- Strangulation in the first degree

- Assault on a peace officer, police officer, fireman or emergency medical services professional

C (Non-Violent)

- Forgery in the first degree
- Criminal possession of a controlled substance in the fourth degree
- Criminal possession of marihuana in the first degree

D (Violent)

- Rape in the second degree
- Criminal possession of a weapon in the third degree
- Assault in the second degree

D (Non-Violent)

- Burglary in the third degree
- Perjury in the first degree
- Unlawful fleeing a police officer in a motor vehicle in the first degree

E (Violent)

- Aggravated sexual abuse in the fourth degree
- Falsely reporting an incident in the second degree

E (Non-Violent)

- Menacing in the first degree
- Rape in the third degree

Misdemeanors

Misdemeanors are crimes punishable by 364 days or less in jail. Class A misdemeanors are punishable by up to 364 days in jail and fines up to $1,000. Class B misdemeanors are punishable by up to 90 days in jail and fines up to $500. There are also unclassified misdemeanors. The incarceration time and fines vary depending on the crime committed.

Examples of each class of misdemeanors:

Class A

- Petit larceny
- Carrying a gun without a permit
- Second-degree criminal impersonation
- Third-degree identity theft

Class B

- Issuing a bad check
- Fortune-telling
- Prostitution

Unclassified

- Aggravated unlicensed driving
- Driving while intoxicated

Violations

These are not “crimes” in New York. While they are part of the Penal Law along with felonies and misdemeanors, they do not rise to the level of crimes. If convicted of a violation, you would not under the law have been convicted of a crime. So, even with a violation conviction, if asked on an employment form if you have ever been convicted of a crime, you would be answering honestly with a response of no. However, a violation conviction can include up to fifteen days in jail, fines, and community service.

Examples of violations:

- Disorderly conduct
- Unlawful possession of marijuana
- Trespass

WHAT DETERMINES THE DEGREE OF A CRIME?

Aggravating factors generally influence the “degree” of the crime. The most serious crimes are labeled first degree, and they become less serious as the degrees increase. So, for example, assault in the third degree is less serious than assault in the second degree, which is less serious than assault in the first degree.

Examples of aggravating factors:

Weapons:

The use of guns or knives greatly increases the chances that somebody will get hurt. If a person employs a weapon, it usually raises the level of the crime and results in greater punishment.

Degree of physical injury: If a person is hurt badly, it becomes a more serious crime. Assault would be the most common example of a crime having the level of physical injury as an aggravating factor.

Amount of damage or money or drugs :

The higher the amount of damage caused, or money stolen, or drugs illegally possessed, the higher degree of the crime. For example, if you shoplift an item worth $999, it is a misdemeanor. However, if you steal an item worth $1,001, it is a felony. Unlawful possession (less than one ounce) of marihuana (also spelled marijuana) in the second degree (PL 221.05) is a violation punishable only by a fine of not more than fifty dollars. Criminal possession of marihuana in the fourth degree (more than 2 ounces) (PL 221.15) is a class A misdemeanor. Possess more than 8 ounces and you will be charged with criminal possession of marijuana in the third degree (PL 221.20), which is a class E felony.

Culpable mental state:

Did the defendant intend to commit the crime or was he just reckless? Intent matters. The law considers crimes that are intentionally committed as more serious. For example, if you intend to kill someone and, in fact, you kill that person, this is Murder in the Second Degree, punishable by life imprisonment. If you only intended to hurt him but, in fact, he dies, this is Manslaughter in the First Degree, punishable by twenty-five years in prison. If you were merely acting recklessly, but without the intent to kill or harm another even though the death of another resulted, that would be Manslaughter Second Degree, punishable by a maximum of fifteen years.

Type of building:

The law considers illegally entering certain buildings and areas more serious than others. If you were to illegally enter a fenced-in area, this would constitute Criminal Trespass in the Third Degree, a class A misdemeanor. Unlawfully enter a detached garage with the intent to commit a crime therein, constitutes Burglary in the Third Degree, a class D felony, punishable by up to seven years in prison. Unlawfully enter a person’s home and this is Burglary in the Second Degree, a class B felony, punishable by up to twenty-five years in prison.

Number of times a defendant has been convicted of a crime:

Commit certain crimes more than once and the same action becomes more serious. For example, the first time you are arrested and convicted of Driving While Intoxicated, it is a misdemeanor (unless you have a minor in your vehicle while driving intoxicated, which makes it a felony). If, after this conviction, you are arrested for Driving While Intoxicated within the next ten years, you will be charged with a felony.

New York law allows for increased sentences of persons convicted of two or more felonies in a ten-year period, excluding time of incarceration. New York has several sentencing categories for felony offenders. They include non-predicate felony offenders, predicate felony offenders, violent felony offenders, persistent felony offenders, and persistent violent felony offenders. There are also categories for the number of times a person is convicted of certain drug offenses.

Age of the victim and defendant :

Crimes committed against children, and by children, are treated differently under the law. When children are victims, the crime is considered more serious. When a person over the age of twenty-one has consensual sexual intercourse with a person whom they are not married to, and who is under the age of seventeen, it is Rape in the Third Degree. It is a crime because the victim is child. This law says that a child under the age of seventeen is incapable of making the decision to consent to the sexual act.

The age of children committing a crime also matters. Children under the age of seven cannot commit a crime regardless of their actions. Crimes committed by juvenile offenders, which is dependent on the age of the defendant and the seriousness of the crime committed, will be heard in family court rather than a criminal court.

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5.3: PART 2- WHAT IS THE PATH OF A NEW YORK CRIMINAL CASE FROM ARREST TO APPEAL?

1. **FILING OF THE ACCUSATORY INSTRUMENT:**

The filing of an accusatory instrument is the official beginning of the criminal proceeding. It can occur before or after an arrest. If no accusatory instrument is filed, the court does not have jurisdiction over the case. It is this instrument which formally accuses the suspect of a crime. These accusatory instruments are called:

- An information; or
- A simplified information; or
- A prosecutor's information; or
- A misdemeanor complaint; or
- A felony complaint; or
- A felony indictment.

2. ARREST

The terms "custody" and "arrest" are often used interchangeably. A person is under arrest when his freedom of movement is materially restricted. In other words, when a person legitimately feels they are not free to just leave the scene. The circumstances surrounding the stop of the suspect, as well as the actions of the police officers, dictate whether or not the suspect is under arrest by the police.

Frequently a suspect is arrested by the police before the accusatory instrument is filed. The arrest can occur either before such filing (assuming that probable cause exists) or after the filing. Commonly, if the accusatory instrument is filed first, the police request the local criminal court to issue a warrant for the suspect's arrest. It is the filing of the accusatory instrument, not the arrest that officially commences the criminal proceeding. For many non-violent crimes, no arrest actually occurs. The Court where the accusatory instrument is filed issues a summons to appear, and this summons is sent to the defendant to advise him of the date he is to appear in court.

3 **. BOOKING:**

Once the suspect is arrested and/or appears in court, he will be "booked." This includes fingerprinting and being photographed, which is often referred to as a mug shot. This data is then sent to the New York State Division of Criminal Justice Services' computerized criminal record index where a fingerprint report, (sometimes referred to as a rap sheet) is compiled. This report will show the accused person's prior criminal record, if one exists.

4**. ARRAIGNMENT** (CPL §§ 170.10, 180.10)

The arraignment is the first appearance of the defendant before a judge. It will occur in the local criminal court which has geographic jurisdiction over the crime, and therefore the defendant. At this arraignment, the defendant will:

Be told what crime he/she is charged with.

Perhaps be given the opportunity to post bail.

Will be advised that he/she has the right to counsel. If it is determined the defendant cannot afford counsel, one may be appointed at this time.

Will be informed by the judge of their basic rights.

If charged with a felony, the defendant is informed of his/her right to a preliminary hearing or a grand jury indictment. If the defendant is being held in custody, the hearing must be held within 120-144 hours of arrest depending on whether the time period includes a weekend.

a) FELONY COMPLAINT:

While the defendant is initially arraigned in a local court, regardless of seriousness of the charge, (referred to as an inferior court), the local court does not have the jurisdiction to try felony cases. Therefore, if the defendant is being charged with a felony, the prosecution will have to obtain an indictment from a grand jury within six months for the case to proceed. If the grand jury indicts the defendant, the case will be moved to a superior court which outside of NYC is a county or supreme court.

b) PRELIMINARY HEARING: (For felony cases only, CPL § 180.60.)

The purpose of a preliminary hearing is to determine whether the evidence against the defendant is sufficient to hold the defendant before the grand jury can hear the case. If the judge presiding over the preliminary hearing finds there is reasonable/probable cause to believe that the defendant committed a felony, the judge can decide whether to incarcerate the defendant pending the grand jury, or set bail for the defendant's release. The preliminary hearing is held in the local criminal court in which the suspect is arraigned. At this hearing, the District Attorney must establish reasonable grounds to believe that a felony has been committed and that the accused committed it. There is no jury present for a preliminary hearing. The D.A. need not establish proof beyond a reasonable doubt.

c) PROBABLE CAUSE, REASONABLE CAUSE, AND REASONABLE SUSPICION:

In NYS, probable cause and reasonable cause mean the same thing. The Court of Appeals has defined probable cause as being "… at least more probable than not that a crime has taken place and that the one arrested is its perpetrator, for conduct equally compatible with guilt or innocence will not suffice …." *People v. Carrasquillo*, 54 NY2d 248, 254 (1981). CPL Section 70.10(2) defines reasonable cause as follows: "'Reasonable cause to believe that a person has committed an offense' exists when evidence or information which appears reliable discloses facts or circumstances which are collectively of such weight and persuasiveness as to convince a person of ordinary intelligence, judgment and experience that it is reasonably likely that such offense was committed and that such person committed it. Except as otherwise provided in this chapter, such apparently reliable evidence may include or consist of hearsay. Reasonable suspicion is a lower standard. It only requires a strong suspicion, even if based on less information of a less-reliable nature, that a person is involved in criminal activity or may be armed and dangerous.

d) GRAND JURY

CPL Section 190.05 requires that the grand jury consists of a minimum of 16 and a maximum of 23 jurors. It also requires that the grand jury proceedings are to be conducted in secret. Besides the grand jurors themselves, the Assistant District Attorney, the witness, and a court stenographer are the only ones generally present. A grand jury may vote for a "True Bill of Indictment," which means that felony charges in an indictment will be brought against the accused, or the grand jury may return a "No Bill," which means that insufficient evidence has been presented to bring charges against the accused. It the grand jury finds that there is insufficient evidence to support a felony charge, but sufficient evidence has been presented to support a misdemeanor charge, the grand jury will then direct the District Attorney to file a "Prosecutor's Information" back in local criminal court pursuant to CPL Section 190.70.

e) ARRAIGNMENT IN SUPERIOR COURT (CPL § 210.15)

If the grand jury issues a true bill of indictment, the defendant must then be arraigned on the new accusatory instrument, which is now the indictment. This post indictment arraignment will now occur in a superior court, which outside of NYC is a county court or supreme court.

At this post indictment arraignment, the defendant is now advised of the charges contained in the indictment. They may be the same or different than those charged in the original felony complaint. The defendant is advised of his/her right to counsel. The issue of bail will also be revisited if necessary.

5. BAIL:

Bail is the amount of money or security that a judge places as a condition of release of a defendant after arraignment. It is set to guarantee of the defendant's appearance in court for a future date. Reasonable bail is a requirement of both the Eighth Amendment of the United States Constitution and Article I Section 5 of the New York Constitution. Defendants are presumed innocent until

proven guilty. When setting bail, the judge may consider the defendant's residence, employment, education, past criminal record, previous compliance with court orders, previous failure to appear in court when required to do so, the seriousness of the crime, and possible sentence if convicted. Federal courts can deny bail if the defendant is considered a danger to society. This factor has been prohibited for consideration in NYS under the Criminal Procedure law since 1971.

Starting January 1, 2020, for most misdemeanors and nonviolent felonies, cash bail is no longer permitted to be imposed. Judges must release individuals charged with those crimes with no cash bail. Judges can release these individuals either on their own recognizance (ROR) or with release conditions designed to ensure that the individual returns to court, such as pretrial supervision and text message reminders for court dates.

For those charged with the most serious crimes, including almost all violent felonies and certain nonviolent felonies, such as sex offenses and witness tampering, judges retain the option to set cash bail.

6. **DISCOVERY:** (As of January 1, 2020, CPL §245 replaces CPL §240)

Pursuant to the Bill of Rights, a defendant has a right to know of all the charges and evidence that will be presented at their criminal trial against them, so they can formulate a proper defense. Starting in 2020, NYS enacted legislation dramatically reforming the criminal discovery process. Discover is now automatic, and not by written "demands" or discovery motions. The new statute requires :"open file" discovery from the District Attorney. District Attorneys must disclose "*all items and information that relate to the subject matter of the case*" that are in the District Attorney's or law enforcement's possession. The law states that when interpreting the District Attorney's discovery obligations, there is a presumption of openness and in favor of disclosure.

While there are some exceptions, generally District Attorneys must now supply the defense discovery materials within 15 days of the defendant's arraignment on any accusatory instrument. The 15 day period can be extended an additional 30 calendar days if discoverable materials are exceptionally voluminous, or, despite diligent and good faith efforts, they are not in the District Attorney's actual possession. If the court grants the District Attorney this extension, full discovery will be required 45 days after the defendants first appearance. The law also includes reciprocal discovery by the defense to the District Attorney 30 calendar days after service of the District Attorney's "certificate of compliance" is issued by the District Attorney. The certificate of compliance is filed with the court and served on the defense by the District Attorney upon the completion their discovery obligations.

7. FORTY-FIVE D**AY PRE-TRIAL MOTION PERIOD** (CPL § 255.20)

After arraignment, the defense has forty-five days to bring what are called pre-trial motions before the court. These motions are often made to obtain clarification on factual issues of the case, have evidence suppressed, or even have the charges reduced or dismissed.

8 **. PRETRIAL HEARINGS :**

Once the defendant receives various discovery items from the prosecution, the defendant may believe that certain evidence is missing, or was improperly obtained or tested. The defendant may believe that the police did not follow proper procedures, or that the evidence being used against them is tainted or false. In these types of situations and many others, the defendant will request a pre-trial hearing before the court, with no jury present, to discern what should be done with this evidence, or testimony, or charges against the defendant. These various pre-trial hearings are often named after previous cases where this legal issue was decided and created or clarified the law.

The following are just a few of the common pre-trial hearings.

WadeHearing – A Wade hearing is a pretrial hearing to contest the validity of a prior identification procedure involving the accused such as an illegal line-up or photo array.

Huntley Hearing – A Huntley hearing is a pretrial hearing to determine whether a statement, confession, or admission made by a defendant to the police should be suppressed if such statement was taken in violation of the defendant's constitutional rights.

Mapp Hearing – A Mapp hearing is a pretrial hearing to determine the admissibility of physical evidence seized by the government.

Dunaway Hearing – A Dunaway hearing is always held in combination with a Mapp, Huntley, or Wade hearing. It is a hearing where the defendant is seeking to suppress evidence obtained by the police that are the fruit of an unlawful arrest without probable

cause.

8. JURY TRIAL :

a. JURY SELECTION:

Jury Selection is also known as Voir Dire. Jury selection begins with a panel of jurors randomly selected by the Commissioner of Jurors. The Commissioner of Jurors provides a standard background questionnaire to be completed by all prospective jurors and used by counsel as a tool to facilitate voir dire.

The following are the qualifications necessary to serve as a juror in NYS as set out in the Judiciary Law.

• The person must be a citizen of the United States, and a resident of the county.

• The person must be at least eighteen years of age.

• The person cannot have a felony record.

• The person is able to understand and communicate in the English language.

Pursuant the Judiciary Law, Article 16, § 519, employers cannot prohibit you from serving as a juror. They may or may not have to pay you depending on the number of employees of the company.

Challenges for cause are unlimited if the attorney can demonstrate a valid reason for such action. Some examples would be if a juror is related to a party or key witness, or if the juror exhibits some bias or prejudice which makes it impossible for them to be fair and impartial. Peremptory challenges are limited by statute because they do not require any specific reason for dismissing a juror from the panel. The more serious crimes have more peremptory challenges available. For example, class A felonies have twenty peremptory challenges, plus two for each alternative juror. Class B and C felonies only have fifteen and all other felonies have ten. As already mentioned, attorneys do not need a reason when using their peremptory challenges, except they cannot exclude a juror solely because of their race or gender. See *Batson v Kentucky*, 476 U.S. 79 (1986.) and *J.E.B. v. Alabama ex rel. T. B.*, 511 U.S. 127 (1994).

b. PRELIMINARY INSTRUCTIONS: (CPL § 260.30 (2))

Judges are required to give preliminary instructions to the jury. The judge will advise the jury of what is considered appropriate and inappropriate behavior during the trial. The judge will inform the jurors that they are required to keep open minds. That they must not deliberate until they have been given the law by the court at the end of the trial. They will be instructed that they are not to discuss the case with anyone until they begin their deliberations with their fellow jurors. They will be told that they are not to visit the scene of the crime, look for information about the case on the internet, or talk with the attorneys, the defendant, or any witnesses.

c.OPENING STATEMENTS: (CPL § 260.30 (3))

The District Attorney is required by New York law to make an opening statement to the jury and go first. The purpose is to give the outline of the case to the jury.

The defense attorney is not required to make an opening statement under the law. However, it is rare that they do not. Since the criminal defendant has no burden of proof, the defense attorneys opening statement may merely ask the jury to maintain open minds and not prejudge the case before all the evidence and testimony is presented. Defense attorneys will often take the opportunity during the opening statement to remind the jurors that the defense has no burden of proof and that the jurors agreed during voir dire questioning that they would be unbiased and fair. They may add something to the effect that they are sure at the conclusion of the trial that the jurors, based on everything presented at the trial, will find the defendant not guilty.

d.PRESENTATION OF EVIDENCE: (CPL § 260.30 (5))

i) Prosecution

Since the District Attorney has the burden of proof, they are required by law to present witnesses and evidence that proves all the elements of the crime(s) charged. This means the District Attorney is solely responsible for going forward with evidence.

ii) Defense

Usually at this point, the defense will make a motion to the court to have the case dismissed on the basis that the district attorney did not prove its case. It is not usual that that judges dismiss cases on these motions, but it does happen if the judge feels the district attorney did not present enough evidence to prove the case.

Since the defense does not have to prove anything, they are not required to put forth any evidence or proof unless they are claiming a) an alibi or b) pleading an affirmative defense. In those two instances, they do have the burden of proving those, but generally only by a preponderance of the evidence Otherwise, they can say and do nothing during the course of the entire trial.

However, what typically happens is that while they do not try to prove anything, they will still make efforts to persuade the jury by making effective use of cross-examination of the People's witnesses, most often to try to demonstrate that the People have not met their burden to prove all elements beyond a reasonable doubt. If the defendant does decide to put proof before the jury, the defendant can choose to take the stand (although the 5th Amendment provides that he cannot be required to do so), present his own witnesses and provide his own evidence.

e . REBUTTAL:

After the defense case is completed, the district attorney may then seek to offer evidence to refute what the defense has presented. This is called rebuttal. It is a response to the defense's evidence. After the district attorney is done with presenting its rebuttal evidence, the defense may then seek to offer evidence to rebut the district attorneys' rebuttal.

f.SUMMATION: (CPL § 260.30(8)(9))

At the end of a trial, after all the presentation of evidence and examination of witnesses by both the prosecution and the defense is done, the parties will tell the court that they rest. In other words, they are done presenting their side of the case. The next step in the process is called summation. This is where both attorneys get to summarize the evidence and their interpretation of the case to the jury in an attempt to persuade them. The defense counsel goes first, and the District Attorney goes last. Their summations are not evidence, and they are not allowed to summarize about or add information that was not presented as evidence or testimony during the trial. Neither the defense nor the prosecution is required to give a summation. However, it would be rare that they would not in a jury trial.

- **JURY CHARGE:**

After summations are completed, the judge delivers instructions to the jury about what law to apply to the evidence and testimony presented during the trial. This is called charging the jury or a jury charge. Judges are provided model jury instructions by the New York Unified Court System for all NYS penal law crimes. These model jury instructions will set out definitions of terms like what is reasonable doubt or what is a weapon. These model jury instructions also set out the required elements of each criminal charge that the district attorney was required to prove. Judges will typically read these instructions verbatim to the jury. The use of model jury instructions by judges throughout the state creates uniformity and fairness in the criminal justice court system. A charge to a jury in Albany will therefore be the same charge given to a jury in Brooklyn. In law, words matter so even a slight deviation in defining certain legal terms between judges can have an impact on a jury verdict.

- **DELIBERATION:**

After the jury has been charged by the judge, they begin what is called deliberations. This is where the jury will now review and evaluate the evidence presented to them during the trial, and determine whether the district attorney has proven the guilt of the defendant based on this evidence and the law to be applied beyond a reasonable doubt.

Typically, these deliberations take place in a private jury room. Deliberations can go on as long as required to reach a verdict. Juries are seldom sequestered. Jurors typically go home at the end of each day of deliberation and return the next day.

- **VERDICT:**

  Criminal cases require a unanimous vote by the jury. If even one juror holds out and will not vote with the other jurors either to a guilty verdict or not guilty verdict, the jury is then called a “hung jury.” At this point the judge may declare a mistrial. The jury is then released. The district attorney will then have to decide on whether to proceed with a retrial or not proceed any further with these charges.

  If the defendant is found not guilty by a unanimous jury, the defendant will be released immediately. The defendant cannot be charged again for these same crimes. A verdict of not guilty is not the same as being innocent. While the defendant may be innocent, the jury verdict of not guilty is declaring that the district attorney did not prove its case beyond a reasonable doubt.

  If the defendant is found guilty of a felony by a unanimous jury, the case will be adjourned for sentencing. The judge will set a date for pre-sentence proceedings and sentencing. The crime the defendant is now guilty of will determine whether the defendant will be remanded immediately into custody at the local jail or be released pending the sentencing date. Under certain circumstances, where a pre-sentence investigation is not required, the judge may sentence the defendant immediately after the verdict.

SUMMARY OF A JURY TRIAL PROCEEDING PURSUANT TO CPL § 260.30:

- **Jury Selection:** The jury must be selected and sworn.
- **Preliminary Instructions:** The court must deliver preliminary instructions to the jury.
- **Opening Statements:** The people must deliver an opening address to the jury.
- **Opening Statements:** The defendant may deliver an opening address to the jury.
- **Presentation of Evidence:** The people must offer evidence in support of the indictment.
- **Presentation of Evidence:** The defendant may offer evidence in his defense.
- **Rebuttal:** The people may offer evidence in rebuttal of the defense evidence
- **Rebuttal:** The defendant may then offer evidence in rebuttal of the people’s rebuttal evidence.
- **Summation:** At the conclusion of the evidence, the defendant may deliver a summation to the jury.
- **Summation**: The people may then deliver a summation to the jury.
- **Jury Charge:** The court must then deliver a charge to the jury.
- **Deliberation:** The jury must then retire to deliberate.
- **Verdict:** The jury, if possible, may render a verdict.

9. POST-TRIAL MOTIONS AND PROCEEDINGS:

After the jury verdict, if the defendant is found guilty, the defense will typically make a motion to have the verdict set aside by the judge. If the judge does set aside the verdict, some or all of the charges against the defendant can be dismissed or a new trial ordered.

If the defendant is found guilty and has been convicted of a previous felony in the last ten years, the court will initiate proceedings to determine whether the defendant is a predicate or violent predicate felony offender. A finding that the defendant is a predicate or violent predicate felony offender may extend the amount of incarceration time of the defendant at sentencing.

10. **SENTENCING :**

Judges have several options for the sentencing of a defendant after conviction. The following are some common sentencing dispositions. They are often used in combination. For example, a defendant may be fined and sentenced to probation with a conditional discharge. The New York Penal Law allows for ten possible sentencing dispositions of a defendant.

- **Unconditional Discharge:** The judge sentences the defendant and the defendant’s release — has no conditions attached to it.
- **Conditional Discharge:** A defendant is sentenced and released with certain conditions attached to the release. If the conditions are not met, the defendant can be re-sentenced.
- **Fine:** A specific amount to be paid by the defendant. The maximum amount to be paid is usually set by statute. In some circumstances, the defendant is given the option of paying a fine or spending a certain amount of time incarcerated if they cannot or choose to not pay the fine. NOTE: A Fine is a state-imposed fee and is NOT designed to assist the victim. See below for Restitution which seeks to help victims recover for expenses/injuries.

- **Conditional Discharge plus a Fine:** The defendant is sentenced to pay a fine in conjunction with the conditional discharge.
- **Probation:** Not to be confused with parole, (which is the early release from prison after incarceration) probation is generally an alternative to incarceration. A defendant is sentenced to probation for a certain length of time in which they will be under the supervision of the Department of Probation. Probation can be used in combination with other sentencing options such as a fine and a conditional discharge.
- **A Fine plus Probation:** A defendant is sentenced to pay a fine in conjunction with probation.
- **Incarceration:** The defendant is sentenced to a certain amount of time in either jail or prison by the judge. The amount of time is set by statute.
- **Incarceration plus a Fine:** The defendant is sentenced to a certain amount of imprisonment time in conjunction with paying a fine.
- **Incarceration plus Probation:** A short sentence of incarceration is combined with probation. The defendant is sentenced to six months or less for a felony, or sixty days or less for a misdemeanor, and then released to probation. This is called a split sentence.
- **Incarceration plus a Conditional Discharge:** A short sentence of sixty days or less of imprisonment in conjunction with a conditional discharge.

Victim Impact Statement: NYS law allows victims or their families to address the court regarding the impact that the crime committed by the defendant has on them. These impact statements can be in writing and submitted or made in open court, both before the judge sentences the defendant.

Restitution: The law now allows a judge to order direct restitution to be paid to the victim by the defendant in all sentencing dispositions. Restitution represents the victim's actual loss resulting from the crime such as medical expenses and damages to the victim's property.

Death Penalty: New York does not have the death penalty as a sentencing option. This is because the NY Court of Appeals has ruled the NY death penalty statute unconstitutional. (*People v. LaValle*, 3 N.Y.3d 88 (2004))

Determinate Sentence: Based on the crime, a defendant is convicted of a judge may impose a determinate sentence. This means the defendant is sentenced for a fixed length of time such as seven years. It may include post-release supervision by a parole officer.

Indeterminate Sentence: Based on the crime, the defendant is convicted of a judge may impose an indeterminate sentence. The means the defendant is sentenced to a minimum maximum sentence like seven to ten years. The behavior of the defendant while imprisoned will determine how much time the defendant actually serves.

Concurrent Sentence: When a person is convicted of more than one offense, a judge may order the sentences to run concurrently. This means the sentences run simultaneously.

Consecutive Sentence: When a person is convicted of more than one offense, a judge may order the sentences run consecutively. This means the sentences run one after the other. Judges may order a combination of concurrent and consecutive sentences.

Intermittent Sentencing: Pursuant to Penal Law Article 85, a judge may issue a sentence of intermittent imprisonment, which is a revocable sentence of imprisonment served on certain days or during certain periods of days, or both, specified by the court as part of the sentence. The court may impose an intermittent imprisonment sentence in any case where:

(a) The court is imposing sentence, upon a person other than a second or persistent felony offender, for a class D or class E felony or for any offense that is not a felony; and

(b) The court is not imposing any other sentence of imprisonment upon the defendant at the same time; and

(c) The defendant is not under any other sentence of imprisonment with a term in excess of fifteen days imposed by any other court.

Non-Predicate Felony Offender: This means a person has not been convicted of another felony in the previous ten years. The minimum sentence may be one-third of the maximum.

Predicate Felony Offender: This means a person has been convicted of another non-violent felony besides the current felony in the previous ten years. The minimum sentence must be at least one-half of the maximum.

Violent Predicate Felony Offender: This means a person has been convicted of another felony in the previous ten years, and that both convictions were for violent felonies. Violent felonies are specifically defined in the Penal Law. The minimum sentence must be at least one-half the maximum. The minimum sentence for a violent predicate felon will be longer than that of a predicate felon, who in turn, will have longer minimum sentence than a non-predicate felon.

Persistent Felony Offender: This means a person has been convicted of at least two previous felonies. The designation of a persistent felony offender is discretionary, not mandatory. After a hearing on the issue by the court, a defendant may be categorized as a persistent felony offender if the court "is of the opinion that the history and characteristics of the defendant and the nature and circumstances of his criminal conduct indicate that extended incarceration and life-time supervision will best serve the public interest." Penal Law § 70.10(2). This may include life-imprisonment.

Persistent Violent Felony Offender: This means a person has been convicted of at least two previous violent felonies. After a hearing on the issue by the court, if the court determines that a person should be categorized as a persistent violent felony offender, the court must impose an indeterminate term of imprisonment with a maximum term of life.

Parole: Parole is often confused by the general public with probation. They are very different. As discussed above, probation is a sentence that is lieu of incarceration. Parole is the early release of a person who is incarcerated in the state prison system. Parole is operated by the state's Parole Board. It allows for felony offenders in state prisons to be returned with certain conditions to the community under the supervision of a parole officer.

Jenna's Law: Passed in 1998, Jenna's Law requires a determinate sentence for violent felony offenses. It also eliminates discretionary parole for a first-time violent felony offender and requires a period of post release supervision following said release. It also allows a victim to demand notification of the escape, absconding, discharge, parole, conditional release, or release to post-release supervision of their offender.

The New York State DNA Databank Law: The NYS DNA Databank was established in 1994. Under the law in NYS, a person convicted of a felony or misdemeanor must submit a DNA sample to the DNA Databank. The law does not apply to children involved in a Family Court matter, to youthful offenders, or to first-time fifth-degree marijuana possession offenders.

New York State Sex Offender Registry: In 1996, the New York State Sex Offender Registration Act (SORA) went into effect. All fifty states have a sexual offender registration. SORA is a classification not a sentence.

There are two components to SORA: Registration by the sexual offender with local law enforcement, and community notification that a sexual offender is residing or working in the community. The level of community notification is based on the classification level of the sexual offender. There are three sexual offender classification levels based on the likelihood that the perpetrator will commit the offense again. Level 1 offenders are considered low risk. Level 2 offenders are considered a moderate risk, and Level 3 offenders are considered a high risk for recidivism.

11. BENCH TRIAL:

A bench trial has all the characteristics of a jury trial without the jury. Without a jury present, many of the steps of a trial necessitated by the presence of a jury are no longer necessary and thereby eliminated such as voir dire and a jury charge. Often, opening statements and summations are also not necessary and can be eliminated at the judge's discretion. All violation trials are bench trials. This is because violations are technically not considered crimes. Since a defendant has the constitutional right to a jury trial in all misdemeanor and felony trials, in those instances, only the defendant can choose to waive that right and request a bench trial. The defendant cannot waive a jury trial in the case of first degree murder. CPL § 320.10(1)

12. **APPEAL :**

Every person convicted of a crime has a right to an appeal. If a person wishes to appeal their conviction, they must file a notice of appeal within thirty days of sentencing. Once this is done, the appellate attorney will request a transcript of the trial that will be submitted to the appellate court, along with the appellate attorney's written brief which sets out the legal grounds for the appeal.

The district attorney cannot appeal an acquittal. This would be considered double jeopardy, which is not allowed under either the N.Y. or U.S. Constitutions.

There are three possible outcomes of an appeal. The appellate court could affirm, and thereby uphold, the lower court decision. The appellate court could reverse the lower court decision. If this happens, the appellate court could dismiss the case, vacate a guilty plea, or remand for a new trial. The third option is that the appellate court could modify the lower court decision in some manner and may send it back to the trial court for a hearing on a specific issue or matter of the case.

Appellate courts do not revisit the facts of a case. They take those as presented to them. They review whether the correct law was applied to the case, or was it applied correctly. They can also review whether there was due process, or if other constitutional protections were not adhered to. Regarding an appeal of the sentence, they appellate court can review whether the sentence is invalid as a matter of law or whether it is too harsh.

If a defendant is not satisfied with the appellate court's decision, the defendant can appeal to the Court of Appeals. Whether that court will hear an appeal is at their discretion.

PLEA BARGAINING:

Plea bargaining is a negotiated disposition of a case between the district attorney and the defendant with the approval of the court. It usually involves the reduction of a charge and sentence, in exchange for a guilty plea. It can occur anytime in the criminal case process before sentencing, even before an arraignment. The vast majority of defendants will accept a plea bargain, and therefore plead guilty without a trial. Only a small percentage of criminal cases ever make it to trial. A guilty plea that is a result of a plea bargain is the same as being found guilty after a trial. It is estimated that around ninety percent (or higher) of those charged with a crime will accept a plea bargain.

So, why is plea bargaining so prevalent? There are several reasons for this. First, the sheer volume of those being arrested and charged with a crime is overwhelming. The current state and federal court systems do not have the capacity to handle a trial for every arrest and charge made. Plea bargaining is therefore an administrative necessity. Another important reason is that plea bargaining gives all the parties certainty in the case's disposition. Typically, the district attorney will get a guaranteed conviction and the defendant will get to plea to reduced charge with a lower negotiated sentence.

What if the district attorney has a decent case, but there are weaknesses in the evidence that can be exploited by the defense? Does the district attorney want to take the chance that a case could be dismissed because of this? Or, perhaps the district attorney is more interested in convicting a more serious criminal defendant and needs the testimony and/or cooperation of another defendant to do so. In both of these instances, offering a plea bargain to a defendant makes sense.

A defendant, even an innocent one, may feel that accepting a plea bargain makes more sense for them than taking their chances with a jury or judge. It is not unusual for a sentence after a trial to be harsher than one offered in a plea bargain. It may also be less time consuming and expensive to take a plea than go all the way to trial.

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5.4: References

Champagne, D. M. (2010, October 21). Persistent felony law stays. Retrieved July 26, 2018, from https://nydailyrecord.com/2010/10/20/persistent-felony-law-stays/

Criteria for Felony Sentencing Category. (n.d.). Retrieved July 26, 2018, from https://crimetime.nypti.org/Criteria.aspx

Division of Criminal Justice Services. (n.d.). Retrieved July 26, 2018, from http://www.criminaljustice.ny.gov/forensic/dnabrochure.htm

Division of Criminal Justice Services. (n.d.). Retrieved July 26, 2018, from http://www.criminaljustice.ny.gov/forensic/dnaoffenses.htm

Division of Criminal Justice Services. (n.d.). Retrieved July 26, 2018, from http://criminaljustice.ny.gov/pio/jenna.htm

How Courts Work. (n.d.). Retrieved July 26, 2018, from https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/pleabargaining.html

Justia Law. (n.d.). Retrieved July 26, 2018, from https://law.justia.com/

New York Consolidated Laws, Penal Law – PEN § 70.10. (n.d.). Retrieved July 26, 2018, from https://codes.findlaw.com/ny/penal-law/pen-sect-70-10.html

New York Criminal Laws. (n.d.). Retrieved July 26, 2018, from https://statelaws.findlaw.com/new-york-law/new-york-criminal-laws.html

New York State. (n.d.). Basic Steps in a Criminal Case. Retrieved July 26, 2018, from https://www.nycourts.gov/courthelp/Criminal/caseBasicsCriminal.shtml

New York State. (n.d.). Preliminary Hearing and Grand Jury. Retrieved July 26, 2018, from https://www.nycourts.gov/courthelp/Criminal/grandJury.shtml

New York State. (n.d.). Sex Offender Registry. Retrieved July 26, 2018, from https://www.nycourts.gov/courthelp/Criminal/sexOffenderRegistry.shtml

New York State. (n.d.). Sentencing Basics. Retrieved July 26, 2018, from https://www.nycourts.gov/courthelp/Criminal/sentencingBasics.shtml

New York State. (n.d.). CJI2d[NY] PENAL LAW OFFENSES. Retrieved July 26, 2018, from http://www.nycourts.gov/judges/cji/2-PenalLaw/cji3.shtml

New York State. (n.d.). Homepage. Retrieved July 26, 2018, from http://www.nycourts.gov/judges/cji/index.shtml

New York State. (n.d.). Pre-trial. Retrieved July 26, 2018, from https://www.nycourts.gov/courthelp/Criminal/pretrial.shtml

New York State. (n.d.). General Information. Retrieved July 26, 2018, from http://www.nyjuror.gov/juryQandA.shtml

New York State. (n.d.). General Information. Retrieved July 26, 2018, from http://www.nyjuror.gov/GI.shtml

NYSBA. New York State Bar Association. Retrieved December 23, 2019, from https://www.nysba.org/Section/New_York_Criminal_Law_Newsletter/2019_Criminal_Justice_Reforms%E2%80%94Preliminary_Advisory/

New York State Division of Criminal Justice Services. (n.d.). Retrieved July 26, 2018, from http://www.criminaljustice.ny.gov/

New York State Law. (n.d.). Retrieved July 26, 2018, from http://ypdcrime.com/penal.law/

New York State Law. (n.d.). Retrieved July 26, 2018, from http://ypdcrime.com/penal.law/felony_sentences.htm

NY Laws. (n.d.). Retrieved July 26, 2018, from http://ypdcrime.com/cpl/article255.htm

Office of Mental Health. (n.d.). Retrieved July 26, 2018, from https://www.omh.ny.gov/omhweb/forensic/manual/html/chapter1.htm

Pouge, D. L., Clifford, E., & Schwartz, A. L. (2009). *Understanding New York Law, 2013-14*. Rochester, NY: Upstate Legal Publishers

The Fund for Modern Courts. (n.d.). From Arrest to Appeal: A Guide to Criminal Cases in the New York State Courts. Retrieved July 26, 2018, from https://www.reentry.net/ny/library/attachment.79819

Walsh, D. (2017, May 03). On Plea Bargaining, the Daily Bread of American Criminal Courts. Retrieved July 26, 2018, from https://www.theatlantic.com/politics/archive/2017/05/plea-bargaining-courts-prosecutors/524112/

Welcome to LII. (n.d.). Retrieved July 26, 2018, from https://www.law.cornell.edu/

Your New York Criminal Case: The Basics. (n.d.). Retrieved July 26, 2018, from https://statelaws.findlaw.com/new-york-law/your-new-york-criminal-case-the-basics.html

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CHAPTER OVERVIEW

6: TRAFFIC STOPS and DWI

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6.1: TRAFFIC STOPS and DWI

INTRODUCTION

To legally pull over a vehicle in NYS, the police need probable cause that there is a violation of the Vehicle and Traffic law, or reasonable suspicion that the driver or occupants of the vehicle have committed, are committing, or are about to commit a crime. The U.S. Supreme Court in *Whren v. United States*, 517 US 806 (1996) held:

An automobile stop is thus subject to the constitutional imperative that it not beunreasonable under the circumstances. As a general matter, the decision to stopan automobile is reasonable where the police have probable cause to believe thata traffic violation has occurred.

The New York Court of Appeals in *People v. Robinson*, 97 NY2d 341 (2001) adopted the ruling in *Whren* holding:

We hold that where a police officer has probable cause to believe that the driver of an automobile has committed a traffic violation, a stop does not violate article I, § 12 of the New York State Constitution. In making that determination of probable cause, neither the primary motivation of the officer nor a determination of what a reasonable traffic officer would have done under the circumstances is relevant.

The Court of Appeals went on to say:

We noted that "police stops of automobiles in this State are legal only pursuant to routine, nonpretextual traffic checks to enforce traffic regulations or when there exists at least a reasonable suspicion that the driver or occupants of the vehicle have committed, are committing, or are about to commit a crime" (*id.*, at 753). However, we explained what we meant by pretextual when we further noted that "there were no objective safeguards circumscribing the exercise of police discretion" and that if such stops "were permissible and motorists could in fact be pulled over at an individual police officer's discretion based upon the mere right to request information, a pandora's box of pretextual police stops would be opened" (*id.*, at 758, 759). Central to Spencer's holding was the absence of an objective standard for stopping a vehicle. Thus, a police officer could contrive a reason to stop a vehicle merely to make an inquiry. However, an objective standard is present here–the Vehicle and Traffic Law.

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6.2: PEOPLE v. ROBINSON

STATE OF NEW YORK COURT OF APPEAL

People v. Robinson

97 NY2d 341 (2001)

(Case Syllabus edited by the Author)

OPINION OF THE COURT

The issue here is whether a police officer who has probable cause to believe a driver has committed a traffic infraction violates article I, § 12 of the New York State Constitution when the officer, whose primary motivation is to conduct another investigation, stops the vehicle. We conclude that there is no violation, and we adopt *Whren v. United States*, 517 U.S. 806, 116 S.Ct. 1769, 135 L.Ed.2d 89 as a matter of state law.

I

People v. Robinson

On November 22, 1993, New York City police officers in the Street Crime Unit, Mobile Taxi Homicide Task Force were on night patrol in a marked police car in the Bronx. Their main assignment was to follow taxicabs to make sure that no robberies occurred. After observing a car speed through a red light, the police activated their high intensity lights and pulled over what they suspected was a livery cab. After stopping the cab, one officer observed a passenger, the defendant, look back several times. The officers testified that they had no intention of giving the driver a summons but wanted to talk to him about safety tips. The officers approached the vehicle with their flashlights turned on and their guns holstered. One of the officers shined his flashlight into the back of the vehicle, where defendant was seated, and noticed that defendant was wearing a bulletproof vest. After the officer ordered defendant out of the taxicab, he observed a gun on the floor where defendant had been seated. Defendant was arrested and charged with criminal possession of a weapon and unlawfully wearing a bulletproof vest. Defendant moved to suppress the vest and gun, arguing that the officers used a traffic infraction as a pretext to search the occupant of the taxicab. The court denied the motion, and defendant was convicted of both charges. He was sentenced as a persistent violent felony offender to eight years to life on the weapons charge and 1 1/2 to 3 years on the other charge.

In affirming, the Appellate Division applied the *Whren* rationale (271 A.D.2d 17, 711 N.Y.S.2d 384 [2000]). We affirm the unanimous order of the Appellate Division.

People v. Reynolds

On March 6, 1999, shortly after midnight, a police officer, on routine motor patrol in the City of Rochester, saw a man he knew to be a prostitute enter defendant's truck. The officer followed the truck and ran a computer check on the license plate. Upon learning that the vehicle's registration had expired two months earlier, the officer stopped the vehicle.

The resulting investigation did not lead to any charges involving prostitution. Nevertheless, because the driver's eyes were bloodshot, his speech slurred and there was a strong odor of alcohol, police performed various field sobriety tests, with defendant failing most. Defendant was placed under arrest for driving while intoxicated. At the police station, tests indicated that defendant's blood alcohol level was .20%, double the legal limit of .10% (see, Vehicle and Traffic Law § 1192[2]).

Defendant was charged with driving while intoxicated, an unclassified misdemeanor, and operating an unregistered motor vehicle, a traffic infraction. Defendant's motion to suppress was granted by the Rochester City Court which dismissed all charges. County Court affirmed the dismissal, holding that the traffic violation was merely a pretext and the officer's primary motivation was to investigate prostitution. We reverse.

People v. Glenn

On November 7, 1997, plainclothes police officers were on street crime patrol in an unmarked car in Manhattan. They observed a livery cab make a right-hand turn without signaling. An officer noticed someone sitting in the back seat lean forward. The police stopped the vehicle to investigate whether or not a robbery was in progress. A police officer subsequently found cocaine on the rear

seat and, after he arrested defendant, found additional drugs on his person. Defendant was charged with criminal possession of a controlled substance in the third degree and criminally using drug paraphernalia in the second degree. He contended that the drugs should be suppressed, asserting that the traffic infraction was a pretext to investigate a robbery. After his motion to suppress was denied, he pleaded guilty to one count of criminal possession of a controlled substance and was sentenced, as a second felony offender, to 4 1/2 to 9 years in prison. Relying on *Whren*, the Appellate Division unanimously affirmed the conviction (279 A.D.2d 422, 723 N.Y.S.2d 425 [2001]). We affirm the order of the Appellate Division.

II

The Supreme Court, in *Whren v. United States*, 517 U.S. 806, 116 S.Ct. 1769, 135 L.Ed.2d 89 [1996], unanimously held that where a police officer has probable cause to detain a person temporarily for a traffic violation, that seizure does not violate the Fourth Amendment to the United States Constitution even though the underlying reason for the stop might have been to investigate some other matter.

In *Whren*, officers patrolling a known drug area of the District of Columbia became suspicious when several young persons seated in a truck with temporary license plates remained at a stop sign for an unusual period of time, and the driver was looking down into the lap of the passenger seated on his right. After the car made a right turn without signaling, the police stopped it, assertedly to warn the driver of traffic violations, and saw two plastic bags of what appeared to be crack cocaine in Whren's hands.

After arresting the occupants, the police found several quantities of drugs in the car. The petitioners were charged with violating federal drug laws. The petitioners moved to suppress the drugs, arguing that the stop was not based upon probable cause or even reasonable suspicion that they were engaged in illegal drug activity and that the police officer's assertion that he approached the car in order to give a warning was pretextual. The District Court denied suppression, and the Court of Appeals for the District of Columbia Circuit affirmed (53 F.3d 371 [1995]).

The Supreme Court held that the Fourth Amendment had not been violated because "[a]s a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred" (*Whren, supra*, 517 U.S., at 810, 116 S.Ct. 1769). The stop of the truck was based upon probable cause that the petitioners had violated provisions of the District of Columbia traffic code. The Court rejected any effort to tie the legality of the officers' conduct to their primary motivation or purpose in making the stop, deeming irrelevant whether a reasonable traffic police officer would have made the stop. According to the Court, "Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis" (id., at 813, 116 S.Ct. 1769). Thus, the "Fourth Amendment's concern with 'reasonableness' allows certain actions to be taken in certain circumstances, whatever the subjective intent" (*id.*, at 814, 116 S.Ct. 1769).

More than 40 states and the District of Columbia have adopted the objective standard approved by Whren or cited it with approval (see, Appendix).1

III

In each of the cases before us, defendant argues that the stop was pretextual and in violation of New York State Constitution, article I, § 12. By arguing that the stops were pretextual, defendants claim that although probable cause existed warranting a stop of the vehicle for a valid traffic infraction, the officer's primary motivation was to conduct some other investigation.

We hold that where a police officer has probable cause to believe that the driver of an automobile has committed a traffic violation, a stop does not violate article I, § 12 of the New York State Constitution. In making that determination of probable cause, neither the primary motivation of the officer nor a determination of what a reasonable traffic officer would have done under the circumstances is relevant.

We have observed that because the search and seizure language of the Fourth Amendment and of article I, § 12 is identical, they generally confer similar rights (see, *People v. Harris*, 77 N.Y.2d 434, 437, 568 N.Y.S.2d 702, 570 N.E.2d 1051 [1991]; *People v. P.J. Video*, 68 N.Y.2d 296, 304, 508 N.Y.S.2d 907, 501 N.E.2d 556 [1986]).2 Nevertheless, this Court has not hesitated to expand the rights of New York citizens beyond those required by the Federal Constitution when a longstanding New York interest was involved (see, e.g., *People v. Scott*, 79 N.Y.2d 474, 583 N.Y.S.2d 920, 593 N.E.2d 1328 [1992]; *People v. Keta*, 79 N.Y.2d 474, 583 N.Y.S.2d 920, 593 N.E.2d 1328 [1992]; *People v. Griminger*, 71 N.Y.2d 635, 529 N.Y.S.2d 55, 524 N.E.2d 409 [1988]; *People v. Bigelow*, 66 N.Y.2d 417, 497 N.Y.S.2d 630, 488 N.E.2d 451 [1985]).

This Court has always evaluated the validity of a traffic stop based on probable cause that a driver has committed a traffic violation, without regard to the primary motivation of the police officer or an assessment that a reasonable traffic officer would have made the same stop. Where the police have stopped a vehicle for a valid reason, we have upheld police conduct without regard to the reason for the stop (*People v. David L.*, 81 A.D.2d 893, 439 N.Y.S.2d 152, revd. on dissent below 56 N.Y.2d 698, 451 N.Y.S.2d 722, 436 N.E.2d 1324 [1982], cert. denied 459 U.S. 866, 103 S.Ct. 146, 74 L.Ed.2d 123).

This Court has never held that a pretextual stop, as opposed to subsequent police conduct, was violative of article I, § 12. The dissent does not disagree (dissenting opn. at 367-368, 741 N.Y.S.2d at 164-65, 767 N.E.2d at 655-56). Although the Appellate Divisions have, on occasion, examined the primary motivation of a police officer in evaluating a traffic stop, all seven of the Judges on this Court acknowledge the "difficulty, if not futility, of basing the constitutional validity of searches or seizures on judicial determinations of the subjective motivation of police officers" (dissenting opn. at 371, 741 N.Y.S.2d at 167, 767 N.E.2d at 658). Thus, we are unanimous in our view that the primary motivation test is not, and should not be, part of our State constitutional jurisprudence.

Defendants, however, point to several of our cases-most notably *People v. Spencer*, 84 N.Y.2d 749, 622 N.Y.S.2d 483, 646 N.E.2d 785 [1995]-and contend that we have previously indicated our disapproval of pretextual police conduct. Defendants' reliance on *People v. Spencer* is misplaced. There, we held that the stop of the vehicle merely to request information from the driver concerning the whereabouts of a criminal suspect was an unreasonable seizure in violation of the Fourth Amendment. In that case, the defendant had not committed a traffic violation.

We noted that "police stops of automobiles in this State are legal only pursuant to routine, nonpretextual traffic checks to enforce traffic regulations or when there exists at least a reasonable suspicion that the driver or occupants of the vehicle have committed, are committing, or are about to commit a crime" (id., at 753, 622 N.Y.S.2d 483, 646 N.E.2d 785). However, we explained what we meant by pretextual when we further noted that "there were no objective safeguards circumscribing the exercise of police discretion" and that if such stops "were permissible and motorists could in fact be pulled over at an individual police officer's discretion based upon the mere right to request information, a pandora's box of pretextual police stops would be opened" (id., at 758, 759, 622 N.Y.S.2d 483, 646 N.E.2d 785). Central to *Spencer's* holding was the absence of an objective standard for stopping a vehicle. Thus, a police officer could contrive a reason to stop a vehicle merely to make an inquiry. However, an objective standard is present here-the Vehicle and Traffic Law.

Moreover, in none of the cases in which we have extended the rights of New York State defendants beyond those of the Federal Constitution have we questioned a police officer's authority to act when there was probable cause to conclude that a law or regulation has been violated. None of the reasons for extending protections of our Constitution beyond those given by the Federal Constitution exist here. In this case, regulating the ability of the police to stop a vehicle when there is probable cause to believe that a traffic regulation has been violated does little to expand the rights of the accused. Instead it may lead to the harm of innocent citizens. Thus, for example, in *People v. Reynolds*, the stop of the automobile led to the arrest of a person driving under the influence of alcohol.

The real concern of those opposing pretextual stops is that police officers will use their authority to stop persons on a selective and arbitrary basis. *Whren* recognized that the answer to such action is the Equal Protection Clause of the Constitution. We are not unmindful of studies, some of which are cited by defendants and the amici, which show that certain racial and ethnic groups are disproportionately stopped by police officers, and that those stops do not end in the discovery of a higher proportion of contraband than in the cars of other groups. The fact that such disparities exist is cause for both vigilance and concern about the protections given by the New York State Constitution. Discriminatory law enforcement has no place in our law.

Indeed, in *Brown v. State of New York*, 89 N.Y.2d 172, 652 N.Y.S.2d 223, 674 N.E.2d 1129 [1996], this Court recognized that in New York State, a plaintiff has a cause of action for a violation of the Equal Protection Clause 4 and the Search and Seizure Clause of the State Constitution. In upholding the right of African Americans to sue for alleged violations of their right to equal protection and freedom from unreasonable searches and seizures, when they were detained because of their race during a police investigation, this Court stated:

"These sections [art. I, §§ 11, 12] establish a duty sufficient to support causes of action to secure the liberty interests guaranteed to individuals by the State Constitution independent of any common-law tort rule. Claimants alleged that the defendant's officers and employees deprived them of the right to be free from unlawful police conduct violating the Search and Seizure Clause and that they

were treated discriminatorily in violation of the State Equal Protection Clause. The harm they assert was visited on them was well within the contemplation of the framers when these provisions were enacted for fewer matters have caused greater concern throughout history than intrusions on personal liberty arising from the abuse of police power. Manifestly, these sections were designed to prevent such abuses and protect those in claimants' position. A damage remedy in favor of those harmed by police abuses is appropriate and in furtherance of the purpose underlying the sections" (89 N.Y.2d, at 191).

The alternatives to upholding a stop based solely upon reasonable cause to believe a traffic infraction has been committed put unacceptable restraints on law enforcement. This is so whether those restrictions are based upon the primary motivation of an officer or upon what a reasonable traffic police officer would have done under the circumstances. Rather than restrain the police in these instances, the police should be permitted to do what they are sworn to do-uphold the law.

In none of the cases cited by defendants has this Court penalized the police for enforcing the law. We should not do so here. To be sure, the story does not end when the police stop a vehicle for a traffic infraction. Our holding in this case addresses only the initial police action upon which the vehicular stop was predicated. The scope, duration and intensity of the seizure, as well as any search made by the police subsequent to that stop, remain subject to the strictures of article I, § 12, and judicial review (*People v. Troiano*, 35 N.Y.2d 476, 363 N.Y.S.2d 943, 323 N.E.2d 183 [1974]; *People v. Marsh*, 20 N.Y.2d 98, 281 N.Y.S.2d 789, 228 N.E.2d 783 [1967]).

IV

…We are not confounded by the proposition that police officers must exercise their discretion on a daily basis. Nor are we surprised at the assertion that many New Yorkers often violate some provision of the Vehicle and Traffic Law. But we cannot equate the combination of police officer discretion and numerous traffic violations as arbitrary police conduct that the Supreme Court in *Delaware v. Prouse* viewed as evil. That conduct violates the Fourth Amendment because it was "standardless and unconstrained" (id., at 661, 99 S.Ct. 1391). In the cases before us, however, we confirm a standard that constrains police conduct-probable cause under the Vehicle and Traffic Law and its related regulations that govern the safe use of our highways.

Accordingly, in *People v. Robinson* and *People v. Glenn*, the orders of the Appellate Division should be affirmed. In *People v. Reynolds*, the order of the Monroe County Court should be reversed, defendant's motion to suppress denied, the accusatory instruments reinstated, and the case remitted to Rochester City Court for further proceedings in accordance with this opinion.

The U.S. Supreme Court held in 2014 that even if an officer is mistaken regarding the law, if that mistake is reasonable, the stop is still valid. Whether New York courts will apply this standard is yet to be determined.

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6.3: HEIEN v. NORTH CAROLINA

SUPREME COURT OF THE UNITED STATES:

Heien v. North Carolina

574 U.S. ___ (2014)

Following a suspicious vehicle, Sergeant Matt Darisse noticed that only one of the vehicle's brake lights was working and pulled the driver over. While issuing a warning ticket for the broken brake light, Darisse became suspicious of the actions of the two occupants and their answers to his questions. Petitioner Nicholas Brady Heien, the car's owner, gave Darisse consent to search the vehicle. Darisse found cocaine, and Heien was arrested and charged with attempted trafficking. The trial court denied Heien's motion to suppress the seized evidence on Fourth Amendment grounds, concluding that the vehicle's faulty brake light gave Darisse reasonable suspicion to initiate the stop. The North Carolina Court of Appeals reversed, holding that the relevant code provision, which requires that a car be "equipped with a stop lamp," N. C. Gen. Stat. Ann. §20–129(g), requires only a single lamp —which Heien's vehicle had—and therefore the justification for the stop was objectively unreasonable. Reversing in turn, the State Supreme Court held that, even assuming no violation of the state law had occurred, Darisse's mistaken understanding of the law was reasonable, and thus the stop was valid.

Held: Because Darisse's mistake of law was reasonable, there was reasonable suspicion justifying the stop under the Fourth Amendment.

(a) The Fourth Amendment requires government officials to act reasonably, not perfectly, and gives those officials "fair leeway for enforcing the law," *Brinegar v. United States*, 338 U. S. 160. Searches and seizures based on mistakes of fact may be reasonable. See, e.g., *Illinois v. Rodriguez*, 497 U. S. 177 –186. The limiting factor is that "the mistakes must be those of reasonable men." *Brinegar, supra*, at 176. Mistakes of law are no less compatible with the concept of reasonable suspicion, which arises from an understanding of both the facts and the relevant law. Whether an officer is reasonably mistaken about the one or the other, the result is the same: the facts are outside the scope of the law. And neither the Fourth Amendment's text nor this Court's precedents offer any reason why that result should not be acceptable when reached by a reasonable mistake of law.

More than two centuries ago, this Court held that reasonable mistakes of law, like those of fact, could justify a certificate of probable cause. *United States v. Riddle*, 5 Cranch 311, 313. That holding was reiterated in numerous 19th-century decisions. Although Riddle was not a Fourth Amendment case, it explained the concept of probable cause, which this Court has said carried the same "fixed and well known meaning" in the Fourth Amendment, *Brinegar, supra*, at 175, and n. 14, and no subsequent decision of this Court has undermined that understanding. The contrary conclusion would be hard to reconcile with the more recent precedent of *Michigan v. DeFillippo*, 443 U. S. 31, where the Court, addressing the validity of an arrest made under a criminal law later declared unconstitutional, held that the officers' reasonable assumption that the law was valid gave them "abundant probable cause" to make the arrest, *id.*, at 37. *Heien* attempts to recast *DeFillippo* as a case solely about the exclusionary rule, not the Fourth Amendment itself, but *DeFillippo's* express holding is that the arrest was constitutionally valid because the officers had probable cause. See *id*., at 40. Heien misplaces his reliance on cases such as *Davis v. United States*, 564 U. S. ___, where any consideration of reasonableness was limited to the separate matter of remedy, not whether there was a Fourth Amendment violation in the first place.

Heien contends that the rationale that permits reasonable errors of fact does not extend to reasonable errors of law, arguing that officers in the field deserve a margin of error when making factual assessments on the fly. An officer may, however, also be suddenly confronted with a situation requiring application of an unclear statute. This Court's holding does not discourage officers from learning the law. Because the Fourth Amendment tolerates only objectively reasonable mistakes, *cf. Whren v. United States*, 517 U. S. 806, an officer can gain no advantage through poor study. Finally, while the maxim "Ignorance of the law is no excuse" correctly implies that the State cannot impose punishment based on a mistake of law, it does not mean a reasonable mistake of law cannot justify an investigatory stop.

(b) There is little difficulty in concluding that Officer Darisse's error of law was reasonable. The North Carolina vehicle code that requires "a stop lamp" also provides that the lamp "may be incorporated into a unit with one or more other rear lamps," N. C. Gen. Stat. Ann. §20–129(g), and that "all originally equipped rear lamps" must be "in good working order," §20–129(d). Although the

State Court of Appeals held that “rear lamps” do not include brake lights, the word “other,” coupled with the lack of state-court precedent interpreting the provision, made it objectively reasonable to think that a faulty brake light constituted a violation.

367 N. C. 163, 749 S. E. 2d 278, affirmed.

Roberts, C. J., delivered the opinion of the Court, in which Scalia, Kennedy, Thomas, Ginsburg, Breyer, Alito, and Kagan, JJ., joined. Kagan, J., filed a concurring opinion, in which Ginsburg, J., joined. Sotomayor, J., filed a dissenting opinion.

DRIVING WHILE INTOXICATED (DWI) IN NEW YORK: New York has two ways of convicting a driver of driving while intoxicated:

1. Operating a motor vehicle while having a blood alcohol content (BAC) of .08 percent or more. The blood alcohol content is usually measured through analysis of your breath by a breathalyzer machine, although blood and urine samples can also be used. (V&T Section 1192)

2. Operating a motor vehicle while your ability to do so is seriously impaired by intoxication. Under this method, the proof against you is the testimony of witnesses, the arresting officer, persons who saw you drive, a bartender who served you alcohol before you drove, etc. (V&T Section 1192(3)). This charge is frequently referred to as common law driving while intoxicated.

A lesser-included charge of Driving While Intoxicated is Driving While Ability Impaired, which is a violation, not a crime. It requires a BAC between .05 and .07, or other evidence of impairment.

THE BREATHALYZER TEST: Driving in New York is a privilege, not a right. This privilege is conditioned upon a driver’s willingness to take a breathalyzer test when asked by the police. This is referred to as the implied consent law. Because you are deemed to have consented, a blood test can be taken if you are unconscious, (*People v Kates*, 53 NY2d 591(1981)). Without a court order, a driver cannot be forced to take a breathalyzer, but, if you refuse, there are consequences. A court order can be obtained if you are involved in an accident in which death or serious physical injury occurs [V&T Section 1194(3)(b)(1). If such an order is issued by a judge, your blood will be taken so it can be tested for alcohol content.

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6.4: PEOPLE v KATES

STATE OF NEW YORK COURT OF APPEALS

People v Kates

53 NY2d 591(1981)

(Case Syllabus edited by the Author)

WACHTLER, J.

The primary question on this appeal is whether a blood alcohol test of a hospitalized driver, who was unconscious or so disoriented that the police were unable to obtain his consent, was made in violation of section 1194 of the Vehicle and Traffic Law. The trial court suppressed the test results holding that the statute requires express consent and that a contrary interpretation would violate the equal protection rights of the unconscious driver. The Appellate Division reversed finding no statutory or constitutional bar to admissibility. The defendant appeals claiming the trial court properly suppressed. He also argues that the prosecutor possesses other evidence of intoxication and thus had no right to appeal the suppression order in this case.

At approximately 6:00 P.M. on March 3, 1979 a car driven by the defendant collided with another car fatally injuring the woman driving that vehicle. The defendant and his three passengers were removed to nearby hospitals. After examining the accident scene, the police spoke to one of the defendant's passengers who appeared to be intoxicated. At approximately 9:00 P.M., the police went to see the defendant who was then in another emergency room being treated for various injuries including lacerations of the head. As the police approached the defendant they detected an odor of alcohol, observed that his eyes were bloodshot and watery and concluded that he was intoxicated. They also concluded, and it was found as a fact at the hearing, that the defendant was so disoriented as to be incapable of giving or refusing consent to a blood test. Thus, unable to obtain his consent the police simply asked the attending physical to take a blood sample. This was done without incident and subsequent analysis showed that defendant's blood contained .18% by weight of alcohol. The defendant was indicted for criminally negligent homicide, driving while intoxicated, and related offenses.

Prior to trial the defendant moved to suppress the blood test results claiming they were obtained without his consent in violation of section 1194 of the Vehicle and Traffic Law and his constitutional rights under the Fourth Amendment and the equal protection clause of the Fourteenth Amendment. After a hearing the court found that it was, in fact, impossible for the police to obtain defendant's consent because of his condition at the time of the test. Nevertheless, the court concluded that under the statute blood test results are not admissible unless the defendant "expressly consented" to the test. The court also agreed with the defendant that if the statute were construed to dispense with the need to consent in the case of an unconscious driver it would violate the defendant's constitutional right of equal protection.

The People appealed the suppression order (CPL § 450.20, subd 8) and certified that the remaining proof was not enough to obtain a conviction (CPL § 450.50, subd 1). The Appellate Division reversed, concluding that section 1194 literally read did not require the driver's express consent to a blood test and that its history showed that the Legislature did not intend lack of consent to be a bar to the admissibility of blood test results when the driver was unconscious or otherwise incapable of giving or refusing consent. The court also found that there was a basis for distinguishing between conscious drivers and unconscious drivers and thus no denial of equal protection. The defendant's contention that the suppression order was not appealable because the prosecutor had other evidence of intoxication was found to be without merit in view of the prosecutor's certification that the suppressed evidence was essential to his case. On these points we agree with the Appellate Division.

Initially it should be noted that taking the blood sample in this case did not involve any violation of the defendant's constitutional rights under the Fourth or Fifth Amendments. Taking a driver's blood for alcohol analysis does not call for testimonial compulsion prohibited by the Fifth Amendment (*Schmerber v California*, 384 U.S. 757, 760-765; *People v Thomas*, 46 N.Y.2d 100). Nor does it involve an unreasonable search under the Fourth Amendment when there is probable cause, exigent circumstances and a reasonable examination procedure (*Schmerber v California*, *supra*, pp 768-772). So long as these requirements are met — and the defendant does not suggest that they were not met in this case — the test may be performed absent defendant's consent and indeed over his objection without violating his Fourth Amendment rights (*Schmerber v California*, *supra*, p 759).

Thus, the defendant's contention that the test made without his consent was illegal, depends solely upon his interpretation of section 1194 of the Vehicle and Traffic Law. Subdivision 1 of that statute establishes the general rule that "Any person who operates a motor vehicle in this state shall be deemed to have given his consent" to such a test. Subdivision 2 contains an exception which is only applicable when the driver refuses to consent. It states, "If such person having been placed under arrest or after a breath test indicates the presence of alcohol in his system and having thereafter been requested to submit to such chemical test, refuses to submit to such chemical test, the test shall not be given". The statute also provides penalties for the driver who refuses to submit after being advised of the consequences of refusal (see subds 2, 4; *People v Thomas, supra*, p 108).

Literally read the statute was not violated in this case because the defendant had not refused consent. Of course, the result would be different if the Legislature had provided that no test could be given unless the driver expressly consents to it. Under such a statute consent would be a prerequisite and the unconscious or incapacitated driver could not be given a blood test because of the impossibility of obtaining his consent. However, subdivision 2 cannot be read as requiring the driver's express consent because that would effectively nullify the consent implied in subdivision 1 or at least make the statute inherently inconsistent. In any event that is not the way the Legislature worded the exception and the history of the statute shows that the wording was carefully chosen with this situation in mind. The legislative committee responsible for this statute noted in its report: "In the case of an unconscious individual, a chemical test can be administered since he is deemed to have given his consent when he used the highway. It is not necessary that a person be given the opportunity to revoke his consent. The only reason the opportunity to revoke is given is to eliminate the need for the use of force by police officers if an individual in a drunken condition should refuse to submit to the test" (Report of Joint Legislative Committee on Motor Vehicle Problems, McKinney's 1953 Session Laws of NY, pp 1912-1928). Indeed, it would have been odd if the Legislature had provided that the blood test and the penalties for refusal designed to remove drunken drivers from the road would become inapplicable when the driver has, by excessive drinking or injuries sustained in a related accident, made himself incapable of consenting or refusing to submit to the test.

The distinction drawn between the conscious driver and the unconscious or incapacitated driver does not offend the equal protection clause. It was reasonable for the Legislature, concerned with avoiding potentially violent conflicts between the police and drivers arrested for intoxication, to provide that the police must request the driver's consent, advise him of the consequences of refusal and honor his wishes if he decides to refuse, but to dispense with these requirements when the driver is unconscious or otherwise incapacitated to the point where he poses no threat. Indeed, there is a rational basis for distinguishing between the driver who is capable of making a choice and the driver who is unable to do so. Thus, denying the unconscious driver the right to refuse a blood test does not violate his right to equal protection.

As noted the defendant also contends that the prosecutor had no right to appeal the suppression order because the defendant believes that the remaining evidence is sufficient to sustain a conviction. The statute provides however, that the prosecutor may appeal not only where the remaining proof is legally insufficient but also where he certifies that it is "so weak in its entirety that any reasonable possibility of prosecuting such charge to a conviction has been effectively destroyed" (CPL § 450.50, subd 1, par [b]). The quoted portion obviously calls for a personal evaluation which can only be made by the prosecutor who is a better judge than his opponent or an appellate court of his chance of succeeding at trial with the remaining proof. Nor is there any general need to check the accuracy of the prosecutor's assessment since the statute itself discourages a prosecutor from overestimating his need for the suppressed evidence. Once he files the certification and takes an appeal, he will not be permitted to change his position and try the defendant on other proof if the suppression order is upheld on appeal (CPL § 450.50, subd 2; *Matter of Forte v Supreme Ct. of State of N. Y.*, 48 N.Y.2d 179). Thus, the prosecutor's certification is sufficient; he need not expose his case for appellate confirmation of his likelihood of obtaining a conviction without the suppressed proof.

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

FUCHSBERG, J. (concurring).

While, for the reasons I advanced in my dissent in *People v Thomas*, (46 N.Y.2d 100, 110-113), I do not depart from my conviction that section 1194 of the Vehicle and Traffic Law runs afoul of the fundamental constitutional bar against testimonial compulsion, I am now constrained to concur on authority of the majority's holding in that case.

Order affirmed.

RAMIFICATIONS OF REFUSING TO TAKE A BREATHALYZER TEST: Whether or not a person should take the breathalyzer test when asked by the police to do so is not an easy question to answer. There may be instances where refusing to

take the test is in a person's best interest. However, it is important to know what the ramifications are for refusing to do so.

Upon a finding by the Department of Motor Vehicles (DMV) that a defendant did indeed refuse to take the breathalyzer test, the defendant's license to drive will automatically be revoked for a period of one year with a $500.00 fine and 18 months and a $750 fine if the defendant has a prior DWI conviction.

At trial, the District Attorney will be allowed to introduce into evidence the fact that

> the defendant refused to take the test. The defendant's refusal does not prevent the defendant from being charged and convicted of common law Driving While Intoxicated in violation of V&T Section 1192(3).\

Some District Attorney offices have a policy of not offering plea bargains to

> defendants that refuse to that the breathalyzer test.

ATTORNEYADVICE ON SUBMITTINGTO A BREATHALYZER TEST: If a suspect driver asks to consult with their attorney, the police must allow the suspect the opportunity to try to contact their attorney. However, if the attorney cannot be reached within a reasonable time, the suspect will be required to make the decision on your own (*People v Gursey*, 22 NY2d 224 (1968))

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6.5: ADMINISTERING THE BREATHALYZER TEST

The breathalyzer test must be given within two hours of the arrest of the suspect. Prior to administering the test, the suspect must be closely monitored for a period of at least twenty minutes. During this time, the suspect will not be allowed to chew gum, take mouthwash, or place any other object in their mouth. This is to guard against a false reading caused by introducing a chemical substance into the suspect's mouth.

The suspect will then be asked to blow for a sustained period of time into a small glass ampule. This ampule will then be analyzed by the breathalyzer machine which in turn will print out a copy of the machine's analysis of the suspect's blood alcohol content. Breathalyzers don't actually measure blood alcohol concentration (BAC) directly, they estimate BAC based on breath alcohol.

It is estimated that a breathalyzer machines are accurate to within .01. That degree of accuracy may sound great, but consider the fact that if the test is off by .01, the range when a person blows into the machine can be from .07 to .09. Since the law in NYS is that it is a crime to drive with a BAC of .08, but a violation to drive with a BAC of .07, that degree of accuracy of .01 may not be so great after all.

FACTORS TO BE CONSIDERED IN DECIDING TO TAKE THE TEST: If possible, a suspect should consult with an attorney before making the decision to take a breathalyzer test. The following are some of the more typical matters to consider in making this decision:

- Was an accident involved?
- Does the driver have a prior alcohol related driving conviction? If so, when did this occur?
- Does the driver have a prior DWI conviction? If so, when did this occur?
- Will the driver need their license for purposes of employment or other reasons?

NEW YORK FIELD SOBRIETY TESTS: When a police officer suspects a driver of being intoxicated, they will ask the driver to perform a series of physical acts to determine whether the physical coordination or lack thereof is indicative of intoxication or the influence of drugs. These are called field sobriety tests and vary across the state.

Generally, the field sobriety tests consist of the point finger-to-nose, walk-and-turn in a straight line, stand on one leg, the Horizontal Gaze Nystagmus (HGN), and recite the alphabet. The officers also use their personal observations to make a determination of intoxication. Depending on how a suspect performs in these various tests, the officer may request the suspect to breath into a small portable device known as an Alco-Sensor. This is not to be confused with the breathalyzer machine. The Alco-Sensor is used as a screening tool to determine the presence of alcohol in your breath. It is not evidence of intoxication itself. A suspect can refuse to submit to the field sobriety tests in the same manner as refusing to take a breathalyzer test.

Regardless of whether a driver submits to the field sobriety tests or agrees to the breathalyzer test, an officer is making observations about the suspect's condition. These include whether the officer smells alcohol on the suspects breath, the suspect has blood shot eyes, sways while standing, has slurred speech, or has a flushed face. All of these observations can be submitted as evidence of intoxication through testimony of the officer at trial.

FINANCIAL COSTS OF A DWI ARREST/CONVICTION: Whether a person is guilty or not of driving while intoxicated, just being charged can be expensive. Attorney fees, loss of time from work, drastically increased rates of insurance are all to be expected. The following can be found on the New York State Department of Motor Vehicles website

(dmv.ny.gov) regarding the penalties for an alcohol or drug-related violation include the loss of driving privileges, fines, and a possible jail term. (https://dmv.ny.gov/org/tickets/penalties-alcohol-or-drug-related-violations July 23, 2018)

Violation	Fine	Jail	License Action
Aggravated Driving While Intoxicated (A-DWI)	$1,000 – $2,500	1 year	Revoked for at least one year
Second A-DWI in 10 years (E felony)	$1,000 – $5,000	4 years	Revoked for at least 18 months
Third A-DWI in 10 years (D felony)	$2,000 – $10,000	7 years	Revoked for at least 18 months
Driving While Intoxicated (DWI) or Driving While Impaired by a Drug (DWAI-Drug)	$500 – $1,000	1 year	DWI-Revoked for at least six months. DWAI-Drugs – Suspended for at least six months
Second DWI/DWAI-Drug violation in 10 years (E felony)	$1,000 – $5,000	4 years	Revoked for at least one year
Third DWI/DWAI-Drug violation in 10 years (D felony)	$2,000 – $10,000	7 years	Revoked for at least one year
Driving While Ability Impaired by a Combination of Alcohol/Drugs (DWAI-Combination)	$500 – $1,000	1 year	Revoked for at least six months
Second DWAI/Combination in 10 years (E felony)	$1,000 – $5,000	4 years	Revoked for at least one year
Third DWAI/Combination in 10 years (D felony)	$2,000 – $10,000	7 years	Revoked for at least one year
Driving While Ability Impaired by Alcohol (DWAI)	$300 – $500	15 days	Suspended for 90 days
Second DWAI violation in 5 years	$500 – $750	30 days	Revoked for at least six months
Third or subsequent DWAI within 10 years (Misdemeanor)	$750 – $1,500	180 days	Revoked for at least six months

Zero Tolerance Law	$125 civil penalty and $100 fee to terminate suspension	None	Suspended for six months
Second Zero Tolerance Law	$125 civil penalty and $100 re-application fee	None	Revoked for one year or until age 21
Chemical Test Refusal	$500 civil penalty ($550 for commercial drivers)	None	Revoked for at least one year, 18 months for commercial drivers
Chemical Test Refusal within five years of a previous DWI-related charge/Chemical Test Refusal	$750 civil penalty	None	Revoked for at least 18 months, one-year or until age 21 for drivers under age 21, permanent CDL revocation for commercial drivers
Chemical Test Refusal – Zero Tolerance Law	$300 civil penalty and $100 re-application fee	None	Revoked for at least one year
Chemical Test Refusal – Second or subsequent Zero Tolerance Law	$750 civil penalty and $100 re-application fee	None	Revoked for at least one year
Driving Under the Influence (Out-of-State)	N/A	N/A	Revoked for at least 90 days. If less than 21 years of age, revoked at least one year
Driving Under the Influence (Out-of State) with any previous alcohol-drug violation	N/A	N/A	Revoked for at least 90 days (longer term with certain prior offenses). If less than 21 years of age, revoked at least one year or until age 21 (longest term)

ZERO TOLERANCE LAW: This law makes it illegal for a driver under age 21 to have consumed any alcohol. A police officer may temporarily detain a driver to request or administer a chemical test to determine the driver's Blood Alcohol Content (BAC). If the driver's BAC is .02 to .07 percent, the driver will be notified to appear at a DMV hearing. If the judge's finding supports the charge, the penalty is a 6-month license suspension, a $125 civil penalty, and a $100 suspension termination fee. Each additional offense will result in the driver's license being revoked for at least one year or until age 21, whichever is longer, plus a $125 civil penalty, and a $100 license re-application fee. If the driver's BAC is .05 percent or greater, the police may charge driver with driving while ability impaired (DWAI) or driving while intoxicated (DWI) and may prosecute the driver in criminal court. (Source: dmv.ny.gov)

IGNITION INTERLOCK: Any driver convicted of misdemeanor or felony drunk driving charges – even first-time offenders – are required to install and maintain ignition interlock devices at their own expense on any vehicles they own or operate. For an Aggravated DWI offense or any repeat alcohol or drug offense within five years, a judge is required to order the system installed on each vehicle owned or operated by the motorist during both the revocation period and any probation period that follows. The judge also must order an alcohol assessment for the repeat offender.

The device, purchased and installed at the expense of the motorist, is connected to a motor vehicle ignition system and measures the alcohol content of the operator's breath. As a result, the vehicle cannot be started until the driver provides an acceptable sample breath. The motorist may be qualified to hold a conditional license during the time an interlock device is in use. This conditional driver license will be revoked if the motorist does not comply with the court terms or for conviction of any traffic offense except parking, stopping or standing. (Source: dmv.ny.gov)

LEANDRAS LAW: This legislation makes operating a motor vehicle while intoxicated or under the influence of drugs with a passenger under the age of 16 a Class E felony punishable by up to four years in state prison. Courts must order all drivers, including youthful offenders, convicted of driving while intoxicated or aggravated driving while intoxicated to install and maintain an ignition interlock on any vehicle owned or operated by such driver for at least 12 months. The law also makes it a felony to drive drunk with a conditional license. Drivers who drive while intoxicated or impaired by drug and cause the death of a child under 16 in the vehicle may be charged with a Class B felony punishable by up to 25 years in prison. Drivers who drive while intoxicated or impaired by drugs and cause serious physical injury to a child under 16 in the vehicle may be charged with a Class C felony punishable by up to 15 years in prison. (Source: dmv.ny.gov)

LOSS OF LICENSE FOR A DWI CONVICTION: After a conviction of an alcohol-related offense, the defendant's license is usually revoked. One exception is for first Driving While Ability Impaired convictions which results in a suspension for 90 days, not a revocation. Even if not convicted, a defendant's license can be still be revoked by the DMV for refusing to take a breathalyzer test.

In some instances, by paying a fee and attending and completing a state-approved Alcohol and Drug Rehabilitation program, sometimes called a Drinking Driver Program, and by attending Victim Impact Panels, you can apply to have your license restored and, additionally, the court can allow you a "conditional license," which enables you to drive to work, school, and medical appointments.

LEGALITY OF SOBRIETY CHECKPOINTS AND ROADBLOCKS: In the *People v. Scott*, 63 NY2d 518 (1984) case the New York Court of Appeals upheld the constitutionality of such roadblocks, as long as they are conducted according to certain guidelines and not applied in a discriminatory manner.

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6.6: PEOPLE v. SCOTT

STATE OF NEW YORK COURT OF APPEALS

People v. Scott

63 NY2d 518 (1984)

(Case Syllabus edited by the Author)

MEYER, J.

A roadblock established pursuant to a written directive of the County Sheriff for the purpose of detecting and deterring driving while intoxicated or while impaired, and as to which operating personnel are prohibited from administering sobriety tests unless they observe listed criteria, indicative of intoxication, which give substantial cause to believe that the operator is intoxicated, is constitutionally permissible, notwithstanding that the location of the roadblock is moved several times during the three- to four-hour period of operation, and notwithstanding that legislative initiatives have also played a part in reducing the incidence of driving while intoxicated in recent years. Defendant having pleaded guilty to driving while impaired after denial of his motion to suppress the evidence obtained at the roadblock, the order of the County Court, Genesee County, affirming his conviction, should, therefore, be affirmed.

I

At about 2:00 A.M. on Saturday, September 25, 1982, defendant, while driving on Route 5 in the Town of LeRoy, came up to a roadblock established pursuant to a directive of the Sheriff of Genesee County. He was directed to pull to the side and there was requested by Chief Deputy Sheriff Maha to produce his license, registration and insurance card. Observing that defendant fumbled a bit with his wallet, that his eyes were watery and bloodshot and that there was a strong odor of alcohol, Maha asked whether defendant had been drinking. After defendant responded that he had just left a bar, he was asked to step out of his car. As he did so he was unstable on his feet and was unable successfully to perform heel-to-toe and finger-to-nose tests. Based on those facts and an alco-sensor breath screening test, which defendant agreed to take, Maha concluded that defendant was intoxicated and placed him under arrest.

The roadblock had been established pursuant to a March 5, 1982 memorandum of the County Sheriff which called attention to the deaths, injuries and losses occasioned by intoxicated drivers and the need “to employ every lawful means to deter and apprehend the drunken driver.” It quoted from the October, 1981 Report of the Governor’s Alcohol and Highway Safety Task Force the value of “systematic traffic checkpoints at known DWI and high accident locations during peak hours”, and the advisability that, “Such checks at specific sites * * * be of short duration, with an ability to move quickly to new sites to insure that the drinking driver will not be able to forecast checkpoint locations”, and noted that the “greatest risk is on weekend late evening/early morning hours, when one in every ten vehicles or less contains an intoxicated driver.” In succeeding detailed paragraphs it established procedures for site selection, lighting and signs; avoidance of discrimination by stopping all vehicles, or every second, third or fourth vehicle; location of screening areas off the highway to which vehicles would be directed; the nature of the inquiries to be made, with specific direction that unless the operator’s appearance and demeanor gave cause to believe him or her intoxicated sobriety tests not be given. It listed the factors to be considered and stated that neither the odor of alcohol alone nor any one of the listed factors would suffice as a basis for sobriety tests. It also directed that checkpoint sites be prescreened and that from two to four locations be used during a four-hour period.

Under that procedure roadblocks were established once each month between midnight and 3:00 A.M., at locations selected in advance by senior personnel. Of the predetermined sites, four had been selected for use on September 25, 1982, the roadblock at each location being maintained for some 20 to 30 minutes before moving on to the next. Defendant was stopped at the third location in use that night. At that location warning signs were set up on the shoulders facing traffic from both directions some 300 feet in advance of the checkpoint,1 two police vehicles exhibiting flashing roof lights were placed so that their headlights illuminated the signs, and flares were placed in the center of the road. The checkpoint was manned by 10 persons, 6 from the Sheriff’s office and 4 from the auxiliary police, and all vehicles approaching from either direction were stopped.2 In addition, two

patrol cars were stationed in the area to follow and observe for possible violations any vehicle that avoided the roadblock by making a U-turn.

Defendant moved to suppress the evidence obtained at the roadblock. After a hearing the Town Justice denied the motion, finding that it had been operated in a uniform, nonarbitrary and nondiscriminatory manner. The County Court affirmed, finding the State's interest in curbing drunken drivers great and the operation of the roadblock sufficient to allay feelings of fright or annoyance and to circumscribe sufficiently the discretion of the personnel engaged in the operation. On appeal to this court defendant argues that deterrence is an improper purpose, that a temporary roadblock is constitutionally impermissible, and that it has not been shown that less intrusive means of enforcement would not be effective. We affirm.

II

There is, of course, no question that a roadblock or checkpoint stop is a seizure within the meaning of the Fourth Amendment but it is also true that there is only a diminished expectation of privacy in an automobile and that individualized suspicion is not a prerequisite to a constitutional seizure of an automobile which is "carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers."

The permissibility of a particular practice is a function of its "reasonableness," which is determined by balancing its intrusion on the Fourth Amendment interests of the individual involved against its promotion of legitimate governmental interests. Of importance in that analysis are the governmental interest involved and the effect of the procedure in relation to it, on the one hand, and, on the other, the degree of intrusion of the procedure on the individual subjected to it, measured in terms of both its subjective effect and the degree of discretion vested in the officials charged with carrying it out.

The importance of the governmental interest here involved is beyond question. "The carnage caused by drunk drivers is well documented and needs no detailed recitation here."

Moreover, in light of the specific procedures devised and promulgated to law enforcement personnel by the head of their department, the Sheriff, and the way in which the particular roadblock was being operated when defendant was stopped, the courts below could properly conclude that it did not intrude to an impermissible degree upon the privacy of motorists approaching the checkpoint, that it was being maintained in accordance with a uniform procedure which afforded little discretion to operating personnel, and that adequate precautions as to safety, lighting and fair warning of the existence of the checkpoint were in operation. The fact that the plan contemplated situations in which not every car would be stopped did not affect its validity in view of the specific nondiscriminatory pattern of selection it called for and of the reasonableness of allowing some cars to pass when traffic became congested.

Nor is the plan invalid because of its deterrent purpose, the shifting of checkpoints after short periods of time, or the question raised by defendant concerning its efficiency.

The value of roadblocks in decreasing drunk driving is attested by both the United States Department of Transportation and the Governor's Alcohol and Highway Safety Task Force. A 1983 paper on Safety Checkpoints For DWI Enforcement issued by the Department of Transportation's National Highway Traffic Safety Administration's Office of Alcohol Countermeasures emphasizes the importance of informing the public about DWI checkpoint operations as the chief means of deterring driving while intoxicated, and the Governor's Task Force found "that the systematic, constitutionally conducted traffic checkpoint is the single most effective action in raising the community's perception of the risk of being detected and apprehended for drunk driving". Moreover, the Supreme Court has held deterrence to be a legitimate governmental purpose not only with respect to legislation but also with respect to checkpoint stops. We conclude, therefore, as did the Maryland Court of Appeals in *Little v State* that deterrence by fear of apprehension is a constitutionally proper means of keeping drunk drivers off the highways, though it may not be with respect to pedestrians (see *People v Johnson*, 63 N.Y.2d 888).

Nor is constitutionality affected by the shifting and temporary nature of the checkpoints. The fact that the Supreme Court has approved permanent roadblocks, but disapproved roving patrol stops is not determinative. What is critical is the intrusiveness of the checkpoint in relation to the governmental purpose involved. The subjective effect upon a vehicle driver approaching a roadblock is unrelated to whether it is permanent or was established but a few minutes before the driver approached it; in either instance his or her observation of it will be measured in minutes if not seconds. The likelihood of there being the kind of fright or annoyance that invalidates a random stop made by a roving patrol is obviated in the case of a temporary checkpoint by the visible signs of

authority which the checkpoint entails — signs announcing the purpose, lighting, and identifiable police vehicles and the observable fact that there is a uniform system for stopping cars (*United States v Hernandez*, 739 F.2d 484; *Little v State, supra*). The only subjective difference between temporary and permanent checkpoints is that because its location is known in advance the latter can be avoided entirely by using a different route, but that difference is minimal as concerns anxiety, especially since a temporary checkpoint can also be avoided. Of greater importance on the other side of the equation is the fact that both the detection and deterrence purposes would be adversely affected, if not forestalled entirely, were drunk driving checkpoints required to remain in one place, the known and permanent location of the checkpoint making it easily avoidable.

Nor, finally, is there sufficient question about the productivity of DWI checkpoints to require invalidation of the procedure. The contrary argument is based on the effectiveness of the procedure as a means of apprehension and ignores entirely its deterrent effect. There can be no question that substantial reductions have occurred since 1980 in the deaths, injuries and damage resulting from drunken driving. Thus, the Report of the Subcommittee on Drunk Driving of the Assembly Transportation Committee (at p 2) contains findings that highway fatalities from 1980 to 1983 decreased by 21%, while the risk of being in an accident, as measured by vehicle miles traveled, increased by 5.5%; alcohol-involved fatal accidents decreased 25% from 1981 to 1983; all accidents have declined by less than 1.5% since 1980, while reported alcohol-involved accidents have fallen at almost ten times that rate (14.5%); accidents during bar hours have declined 21.3% since 1980, while nonbar hour accidents actually have increased 3.6%; and fatal accidents during bar hours have decreased 33% since 1980, while nonbar hour fatal accidents have decreased only 11%. The extent to which those results stem from legislative reforms during that period as distinct from the deterrent effect of roadblocks and other educational and public information programs aimed at combatting the problem is not revealed, but in our view is not of constitutional moment. It is enough that such checkpoints, when their use becomes known, do have a substantial impact on the drunk driving problem (*Little v State*, 300 Md, at p 504, supra).

The State is entitled in the interest of public safety to bring all available resources to bear, without having to spell out the exact efficiency coefficient of each component and of the separate effects of any particular component (*cf. Mackey v Montrym*, 443 US, at p 19, supra). There being a reasonable basis for concluding that considering both its detection and its deterrence effect, the DWI checkpoint procedure in question is a valuable component of the program to control drunk driving, we conclude that it is a sufficiently productive mechanism to justify the minimal intrusion involved.

For the foregoing reasons, the order of the County Court, Genesee County, should be affirmed.

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6.7: PEOPLE v GURSEY

STATE OF NEW YORK

COURT OF APPEALS

People v Gursey

22 NY2d 224 (1968)

(Case Syllabus edited by the Author)

BREITEL, J.

The People appeal from an order of the Appellate Term unanimously reversing a judgment of the Criminal Court of the City of New York, New York County, and ordering a new trial. Defendant had been convicted, after trial, of the misdemeanor of driving while intoxicated (Vehicle and Traffic Law, § 1192, subd. 2) and the offense of driving the wrong way on a one-way street. * On the drunken driving charge, he was sentenced to pay a fine of $100 or serve 10 days in jail. The latter conviction was reversed by the Appellate Term because of the trial court's failure to suppress on defendant's application the results of a drunkometer test performed after defendant had been denied an opportunity to telephone his lawyer. Since there was sufficient other evidence of intoxication, the Appellate Term ordered a new trial.

The only issue presented is whether a criminal conviction may rest upon the results of a chemical test performed over the defendant's initial objection and after he had been prevented from telephoning his lawyer for legal advice concerning the test, such communication involving no significant or obstructive delay. Since it is concluded that the test results were secured in violation of defendant's privilege of access to counsel without occasioning any significant or obstructive delay, the order of the Appellate Term should be affirmed.

On the evening of February 7, 1966, one Patrolman Foley, while on radio patrol, stopped defendant's automobile traveling eastward in Manhattan on 47th Street, a one-way west street. While questioning defendant driver, the officer noticed that defendant's head was bobbing, his speech was slurred, and his breath betrayed an alcoholic odor. The officer drove defendant to the station house and questioned him there. At a point during the questioning, defendant asked permission to call his lawyer and was told, "You will be allowed to make a call to your attorney after I get this information." Significantly, defendant had a particular attorney in mind when he requested permission to call. Although at one-point defendant indicated an intention to claim his privilege against self-incrimination, he nevertheless continued to answer questions and perform co-ordination tests, after his request to call his lawyer had been denied. When asked to submit to a drunkometer or breath analysis test, however, defendant refused, and again asked for permission to call his lawyer. Another police officer, the sergeant in charge of the drunkometer test, told defendant, "You have got to take this test." When defendant asked what would happen if he did not submit to the test, the sergeant replied, "If you don't take this test, the State will take away your license." Thereupon, defendant submitted to the test.

At trial, a voir dire was held to determine the admissibility of the statements made by defendant as well as the results of the physical co-ordination exercises and drunkometer tests. The trial court suppressed the statements and the results of the co-ordination tests, but admitted evidence of the drunkometer readings. The Appellate Term unanimously reversed on the ground that "the denial of defendant's request to telephone his attorney before he took the test violated his constitutional rights".

In light of current recognition of the importance of counsel in criminal proceedings affecting significant legal rights, law enforcement officials may not, without justification, prevent access between the criminal accused and his lawyer, available in person or by immediate telephone communication, if such access does not interfere unduly with the matter at hand. This court recently noted, in another context, that: "As a matter of fairness, government ought not compel individuals to make binding decisions concerning their legal rights in the enforced absence of counsel" (*People v. Ianniello*, 21 N.Y.2d 418, 424; see *Escobedo v. Illinois*, 378 U.S. 478, 486; *People v. Donovan*, 13 N.Y.2d 148, 153). In the present case, defendant possessed a number of statutory options which could be asserted only during the transaction at the station house, and concerning which the advice of counsel, if available, was relevant.

Subdivision 1 of section 1194 of the Vehicle and Traffic Law reads: “1. Any person who operates a motor vehicle or motorcycle in this state shall be deemed to have given his consent to a chemical test of his breath, blood, urine, or saliva for the purpose of determining the alcoholic * * * content of his blood provided that such test is administered at the direction of a police officer having reasonable grounds to believe such person to have been driving in an intoxicated condition or, while his ability to operate such motor vehicle or motorcycle was impaired by the consumption of alcohol * * * and in accordance with the rules and regulations established by the police force of which he is a member. If such person having been placed under arrest and having thereafter been requested to submit to such chemical test refuses to submit to such chemical test, the test shall not be given, but the commissioner shall revoke his license or permit to drive and any non-resident operating privilege”.

By these provisions, defendant had the option to refuse to take the drunkometer test, electing instead to submit to the revocation of his license. In addition, if he elected to take the test, he was entitled “to have a physician of his own choosing administer a chemical test in addition to the one administered at the direction of the police officer” (Vehicle and Traffic Law, § 1194, subd. 4). Of course, defendant was informed that he would lose his license if he refused to take the police-administered test. Nevertheless, he wished legal counseling concerning his option and refused to submit to the test until his several requests to telephone his lawyer were denied. Granting defendant’s requests would not have substantially interfered with the investigative procedure, since the telephone call would have been concluded in a matter of minutes. At least, the record here does not indicate otherwise. Consequently, the denial of defendant’s requests for an opportunity to telephone his lawyer must be deemed to have violated his privilege of access to counsel.

Quite different was the situation in *Matter of Story v. Hults*, (19 N.Y.2d 936, affd. 27 A.D.2d 745) in which, apart from the quite significant fact that only an administrative proceeding was involved, petitioner’s lawyer did not appear at the station house until just before the expiration of the statutory two-hour period, and in the meantime, petitioner had refused to submit to the test. It is notable, however, that in the Story case petitioner was permitted to telephone his wife or his lawyer, and he did call his wife, who, evidently, procured the lawyer, but too late.

The privilege of consulting with counsel concerning the exercise of legal rights should not, however, extend so far as to palpably impair or nullify the statutory procedure requiring drivers to choose between taking the test or losing their licenses. It is common knowledge that the human body dissipates alcohol rapidly and, indeed, under subdivision 3 of section 1192 of the Vehicle and Traffic Law, test results are admissible in evidence only if the test had been taken within two hours of the time of arrest. Where the defendant wishes only to telephone his lawyer or consult with a lawyer present in the station house or immediately available there, no danger of delay is posed. But, to be sure, there can be no recognition of an absolute right to refuse the test until a lawyer reaches the scene (see *Matter of Finocchairo v. Kelly*, 11 N.Y.2d 58, 61 [VAN VOORHIS, J., concurring]). If the lawyer is not physically present and cannot be reached promptly by telephone or otherwise, the defendant may be required to elect between taking the test and submitting to revocation of his license, without the aid of counsel.

Nor is any issue of self-incrimination presented in this case, namely, whether defendant was subject to a chemical test, on which *Schmerber v. California*, (384 U.S. 757), involving a blood test, would be applicable (see, also, *State v. Kenderski*, 99 N.J.Super. 224).

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

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6.8: RECOMMENDED CONDUCT DURING A TRAFFIC STOP

RECOMMENDED CONDUCT DURING A TRAFFIC STOP:

Pull over to the side of the road as soon as it is safe to do so.

Do not exit the vehicle unless told to do so.

Open the driver's side window.

Turn down the music.

Keep both of your hands on the steering wheel in clear view of the officer

Never reach under the seat or in the glove box

Try to remain relaxed and be respectful even if the officer is not.

Do not resist arrest if it occurs.

CONSENT TO SEARCH VEHICLE: Usually a respectful attitude will elicit a more favorable response from the officer. However, some defense attorneys advise to never agree to search of the vehicle even if there is nothing to hide.

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6.9: References

Arrest and Testing. (n.d.). Retrieved July 27, 2018, from http://www.nydwi.com/DWIQA/Arrest-Testing.php

Do You Take the Test. (n.d.). Retrieved July 27, 2018, from http://www.nydwi.com/blog/2014/12/the-oldest-question-do-you-take-the-test/

Find Laws, Legal Information, and Attorneys. (n.d.). Retrieved July 25, 2018, from https://www.findlaw.com/

Justia Law. (n.d.). Retrieved July 25, 2018, from https://law.justia.com/

New York State. (n.d.). New York State Unified Court System. Retrieved July 25, 2018, from http://nycourts.gov/

New York State Law. (n.d.). Retrieved July 27, 2018, from http://ypdcrime.com/vt/dwi_penalties.htm

Ny dwi . com. (n.d.). Retrieved July 27, 2018, from http://www.nydwi.com/?gclid=EAIaIQobChMIsZ-_zsa73AIVCzxpCh05qwjCEAAYASAAEgJCC_D_BwE

Pogue, D. L., Clifford, E., & Schwartz, A. L. (2009). Understanding New York Law, 2013-14. Upstate Legal Publishers

Reisinger, D. (2017, December 20). Penalties for alcohol or drug-related violations. Retrieved July 27, 2018, from https://dmv.ny.gov/org/tickets/penalties-alcohol-or-drug-related-violations

Welcome to LII. (n.d.). Retrieved July 25, 2018, from https://www.law.cornell.edu/

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7.1: DISCRIMINATION LAW

INTRODUCTION

"Discrimination is rarely so obvious or its practice so overt that recognition of it is instant and conclusive, it being accomplished usually by devious and subtle means."

This quotation is from the *300 Gramatan Association v. State Division of Human Rights*, 45 NY2d 176 (1978) case. This case involved an individual named Harold Johnson, who attempted to rent an apartment in a 96-unit apartment building owned by 300 Gramatan Avenue Associates in the City of Mount Vernon, NY. Mr. Johnson went to the premises on March 10, 1975, to examine a vacant five-room apartment and, after talking with the superintendent, attempted to rent it.

Mr. Johnson was told later that day that the apartment was "under litigation" and not available for rent. Mr. Johnson filed a complaint two days later with the State Division of Human Rights. The State Division of Human Rights held a hearing and determined that the owner of the building had violated NY's Human Rights Law by discriminating against Mr. Johnson when they refused to consider him as a prospective tenant because of his race and color. Mr. Johnson is a black man. Testimony at the hearing established the vacant apartment was never under "under litigation" on March 10, 1975. On appeal, the NY Court of Appeals agreed with the Division of Human Rights that found in favor of Mr. Johnson.

Some discrimination is very overt and direct. But often it is not and is difficult to ascertain and prove. This chapter will discuss the various laws in place to combat discrimination and the remedies available to victims of discrimination.

FEDERAL LAWS AGAINST DISCRIMINATION

The federal government has enacted several statutes proscribing discrimination of various types and in various contexts, and providing remedies for violations of these statutes.

The following are employment-related anti-discrimination statutes:

Equal Pay Act of 1963, making sex discrimination in employment unlawful.

Title VII of the Civil Rights Actof 1964 (Title VII), making race, color, creed, religion, and national origin in employment unlawful. (Title VII's anti-discrimination requirements apply to more than just employment discrimination.)

Age Discrimination in Employment Actof 1967 (**ADEA**), making age discrimination in employment unlawful, protecting individuals over the age of forty.

Americans with Disabilities Actof 1990 (**ADA**), making discrimination based on disability unlawful, whether the disability is permanent or temporary.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (EEOC)

Federal anti-discrimination laws related to employment are enforced by the administrative agency called the Equal Employment Opportunity Commission (EEOC). EEOC hearings are presided over by an Administrative Law Judge. Jurisdiction of the EEOC applies to any employer with 15 or more employees, and since it is enforcing federal law, extends over all states.

If a person feels they are a victim of discrimination that is a violation of federal law, they must exhaust their EEOC administrative remedies first before they can proceed in a federal court. Usually, if an EEOC decision goes against a person or company, the federal trial court will not substitute its judgment for that of the EEOC. It is a "presumption" that the preceding EEOC administrative proceeding had reached a proper conclusion.

Remedies under federal discrimination laws, whether administrative or judicial, entitle the party discriminated against to attorney fees, back pay, pre-judgment interest, and any lost benefits. Under federal laws, the prevailing party is not entitled to punitive damages.

NYS LAWS AGAINST EMPLOYMENT DISCRIMINATION

Very much like the federal Constitution, the NYS Constitution proscribes discrimination quite generally. In 1951 the NYS legislature enacted the Human Rights Law (HRL), which over the years has been amended and added to. The HRL forbids

discrimination because of age, race, creed, religion, color, national origin, sex, sexual orientation, disability, or marital status as to hiring, compensation, and any other terms and conditions of employment. The HRL is found at Article 15 of NYS' Executive Law.

DIVISION OF HUMAN RIGHTS (DHR)

The administrative agency that enforces the HRL is NYS' Division of Human Rights (DHR). Just like its counter-part EEOC at the federal level, the DHR is presided over by an Administrative Law Judge. Unlike the EEOC, jurisdiction of the DHR extends to any NYS employer with more than four employees.

Like the federal law, access to the NYS courts requires that administrative remedies of DHR be used and exhausted first before a victim of employment discrimination is allowed to file a court case. NYS courts are also reluctant to reverse decisions by the DHR.

In NYS, a person alleging employment discrimination may seek a jury trial, may obtain a job offer or reinstatement, may get compensation for lost wages, may recover some court costs, attorney fees, and may be awarded punitive damages (which are not allowed under federal law).

HOW ARE EMPLOYMENT DISCRIMINATION CASES ANALYZED?

As long as a claimant meets the jurisdictional requirements for the number of employees employed by the employer, a claimant has a choice of filing a complaint under the federal or state employment discrimination laws and agencies. The facts of their particular case may dictate which law or agency would be the best fit. Regardless of which they choose, the federal and NYS agencies and courts use the same two criteria, or standards, for determining whether there has been employment discrimination: (1) "disparate treatment" and, (2) "disparate impact."

DISPARATE TREATMENT: Disparate treatment occurs when someone is treated less favorably in an employment situation than others because of intentional unlawful discrimination. The burden of proof in this civil matter is by a preponderance of the evidence. A claimant must prove that the employer intended to discriminate. The claimant must prove that the employer's proffered reasons for such action as failure to hire, failure to give a pay raise, failure to promote, etc., are untrue and the actions were or were not taken because of the intentional unlawful discrimination of the employer. It is certainly easier to prove disparate treatment if it is not an isolated case. It is usually easier to prove intentional discrimination when there is a pattern of employer discriminatory behavior.

What happens when the evidence of a case shows that there is both a legitimate and illegal reason for the employer's actions? The U.S. Supreme Court decision in *Price Waterhouse v Hopkins*, 490 US 228 (1989) answers this question. Ann Hopkins brought a $25M lawsuit against her employer, Price Waterhouse, alleging that her employer, a male-dominated accounting firm, had passed her over for promotion because she was a woman. At that time, the firm had 662 partners of which only seven were women. Price Waterhouse proved that they had lawfully not promoted the plaintiff because of her weak interpersonal skills and for that reason alone, she was not be eligible for partnership status. The United States Supreme Court ruled in favor of Price Waterhouse, holding that so long as legitimate reasons outweighed the impermissible one, in this case sex discrimination, then the employer would not be liable for employment discrimination.

Abercrombie is a national chain of clothing stores that required its employees in 2008 to comply with a "Look Policy" that reflected the store's style and forbid black clothing and caps, though the meaning of the term cap was not defined in the dress policy. In 2008, Samantha Elauf, a practicing Muslim, applied for a position at an Abercrombie store. She wore a headscarf, or hijab, every day, and did so in her interview.

Elauf did not mention her headscarf during her interview and did not indicate that she would need an accommodation from the "Look Policy." Her interviewer likewise did not mention the headscarf, though the interviewer contacted her district manager, who told her to lower Elauf's rating on the appearance section of the application, which lowered her overall score and prevented her from being hired. The EEOC sued Abercrombie on Elauf's behalf claiming that the company had violated Title VII of the Civil Rights Act of 1964 by refusing to hire Elauf because of her headscarf.

The U.S. Supreme Court, on June 1, 2015 ruled 8-1 in Elauf's favor. (Note the length of time these actions can take.) The court held that if the applicant can show that the employer's decision not to hire an applicant was based on a desire to avoid having to accommodate a religious practice, then the employer has violated Title VII. The Court also held that Title VII does not demand mere neutrality; instead it creates an affirmative duty to accommodate religious practices.

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7.2: EQUAL EMPLOYMENT OPPORTUNITY COMMISSION v. ABERCROMBIE and FITCH STORES, INC.,

SUPREME COURT OF THE UNITED STATES

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION ***v . ABERCROMBIE & FITCH STORES, INC.,***

575 U. S. ____ (2015)

(Case Syllabus edited by the Author)

Respondent (Abercrombie) refused to hire Samantha Elauf, a practicing Muslim, because the headscarf that she wore pursuant to her religious obligations conflicted with Abercrombie's employee dress policy. The Equal Employment Opportunity Commission (EEOC) filed suit on Elauf's behalf, alleging a violation of Title VII of the Civil Rights Act of 1964, which, *inter alia*, prohibits a prospective employer from refusing to hire an applicant because of the applicant's religious practice when the practice could be accommodated without undue hardship. The EEOC prevailed in the District Court, but the Tenth Circuit reversed, awarding Abercrombie summary judgment on the ground that failure-to-accommodate liability attaches only when the applicant provides the employer with actual knowledge of his need for an accommodation.

Held: To prevail in a disparate-treatment claim, an applicant need show only that his need for an accommodation was a motivating factor in the employer's decision, not that the employer had knowledge of his need. Title VII's disparate-treatment provision requires Elauf to show that Abercrombie (1) "fail[ed]. . . to hire" her (2) "because of" (3) "[her] religion" (including a religious practice). 42 U. S. C. §2000e-2(a)(1). And its "because of" standard is understood to mean that the protected characteristic cannot be a "motivating factor" in an employment decision. § 2000e-2(m). Thus, rather than imposing a knowledge standard, § 2000e-2(a)(1) prohibits certain *motives*, regardless of the state of the actor's knowledge: An employer may not make an applicant's religious practice, confirmed or otherwise, a factor in employment decisions. Title VII contains no knowledge requirement. Furthermore, Title VII's definition of religion clearly indicates that failure-to-accommodate challenges can be brought as disparate-treatment claims. And Title VII gives favored treatment to religious practices, rather than demanding that religious practices be treated no worse than other practices.

731 F. 3d 1106, reversed and remanded.

SCALIA, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. ALITO, J., filed an opinion concurring in the judgment. THOMAS, J., filed an opinion concurring in part and dissenting in part.

DISPARATE IMPACT: Disparate impact lacks discriminatory intent. It occurs when a neutral employment practice has an adverse impact on employees protected by anti-discrimination laws. While the employer's action appears to be legal or proper on the surface, the employer's action negatively affects certain employees more than others in an illegally discriminatory way. The plaintiff-claimant does not have to prove that the employer intended to discriminate; proof of the discrimination consists of the discriminatory outcome or adverse impact, regardless of the employer's intent. However, if an employer can prove that there is a lawful business justification for the employer's actions, then they will not be held liable under a disparate impact case.

The case that follows, *Frank Ricci, et al., v John DeStefano, et al.* 557 U.S. 557 (2009) is a U.S. Supreme Court decision regarding disparate impact. The Supreme Court held in a 5–4 decision that the city of New Haven's decision to ignore the test results for promotion of some of its firefighters violated Title VII. The Court found that because the city did not have a "strong basis in evidence" that it would have subjected itself to disparate impact liability if it had promoted the white and Hispanic firefighters instead of the black firefighters, ignoring the test results was itself discriminatory.

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7.3: FRANK RICCI, et al., PETITIONERS v. JOHN DeSTEFANO et al

SUPREME COURT OF THE UNITED STATES

FRANK RICCI, et al., PETITIONERS v.

JOHN DeSTEFANO et al.

557 U.S. 557 (2009)

(Case Syllabus edited by the Author)

Justice Kennedy delivered the opinion of the Court.

…In 2003, 118 New Haven firefighters took examinations to qualify for promotion to the rank of lieutenant or captain. Promotion examinations in New Haven (or City) were infrequent, so the stakes were high. The results would determine which firefighters would be considered for promotions during the next two years, and the order in which they would be considered. Many firefighters studied for months, at considerable personal and financial cost.

When the examination results showed that white candidates had outperformed minority candidates, the mayor and other local politicians opened a public debate that turned rancorous. Some firefighters argued the tests should be discarded because the results showed the tests to be discriminatory. They threatened a discrimination lawsuit if the City made promotions based on the tests. Other firefighters said the exams were neutral and fair. And they, in turn, threatened a discrimination lawsuit if the City, relying on the statistical racial disparity, ignored the test results and denied promotions to the candidates who had performed well. In the end the City took the side of those who protested the test results. It threw out the examinations.

Certain white and Hispanic firefighters who likely would have been promoted based on their good test performance sued the City and some of its officials. Theirs is the suit now before us. The suit alleges that, by discarding the test results, the City and the named officials discriminated against the plaintiffs based on their race, in violation of both Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U. S. C. §2000e et seq., and the Equal Protection Clause of the Fourteenth Amendment . The City and the officials defended their actions, arguing that if they had certified the results, they could have faced liability under Title VII for adopting a practice that had a disparate impact on the minority firefighters. The District Court granted summary judgment for the defendants, and the Court of Appeals affirmed.

We conclude that race-based action like the City's in this case is impermissible under Title VII unless the employer can demonstrate a strong basis in evidence that, had it not taken the action, it would have been liable under the disparate-impact statute. The respondents, we further determine, cannot meet that threshold standard. As a result, the City's action in discarding the tests was a violation of Title VII. In light of our ruling under the statutes, we need not reach the question whether respondents' actions may have violated the Equal Protection Clause.

The City's contract with the New Haven firefighters' union specifies additional requirements for the promotion process. Under the contract, applicants for lieutenant and captain positions were to be screened using written and oral examinations, with the written exam accounting for 60 percent and the oral exam 40 percent of an applicant's total score. To sit for the examinations, candidates for lieutenant needed 30 months' experience in the Department, a high-school diploma, and certain vocational training courses. Candidates for captain needed one year's service as a lieutenant in the Department, a high-school diploma, and certain vocational training courses.

After reviewing bids from various consultants, the City hired Industrial/Organizational Solutions, Inc. (IOS) to develop and administer the examinations, at a cost to the City of $100,000. IOS is an Illinois company that specializes in designing entry-level and promotional examinations for fire and police departments examinations…[which]…would not unintentionally favor white candidates.

Candidates took the examinations in November and December 2003. Seventy-seven candidates completed the lieutenant examination—43 whites, 19 blacks, and 15 Hispanics. Of those, 34 candidates passed—25 whites, 6 blacks, and 3 Hispanics. 554 F. Supp. 2d, at 145. Eight lieutenant positions were vacant at the time of the examination. As the rule of three operated, this meant

that the top 10 candidates were eligible for an immediate promotion to lieutenant. All 10 were white. *Ibid.* Subsequent vacancies would have allowed at least 3 black candidates to be considered for promotion to lieutenant.

Forty-one candidates completed the captain examination—25 whites, 8 blacks, and 8 Hispanics. Of those, 22 candidates passed—16 whites, 3 blacks, and 3 Hispanics. *Ibid.* Seven captain positions were vacant at the time of the examination. Under the rule of three, 9 candidates were eligible for an immediate promotion to captain—7 whites and 2 Hispanics. *Ibid.*

At the final CSB meeting, on March 18, Ude (the City's counsel) argued against certifying the examination results……

Karen DuBois-Walton, the City's chief administrative officer, spoke on behalf of Mayor John DeStefano and argued against certifying the results. DuBois-Walton stated that the results, when considered under the rule of three and applied to then-existing captain and lieutenant vacancies, created a situation in which black and Hispanic candidates were disproportionately excluded from opportunity. DuBois-Walton also relied on Hornick's testimony, asserting that Hornick "made it extremely clear that … there are more appropriate ways to assess one's ability to serve" as a captain or lieutenant. *Id.*, at A1120.

Burgett (the human resources director) asked the CSB to discard the examination results. She, too, relied on Hornick's statement to show the existence of alternative testing methods, describing Hornick as having "started to point out that alternative testing does exist" and as having "begun to suggest that there are some different ways of doing written examinations." *Id.*, at A1125, A1128.

Other witnesses addressed the CSB. They included the president of the New Haven firefighters' union, who supported certification. He reminded the CSB that Hornick "also concluded that the tests were reasonable and fair and under the current structure to certify them." *Id.*, at A1137. Firefighter Frank Ricci again argued for certification; he stated that although "assessment centers in some cases show less adverse impact," *id.*, at A1140, they were not available alternatives for the current round of promotions. It would take several years, Ricci explained, for the Department to develop an assessment-center protocol and the accompanying training materials. *Id.*, at A1141. Lieutenant Matthew Marcarelli, who had taken the captain's exam, spoke in favor of certification.

The CSB's decision not to certify the examination results led to this lawsuit. The plaintiffs—who are the petitioners here—are 17 white firefighters and 1 Hispanic firefighter who passed the examinations but were denied a chance at promotions when the CSB refused to certify the test results. They include the named plaintiff, Frank Ricci, who addressed the CSB at multiple meetings.

Petitioners sued the City, Mayor DeStefano, DuBois-Walton, Ude, Burgett, and the two CSB members who voted against certification. Petitioners also named as a defendant Boise Kimber, a New Haven resident who voiced strong opposition to certifying the results. Those individuals are respondents in this Court. Petitioners filed suit under Rev. Stat. §§ 1979 and 1980, 42 U. S. C. §§ 1983 and 1985, alleging that respondents, by arguing or voting against certifying the results, violated and conspired to violate the Equal Protection Clause of the Fourteenth Amendment . Petitioners also filed timely charges of discrimination with the Equal Employment Opportunity Commission (EEOC); upon the EEOC's issuing right-to-sue letters, petitioners amended their complaint to assert that the City violated the disparate-treatment prohibition contained in Title VII of the Civil Rights Act of 1964, as amended. See 42 U. S. C. §§ 2000e–2(a).

II

Petitioners raise a statutory claim, under the disparate-treatment prohibition of Title VII, and a constitutional claim, under the Equal Protection Clause of the Fourteenth Amendment . A decision for petitioners on their statutory claim would provide the relief sought, so we consider it first. See *Atkins* v. *Parker*, 472 U. S. 115, 123 (1985) ; *Escambia County* v. *McMillan*, 466 U. S. 48, 51 (1984) *(per curiam)* ("[N]ormally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case").

Our analysis begins with this premise: The City's actions would violate the disparate-treatment prohibition of Title VII absent some valid defense. All the evidence demonstrates that the City chose not to certify the examination results because of the statistical disparity based on race—*i.e.*, how minority candidates had performed when compared to white candidates. As the District Court put it, the City rejected the test results because "too many whites and not enough minorities would be promoted were the lists to be certified." 554 F. Supp. 2d, at 152; see also *ibid.* (respondents' "own arguments … show that the City's reasons for advocating non-certification were related to the racial distribution of the results"). Without some other justification, this express, race-based decision-making violates Title VII's command that employers cannot take adverse employment actions because of an individual's race. See §2000e–2(a)(1).

For the foregoing reasons, we adopt the strong-basis-in-evidence standard as a matter of statutory construction to resolve any conflict between the disparate-treatment and disparate-impact provisions of Title VII…

….The City argues that, even under the strong-basis-in-evidence standard, its decision to discard the examination results was permissible under Title VII. That is incorrect. Even if respondents were motivated as a subjective matter by a desire to avoid committing disparate-impact discrimination, the record makes clear there is no support for the conclusion that respondents had an objective, strong basis in evidence to find the tests inadequate, with some consequent disparate-impact liability in violation of Title VII.

The racial adverse impact here was significant, and petitioners do not dispute that the City was faced with a prima facie case of disparate-impact liability. On the captain exam, the pass rate for white candidates was 64 percent but was 37.5 percent for both black and Hispanic candidates. On the lieutenant exam, the pass rate for white candidates was 58.1 percent; for black candidates, 31.6 percent; and for Hispanic candidates, 20 percent. The pass rates of minorities, which were approximately one-half the pass rates for white candidates, fall well below the 80-percent standard set by the EEOC to implement the disparate-impact provision of Title VII. See 29 CFR § 1607.4(D) (2008) (selection rate that is less than 80 percent "of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact"); *Watson*, 487 U. S., at 995–996, n. 3 (plurality opinion) (EEOC's 80-percent standard is "a rule of thumb for the courts"). Based on how the passing candidates ranked and an application of the "rule of three," certifying the examinations would have meant that the City could not have considered black candidates for any of the then-vacant lieutenant or captain positions.

Based on the degree of adverse impact reflected in the results, respondents were compelled to take a hard look at the examinations to determine whether certifying the results would have had an impermissible disparate impact. The problem for respondents is that a prima facie case of disparate-impact liability—essentially, a threshold showing of a significant statistical disparity, *Connecticut* v. *Teal*, 457 U. S. 440, 446 (1982) , and nothing more—is far from a strong basis in evidence that the City would have been liable under Title VII had it certified the results. That is because the City could be liable for disparate-impact discrimination only if the examinations were not job related and consistent with business necessity, or if there existed an equally valid, less-discriminatory alternative that served the City's needs but that the City refused to adopt. §2000e–2(k)(1)(A), (C). We conclude there is no strong basis in evidence to establish that the test was deficient in either of these respects….

…On the record before us, there is no genuine dispute that the City lacked a strong basis in evidence to believe it would face disparate-impact liability if it certified the examination results. In other words, there is no evidence—let alone the required strong basis in evidence—that the tests were flawed because they were not job-related or because other, equally valid and less discriminatory tests were available to the City. Fear of litigation alone cannot justify an employer's reliance on race to the detriment of individuals who passed the examinations and qualified for promotions. The City's discarding the test results was impermissible under Title VII, and summary judgment is appropriate for petitioners on their disparate-treatment claim.

The record in this litigation documents a process that, at the outset, had the potential to produce a testing procedure that was true to the promise of Title VII: No individual should face workplace discrimination based on race. Respondents thought about promotion qualifications and relevant experience in neutral ways. They were careful to ensure broad racial participation in the design of the test itself and its administration. As we have discussed at length, the process was open and fair……

Petitioners are entitled to summary judgment on their Title VII claim, and we therefore need not decide the underlying constitutional question. The judgment of the Court of Appeals is reversed, and the cases are remanded for further proceedings consistent with this opinion.

It is so ordered.

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7.4: BONA FIDE OCCUPATIONAL QUALIFICATION (BFOQ)

There are situations where employment discrimination is allowable under both federal and NYS law. An employer can discriminate if the employer establishes a lawful job-related reason for the discrimination. This is called a bona fide occupational qualification or BFOQ.

So how does BFOQ work? Here are some examples found by the courts as acceptable reasons to discriminate in hiring:

- Mandatory retirement age requirements were allowed for airline pilots because safety was the primary concern and airlines could show that older pilots were significantly less safe once they reached a certain age.
- Male clothing designers were allowed to legally advertise for male models only, since female models wouldn't be able to model men's clothing as intended.
- Churches were allowed to legally hire only members of their own church and faith and reject clergy from other religions.
- An airline was allowed to hire only pilots of a certain religious background. Why? Because one of the countries that the airline flew over prohibited, under punishment of death, the presence of people outside of a certain religion.

Title VII permits discrimination on the basis of "religion, sex, or national origin in those instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business or enterprise." This exception has also been extended to discrimination based on age through the Age Discrimination in Employment Act (ADEA). This exception does not apply to discrimination based on race. NYS has also adopted the federal rule that race cannot be a justification for BFOQ discrimination.

So, what if a role in movie or play calls for a black male or female actress? Can a director discriminate in hiring an actor to play the role by excluding white actors? The answer is no. Title VII and the NYS's HRL make so exception for such situations. However, a director can choose an actor based on the actor's physical characteristics.

DEFINITION OF A DISABILITY UNDER THE ADA: The EEOC's ADA: Questions and Answers page on its website states the following regarding its interpretation of the ADA's definition of an individual with a disability.

> Question. Who is a "qualified individual with a disability?"
>
> Answer. A qualified individual with a disability is a person who meets legitimate skill, experience, education, or other requirements of an employment position that he or she holds or seeks, and who can perform the "essential functions" of the position with or without reasonable accommodation. Requiring the ability to perform "essential" functions assures that an individual will not be considered unqualified simply because of inability to perform marginal or incidental job functions. If the individual is qualified to perform essential job functions except for limitations caused by a disability, the employer must consider whether the individual could perform these functions with a reasonable accommodation. If a written job description has been prepared in advance of advertising or interviewing applicants for a job, this will be considered as evidence, although not necessarily conclusive evidence, of the essential functions of the job.

REASONABLE ACCOMODATION: The law requires that an employer must make "reasonable accommodations" for those that are disabled. The EEOC's ADA: Questions and Answers page on its website states the following regarding what a reasonable accommodation and what actions is constitute such.

> Question. What is "reasonable accommodation?"
>
> Answer. Reasonable accommodation is a modification or an adjustment to a job or the work environment that will enable a qualified applicant or employee with a disability to participate in the application process or to perform essential job functions. Reasonable accommodation also includes adjustments to assure that a qualified individual with a disability has rights and privileges in employment equal to those of nondisabled employees.
>
> Question. What kinds of actions are required to reasonably accommodate applicants and employees?
>
> Answer. Examples of reasonable accommodation include making existing facilities used by employees readily accessible to and usable by an individual with a disability; restructuring a job; modifying work schedules; acquiring or modifying equipment; providing qualified readers or interpreters; or appropriately modifying examinations, training, or other programs. Reasonable accommodation also may include reassigning a current employee to a vacant position for which the

individual is qualified, if the person becomes disabled and is unable to do the original job. However, there is no obligation to find a position for an applicant who is not qualified for the position sought. Employers are not required to lower quality or quantity standards in order to make an accommodation, nor are they obligated to provide personal use items such as glasses or hearing aids.

The decision as to the appropriate accommodation must be based on the particular facts of each case. In selecting the particular type of reasonable accommodation to provide, the principal test is that of effectiveness, i.e., whether the accommodation will enable the person with a disability to do the job in question.

Of course, what is reasonable is a subjective question. Technology is rapidly changing what is possible and to some extent, what is reasonable. What may have seemed extraordinary 20 years ago is now very much the norm and expected. It is rare to find a public bathroom that does not have wheelchair assessable stalls. Building entry ramps and closer parking spaces are just part of our culture. The law has made much of this a requirement. With computers that work on voice commands and robotics everywhere, what was once impossible is now rapidly becoming reasonable.

The meaning of "reasonable accommodations" depends on the factual context. Take for example the situation of former professional golfer Casey Martin. Due to Casey Martin's degenerative leg condition, he could not walk the course while participating in PGA tournaments and requested the use of a golf cart. The PGA denied his request claiming that walking was part of the game and that the use of a golf cart would give him an advantage over the other golfers. The case made its way to the United States Supreme Court, which applied the ADA to professional sports for the first time. (See *Martin v PGA*, 532 US 661 (2001) The Court in a 7-2 decision found in favor of Casey Martin holding that the use of a golf cart is "a reasonable modification" that gives him the access to tournaments that the ADA law requires. The Court rejected the PGA's argument that waiving the usual "walk-the-course" rule for Martin would represent "a fundamental change in the game."

HEALTH AND DISABILITY DISCRIMINATION AND BFOQ: An employer may not discriminate against someone with a health problem or disability which does not interfere with a person's ability to do a job in a reasonable manner. However, if an employer can prove there is a physical or mental requirement for a job that is a bona fide occupational qualification (BFOQ), they can discriminate. Consider the following two cases.

In *Schor v St. Francis Hospital*, 111 AD2d 852 (2d Dept. 1985) a Poughkeepsie NY hospital rejected an employment application for a nurse's position where the duties required heavy lifting. The job applicant admitted that, because of a disability, she was unable to lift more than 15 pounds. The court ruled in favor of the hospital, holding that there was substantial evidence to support a DHR ruling of no "probable cause" to believe that the hospital acted in a legally impermissible manner.

In *Div. of Human Rights v. Xerox*, 65 N.Y.2d 213 (1985), the Xerox Corporation in Rochester, NY refused to hire a person whose disability was described as "active gross obesity." The Court held that Xerox acted unlawfully, in violation of HRL Section 296(1) finding excessive weight to be a disability protected under the HRL. The Court stated "…the statute protects all persons with disabilities and not just those with hopeless conditions." The Court went on to say that "We have found nothing in the statute or its legislative history indicating a legislative intent to permit employers to refuse to hire persons who are able to do the job simply because they have a possibly treatable condition of excessive weight."

MEDICAL AND MENTAL EXAMINATIONS: A medical examination may be required of an employee or prospective employee, so long as the medical examination is job-related. Employers may require all employees to have annual job-related medical examinations, and/or may require medical examinations upon the happening of a job-related accident.

It is lawful for an employee to be terminated, if a medical report discloses that the employee is unable to perform his/her assigned tasks in a "substantial and reasonable manner," and that the employee's condition is "not temporary and is substantial." The burden of proof is on an employee to prove that, although disabled, the employee can perform the duties required of the job in a reasonable manner.

Employers are also allowed to randomly test employees for drug use as long as the policy is in writing. If an employee tests positive for an illegal substance, the employer is within its legal rights to terminate the employee. Employees who refuse to take a drug test can also be fired.

TERMINATION BASED ON DISABILITY: The American with Disabilities Act (ADA) does not protect employees who miss work due to their disability, even if the disability occurs while on the job. The bottom line is that if an employee cannot do their job

in a reasonable manner, they can be terminated.

SUBSTANCE ABUSE AS A DISABILITY: NYS' HRL Section 296 protects rehabilitating and/or recovering alcoholics and drug abusers. However, it does not protect substance abusers who do not seek treatment for their substance abuse condition. Such is the situation in *Burka v NYC Transit Authority*, 680 F Supp 590 (1988, SD NY). A federal court held that a NYC Transit police officer was properly dismissed from the force when he refused to acknowledge and accept treatment for alcoholism. The court held that it "was reasonable to conclude that the long-term effects of the police officer's alcoholism would result in a diminished capacity to perform police functions and exercise judgment required of police officers."

PREGANCY DISCRIMINATION: The EEOC's Pregnancy Discrimination page on its website states the following regarding pregnancy discrimination.

> Pregnancy Discrimination
>
> Pregnancy discrimination involves treating a woman (an applicant or employee) unfavorably because of pregnancy, childbirth, or a medical condition related to pregnancy or childbirth.
>
> Pregnancy Discrimination & Work Situations
>
> The Pregnancy Discrimination Act (PDA) forbids discrimination based on pregnancy when it comes to any aspect of employment, including hiring, firing, pay, job assignments, promotions, layoff, training, fringe benefits, such as leave and health insurance, and any other term or condition of employment.
>
> Pregnancy, Maternity & Parental Leave
>
> Under the PDA, an employer that allows temporarily disabled employees to take disability leave or leave without pay, must allow an employee who is temporarily disabled due to pregnancy to do the same.
>
> An employer may not single out pregnancy-related conditions for special procedures to determine an employee's ability to work. However, if an employer requires its employees to submit a doctor's statement concerning their ability to work before granting leave or paying sick benefits, the employer may require employees affected by pregnancy-related conditions to submit such statements.
>
> Further, under the Family and Medical Leave Act (FMLA) of 1993, a new parent (including foster and adoptive parents) may be eligible for 12 weeks of leave (unpaid or paid if the employee has earned or accrued it) that may be used for care of the new child. To be eligible, the employee must have worked for the employer for 12 months prior to taking the leave and the employer must have a specified number of employees.

(While the above mentioned EEOC's page regarding pregnancy does not state this, FMLA also applies to the placement with the employee of a child for adoption or foster care, care for an immediate family member (spouse, child, or parent) with a serious health condition, or medical leave when the employee is unable to work because of a serious health condition.)

In 2006, a UPS driver Peggy Young became pregnant with her third child. Based on her doctor's recommendation, she requested lighter-duty work. UPS refused the request and instead put her on unpaid leave. Young sued the company contending that the company discriminated against her because she was pregnant. She based her claim on the fact that UPS offered accommodations to non-pregnant employees with similar doctor recommendations, such as workers who were injured on the job.

Two lower courts disagreed. Both courts found that UPS was not required to offer the accommodation to someone because of their pregnancy and dismissed the case. The Supreme Court found differently, and in a 6-3 decision, the court reversed the lower court ruling and remanding the case back to the lower court. While it did not decide whether Young was discriminated against or not, it set forth the standard that courts should use in determining these types of cases.

The standard is that a plaintiff who makes a claim that she is being discriminated against because of her pregnancy has the initial burden of establishing a prima facie case of discrimination. If the plaintiff carries that burden, the employer has the opportunity to articulate some legitimate, non-discriminatory reason for the difference in treatment of a pregnant employee over a non-pregnant employee. If the employer articulates such a reason, the plaintiff then has an opportunity to prove by a preponderance of the evidence that the reason is not true and a pretext for discrimination.

It should be noted that even before UPS appeared before the U.S. Supreme Court, it had already changed its pregnancy accommodation policy and began treating pregnancy accommodations the same as other disability accommodations. It should also be noted that after the U.S. Supreme Court decision, Peggy Young and United Parcel Service settled this case.

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7.5: YOUNG v. UNITED PARCEL SERVICE, INC.,

SUPREME COURT OF THE UNITED STATES

YOUNG v. UNITED PARCEL SERVICE, INC.,

575 U. S. ____ (2015)

(Case Syllabus edited by the Author)

The Pregnancy Discrimination Act added new language to the definitions subsection of Title VII of the Civil Rights Act of 1964. The first clause of the Pregnancy Discrimination Act specifies that Title VII's prohibition against sex discrimination applies to discrimination "because of or on the basis of pregnancy, childbirth, or related medical conditions." 42 U. S. C §2000e(k). The Act's second clause says that employers must treat "women affected by pregnancy . . . the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work." This case asks the Court to determine how the latter provision applies in the context of an employer's policy that accommodates many, but not all, workers with nonpregnancy-related disabilities.

Petitioner Young was a part-time driver for respondent United Parcel Service (UPS). When she became pregnant, her doctor advised her that she should not lift more than 20 pounds. UPS, however, required drivers like Young to be able to lift up to 70 pounds. UPS told Young that she could not work while under a lifting restriction. Young subsequently filed this federal lawsuit, claiming that UPS acted unlawfully in refusing to accommodate her pregnancy-related lifting restriction. She brought only a disparate-treatment claim of discrimination, which a plaintiff can prove either by direct evidence that a workplace policy, practice, or decision relies expressly on a protected characteristic, or by using the burden-shifting framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U. S. 792. *Texas Dept. of Community Affairs v. Burdine*, 450 U. S. 248, 253.

After discovery, UPS sought summary judgment. In reply, Young presented several favorable facts that she believed she could prove. In particular, she pointed to UPS policies that accommodated workers who were injured on the job, had disabilities covered by the Americans with Disabilities Act of 1990 (ADA), or had lost Department of Transportation (DOT) certifications. Pursuant to these policies, Young contended, UPS had accommodated several individuals whose disabilities created work restrictions similar to hers. She argued that these policies showed that UPS discriminated against its pregnant employees because it had a light-duty-for-injury policy for numerous "other persons," but not for pregnant workers. UPS responded that, since Young did not fall within the on-the-job injury, ADA, or DOT categories, it had not discriminated against Young on the basis of pregnancy, but had treated her just as it treated all "other" relevant "persons."

The District Court granted UPS summary judgment, concluding, inter alia, that Young could not make out a prima facie case of discrimination under McDonnell Douglas. The court found that those with whom Young had compared herself–those falling within the on-the-job, DOT, or ADA categories–were too different to qualify as "similarly situated comparator[s]." The Fourth Circuit affirmed.

Held:

1. An individual pregnant worker who seeks to show disparate treatment through indirect evidence may do so through application of the *McDonnell Douglas* framework.

(a) The parties' interpretations of the Pregnancy Discrimination Act's second clause are unpersuasive.

(i) Young claims that as long as "an employer accommodates only a subset of workers with disabling conditions," "pregnant workers who are similar in the ability to work [must] receive the same treatment even if still other nonpregnant workers do not receive accommodations." Her reading proves too much. The Court doubts that Congress intended to grant pregnant workers an unconditional "most-favored-nation" status, such that employers who provide one or two workers with an accommodation must provide similar accommodations to all pregnant workers, irrespective of any other criteria. After all, the second clause of the Act, when referring to nonpregnant persons with similar disabilities, uses the open-ended term "other persons." It does not say that the employer must treat pregnant employees the "same" as "any other persons" who are similar in their ability or inability to work, nor does it specify the particular "other persons" Congress had in mind as appropriate comparators for pregnant workers. Moreover, disparate-treatment law normally allows an employer to implement policies that are not intended to harm members of a protected

class, even if their implementation sometimes harms those members, as long as the employer has a legitimate, nondiscriminatory, nonpretextual reason for doing so. See, e.g., *Burdine*, *supra*, at 252-258. There is no reason to think Congress intended its language in the Pregnancy Discrimination Act to deviate from that approach.

(ii) The Solicitor General argues that the Court should give special, if not controlling, weight to a 2014 Equal Employment Opportunity Commission guideline concerning the application of Title VII and the ADA to pregnant employees. But that guideline lacks the timing, "consistency," and "thoroughness" of "consideration" necessary to "give it power to persuade." *Skidmore v. Swift & Co.*, 323 U. S. 134, 140. The guideline was promulgated after certiorari was granted here; it takes a position on which previous EEOC guidelines were silent; it is inconsistent with positions long advocated by the Government; and the EEOC does not explain the basis for its latest guidance.

(iii) UPS claims that the Act's second clause simply defines sex discrimination to include pregnancy discrimination. But that cannot be right, as the first clause of the Act accomplishes that objective. Reading the Act's second clause as UPS proposes would thus render the first clause superfluous. It would also fail to carry out a key congressional objective in passing the Act. The Act was intended to overturn the holding and the reasoning of *General Elec. Co. v. Gilbert*, 429 U. S. 125, which upheld against a Title VII challenge a company plan that provided nonoccupational sickness and accident benefits to all employees but did not provide disability-benefit payments for any absence due to pregnancy.

(b) An individual pregnant worker who seeks to show disparate treatment may make out a prima facie case under the *McDonnell Douglas* framework by showing that she belongs to the protected class, that she sought accommodation, that the employer did not accommodate her, and that the employer did accommodate others "similar in their ability or inability to work." The employer may then seek to justify its refusal to accommodate the plaintiff by relying on "legitimate, nondiscriminatory" reasons for denying accommodation. That reason normally cannot consist simply of a claim that it is more expensive or less convenient to add pregnant women to the category of those whom the employer accommodates. If the employer offers a "legitimate, nondiscriminatory" reason, the plaintiff may show that it is in fact pretextual. The plaintiff may reach a jury on this issue by providing sufficient evidence that the employer's policies impose a significant burden on pregnant workers, and that the employer's "legitimate, nondiscriminatory" reasons are not sufficiently strong to justify the burden, but rather–when considered along with the burden imposed–give rise to an inference of intentional discrimination. The plaintiff can create a genuine issue of material fact as to whether a significant burden exists by providing evidence that the employer accommodates a large percentage of nonpregnant workers while failing to accommodate a large percentage of pregnant workers. This approach is consistent with the longstanding rule that a plaintiff can use circumstantial proof to rebut an employer's apparently legitimate, nondiscriminatory reasons, see *Burdine*, *supra*, at 255, n. 10, and with Congress' intent to overrule *Gilbert*.

2. Under this interpretation of the Act, the Fourth Circuit's judgment must be vacated. Summary judgment is appropriate when there is "no genuine dispute as to any material fact." Fed. Rule Civ. Proc. 56(a). The record here shows that Young created a genuine dispute as to whether UPS provided more favorable treatment to at least some employees whose situation cannot reasonably be distinguished from hers. It is left to the Fourth Circuit to determine on remand whether Young also created a genuine issue of material fact as to whether UPS' reasons for having treated Young less favorably than these other nonpregnant employees were pretextual.

707 F. 3d 437, vacated and remanded.

BREYER, J., delivered the opinion of the Court, in which ROBERTS, C. J., and GINSBURG, SOTOMAYOR, and KAGAN, JJ., joined. ALITO, J., filed an opinion concurring in the judgment. SCALIA, J., filed a dissenting opinion, in which KENNEDY and THOMAS, JJ., joined. KENNEDY, J., filed a dissenting opinion.

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7.6: SEXUAL HARRASSMENT

Sexual harassment is a form of sexual discrimination. It is a violation of both NYS' HRL and Title VII of the federal Civil Rights Act of 1964. The EEOC defines sexual harassment as follows:

> "Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when this conduct explicitly or implicitly affects an individual's employment, unreasonably interferes with an individual's work performance, or creates an intimidating, hostile, or offensive work environment."

In employment situations, there are two categories of sexual harassment, quid pro quo or a hostile work environment. They often occur together.

#MeToo

Any discussion regarding sexually harassment in 2018 should include the #MeToo movement. It started with famous Hollywood directors like movie mogul Harvey Weinstein, actors like Bill Cosby, and news personalities like Bill O'Reilly being accused by women in their respective industries of decades of sexual harassment, it quickly grew and brought to light the prevalence of sexual harassment of those not so famous regular people who are also victims. The movement is now a national in scope and changing the way people think about the treatment of women in and out of the workplace.

In 2018, NYS expanded its sexual harassment laws, apparently to some degree in response to the #MeToo movement. Here are some of the highlights of the changes to the law in NYS.

- Non-Employee Liability: The Human Rights Law prohibition against sexual harassment in the workplace now applies to nonemployees, such as independent contractors, consultants, vendors, subcontractors, and persons providing services pursuant to a contract.
- Mandatory Arbitration: CPLR Section 7515 was added so that employers in NYS are now prohibited from requiring employees to sign agreements that require mandatory binding arbitration of claims relating to sexual harassment. Such clauses are null and void as a matter of law.
- Non-Disclosure Settlement: GOB § 5-336 and CPLR Section 5003-b were added so employers in NYS will now be prohibited from requiring nondisclosure clauses in any settlement, agreement, or other resolution of any claim, where "the factual foundation for which involves sexual harassment" unless the condition of confidentiality is the complainant or plaintiff's preference.

It should be noted that sexual harassment should not be confused with sexual assaults and rape. Sexual assaults and rape are crimes. The perpetrators are charged and prosecuted by the state. Sexual harassment in the workplace in and of itself is not a crime but a civil case. Individuals who commit sexual crimes can also be involved in sexual harassment.

QUID PRO QUO SEXUAL HARASSMENT

When a manager or other authority figure of the employer offers that he or she will give the employee something like a raise or a promotion, or not fire an employee or reprimand an employee for some type of sexual favor, it is called quid pro quo sexual harassment. An employer can be responsible even it this act only occurs once. It also applies to job applicants that are the subject of this kind of harassment if the hiring decision was based on the acceptance or rejection of the sexual advances.

HOSTILE WORK ENVIRONMENT SEXUAL HARASSMENT

Employers can be held liable for their employees' unwelcome sexual harassment of another employee when it is so severe that it creates what is called a hostile work environment in violation of both Title VII and the HRL. Courts often consider the following questions in analyzing a hostile environment harassment claim.

- Was the conduct verbal, physical, or both?
- What was the frequency of the conduct?
- Was the conduct hostile or patently offensive?
- Was the alleged harasser a co-worker or supervisor?

- Did others joined in perpetrating the harassment?
- Was the harassment directed at more than one individual or was the victim singled out?

The EEOC Enforcement Guidance dated March 19, 1990 is particularly helpful in working through what is and is not sexual harassment in the workplace. The Enforcement Guidance states in part the following regarding a hostile work environment:

> Sexual harassment is "unwelcome . . . verbal or physical conduct of a sexual nature . . .." 29 C.F.R. § 1604.11(a). Because sexual attraction may often play a role in the day-to-day social exchange between employees, "the distinction between invited, uninvited-but-welcome, offensive-but-tolerated, and flatly rejected" sexual advances may well be difficult to discern. *Barnes v. Costle*, 561 F.2d 983, 999, 14 EPD 7755 (D.C. Cir. 1977) (MacKinnon J., concurring). But this distinction is essential because sexual conduct becomes unlawful only when it is unwelcome. The Eleventh Circuit provided a general definition of "unwelcome conduct" in *Henson v. City of Dundee*, 682 F.2d at 903: the challenged conduct must be unwelcome "in the sense that the employee did not solicit or incite it, and in the sense that the employee regarded the conduct as undesirable or offensive."
>
> In determining whether unwelcome sexual conduct rises to the level of a "hostile environment" in violation of Title VII, the central inquiry is whether the conduct "unreasonably interfer[es] with an individual's work performance" or creates "an intimidating, hostile, or offensive working environment." 29 C.F.R. § 1604.11(a)(3). Thus, sexual flirtation or innuendo, even vulgar language that is trivial or merely annoying, would probably not establish a hostile environment.
>
> In determining whether harassment is sufficiently severe or pervasive to create a hostile environment, the harasser's conduct should be evaluated from the objective standpoint of a "reasonable person."
>
> When an employer receives a complaint or otherwise learns of alleged sexual harassment in the workplace, the employer should investigate promptly and thoroughly. The employer should take immediate and appropriate corrective action by doing whatever is necessary to end the harassment, make the victim whole by restoring lost employment benefits or opportunities, and prevent the misconduct from recurring. Disciplinary action against the offending supervisor or employee, ranging from reprimand to discharge, may be necessary. Generally, the corrective action should reflect the severity of the conduct.

It should be noted that if a superior is involved in creating the hostile work environment, the employer will be liable. If the harassment is committed by a coworker the employer is liable if the employer knew or should have known about the harassment, unless the employer took immediate corrective action to remedy the situation.

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7.7: MERITOR SAVINGS BANK v. VINSON

The following U.S. Supreme Court case provides some guidance on the Court's interpretation of the law regarding sexual harassment in the workplace.

SUPREME COURT OF THE UNITED STATES

MERITOR SAVINGS BANK v. VINSON

477 U.S. 57 (1986)

(Case Syllabus edited by the Author)

Respondent former employee of petitioner bank brought an action against the bank and her supervisor at the bank, claiming that during her employment at the bank she had been subjected to sexual harassment by the supervisor in violation of Title VII of the Civil Rights Act of 1964, and seeking injunctive relief and damages. At the trial, the parties presented conflicting testimony about the existence of a sexual relationship between respondent and the supervisor.

The District Court denied relief without resolving the conflicting testimony, holding that if respondent and the supervisor did have a sexual relationship, it was voluntary and had nothing to do with her continued employment at the bank, and that therefore respondent was not the victim of sexual harassment. The court then went on to hold that since the bank was without notice, it could not be held liable for the supervisor's alleged sexual harassment.

The Court of Appeals reversed and remanded. The Court of Appeals noted that a violation of Title VII may be predicated on either of two types of sexual harassment: (1) harassment that involves the conditioning of employment benefits on sexual favors, and (2) harassment that, while not affecting economic benefits, creates a hostile or offensive working environment. The Court of Appeals held that since the grievance here was of the second type and the District Court had not considered whether a violation of this type had occurred, a remand was necessary. The Court of Appeals further held that the need for a remand was not obviated by the fact that the District Court had found that any sexual relationship between respondent and the supervisor was a voluntary one, a finding that might have been based on testimony about respondent's "dress and personal fantasies" that "had no place in the litigation." As to the bank's liability, the Court of Appeals held that an employer is absolutely liable for sexual harassment by supervisory personnel, whether or not the employer knew or should have known about it.

Held:

1. A claim of "hostile environment" sexual harassment is a form of sex discrimination that is actionable under Title VII.

(a) The language of Title VII is not limited to "economic" or "tangible" discrimination. Equal Employment Opportunity Commission Guidelines fully support the view that sexual harassment leading to non-economic injury can violate Title VII. Here, respondent's allegations were sufficient to state a claim for "hostile environment" sexual harassment.

(b) The District Court's findings were insufficient to dispose of respondent's "hostile environment" claim. The District Court apparently erroneously believed that a sexual harassment claim will not lie absent an economic effect on the complainant's employment, and erroneously focused on the "voluntariness" of respondent's participation in the claimed sexual episodes. The correct inquiry is whether respondent by her conduct indicated that the alleged sexual advances were unwelcome, not whether her participation in them was voluntary.

(c) The District Court did not err in admitting evidence of respondent's sexually provocative speech and dress. While "voluntariness" in the sense of consent is no defense to a sexual harassment claim, it does not follow that such evidence is irrelevant as a matter of law in determining whether the complainant found particular sexual advances unwelcome.

2. The Court of Appeals erred in concluding that employers are always automatically liable for sexual harassment by their supervisors. While common-law agency principles may not be transferable in all their particulars to Title VII, Congress' decision to define "employer" to include any "agent" of an employer evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible. In this case, however, the mere existence of a grievance procedure in the bank and the bank's policy against discrimination, coupled with respondent's failure to invoke that procedure, do not necessarily insulate the bank from liability.

243 U.S. App. D.C. 323, 753 F.2d 141, affirmed and remanded.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, POWELL, STEVENS, and O'CONNOR, JJ., joined. STEVENS, J., filed a concurring opinion, MARSHALL, J., filed an opinion concurring in the judgment, in which BRENNAN, BLACKMUN, and STEVENS, JJ., joined.

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7.8: HARRIS v. FORKLIFT SYSTEMS, INC.

The following U.S. Supreme Court case provides some guidance on the Court's interpretation of the law regarding sexual harassment in the workplace.

SUPREME COURT OF THE UNITED STATES

HARRIS v. FORKLIFT SYSTEMS, INC.

510 U.S. 17 (1993)

(Case Syllabus edited by the Author)

Petitioner Harris sued her former employer, respondent Forklift Systems, Inc., claiming that the conduct of Forklift's president toward her constituted "abusive work environment" harassment because of her gender in violation of Title VII of the Civil Rights Act of 1964. Charles Hardy was Forklift's president.

Hardy told Harris on several occasions, in the presence of other employees, "You're a woman, what do you know," and "We need a man as the rental manager"; at least once, he told her she was "a dumb ass woman." Again, in front of others, he suggested that the two of them "go to the Holiday Inn to negotiate [Harris'] raise." Hardy occasionally asked Harris and other female employees to get coins from his front pants pocket. He threw objects on the ground in front of Harris and other women and asked them to pick the objects up. He made sexual innuendos about Harris' and other women's clothing. In mid-August 1987, Harris complained to Hardy about his conduct. Hardy said he was surprised that Harris was offended, claimed he was only joking, and apologized. He also promised he would stop, and based on this assurance Harris stayed on the job. But in early September, Hardy began anew: While Harris was arranging a deal with one of Forklift's customers, he asked her, again in front of other employees, "What did you do, promise the guy . . . some [sex] Saturday night?" On October 1, Harris collected her paycheck and quit.

Declaring this to be "a close case," the District Court found, among other things, that Forklift's president often insulted Harris because of her gender and often made her the target of unwanted sexual innuendos. However, the court also found that while some of Hardy's comments offended Harris, and would offend a reasonable woman, the comments were not

> "so severe as to be expected to seriously affect [Harris'] psychological well being. A reasonable woman manager under like circumstances would have been offended by Hardy, but his conduct would not have risen to the level of interfering with that person's work performance. the court concluded that the comments in question did not create an abusive environment because they were not "so severe as to . . . seriously affect [Harris'] psychological well being" or lead her to "suffe[r] injury."

The Court of Appeals affirmed.

Held:

To be actionable as "abusive work environment" harassment, conduct need not "seriously affect [an employee's] psychological well being" or lead the plaintiff to "suffe[r] injury."

(a) The applicable standard, here reaffirmed, is stated in Meritor Savings Bank v. Vinson, 477 U.S. 57: Title VII is violated when the workplace is permeated with discriminatory behavior that is sufficiently severe or pervasive to create a discriminatorily hostile or abusive working environment. This standard requires an objectively hostile or abusive environment– one that a reasonable person would find hostile or abusive–as well as the victim's subjective perception that the environment is abusive.

(b) Whether an environment is "hostile" or "abusive" can be determined only by looking at all the circumstances, which may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. The effect on the employee's psychological well being is relevant in determining whether the plaintiff actually found the environment abusive. But while psychological harm, like any other relevant factor, may be taken into account, no single factor is required.

(c) Reversal and remand are required because the District Court's erroneous application of the incorrect legal standard may well have influenced its ultimate conclusion that the work environment was not intimidating or abusive to Harris, especially given that

the court found this to be a “close case.”

976 F. 2d 733, reversed and remanded.

O’Connor, J., delivered the opinion for a unanimous Court. Scalia, J., and Ginsburg, J., filed concurring opinions.

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7.9: BOSTOCK v. CLAYTON COUNTY

The following case applied Title VII protections to homosexual and transgender employees.

SU PREME COURT OF THE UNITED STATES

BOSTOCK v. CLAYTON COUNTY, 590 U.S. ___ (2020)

(Case Syllabus edited by the Author)

Justice Gorsuch delivered the opinion of the Court.

In each of these cases, an employer allegedly fired a long-time employee simply for being homosexual or transgender. Clayton County, Georgia, fired Gerald Bostock for conduct "unbecoming" a county employee shortly after he began participating in a gay recreational softball league. Altitude Express fired Donald Zarda days after he mentioned being gay. And R. G. & G. R. Harris Funeral Homes fired Aimee Stephens, who presented as a male when she was hired, after she informed her employer that she planned to "live and work full-time as a woman." Each employee sued, alleging sex discrimination under Title VII of the Civil Rights Act of 1964. The Eleventh Circuit held that Title VII does not prohibit employers from firing employees for being gay and so Mr. Bostock's suit could be dismissed as a matter of law. The Second and Sixth Circuits, however, allowed the claims of Mr. Zarda and Ms. Stephens, respectively, to proceed.

Held: An employer who fires an individual merely for being gay or transgender violates Title VII.

(a) Title VII makes it "unlawful . . . for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin." 42 U. S. C. §2000e–2(a)(1). The straightforward application of Title VII's terms interpreted in accord with their ordinary public meaning at the time of their enactment resolves these cases.

(1) The parties concede that the term "sex" in 1964 referred to the biological distinctions between male and female. And "the ordinary meaning of 'because of' is 'by reason of' or 'on account of,' " *University of Tex. Southwestern Medical Center* v. *Nassar*, 570 U.S. 338, 350. That term incorporates the but-for causation standard, *id.*, at 346, 360, which, for Title VII, means that a defendant cannot avoid liability just by citing some *other* factor that contributed to its challenged employment action. The term "discriminate" meant "[t]o make a difference in treatment or favor (of one as compared with others)." Webster's New International Dictionary 745. In so-called "disparate treatment" cases, this Court has held that the difference in treatment based on sex must be intentional. See, *e.g.*, *Watson* v. *Fort Worth Bank & Trust*, 487 U.S. 977, 986. And the statute's repeated use of the term "individual" means that the focus is on "[a] particular being as distinguished from a class." Webster's New International Dictionary, at 1267. .

(2) These terms generate the following rule: An employer violates Title VII when it intentionally fires an individual employee based in part on sex. It makes no difference if other factors besides the plaintiff's sex contributed to the decision or that the employer treated women as a group the same when compared to men as a group. A statutory violation occurs if an employer intentionally relies in part on an individual employee's sex when deciding to discharge the employee. Because discrimination on the basis of homosexuality or transgender status requires an employer to intentionally treat individual employees differently because of their sex, an employer who intentionally penalizes an employee for being homosexual or transgender also violates Title VII. There is no escaping the role intent plays: Just as sex is necessarily a but-for cause when an employer discriminates against homosexual or transgender employees, an employer who discriminates on these grounds inescapably intends to rely on sex in its decision making.

(b) Three leading precedents confirm what the statute's plain terms suggest. In *Phillips* v. *Martin Marietta Corp.*, 400 U.S. 542, a company was held to have violated Title VII by refusing to hire women with young children, despite the fact that the discrimination also depended on being a parent of young children and the fact that the company favored hiring women over men. In *Los Angeles Dept. of Water and Power* v. *Manhart*, 435 U.S. 702, an employer's policy of requiring women to make larger pension fund contributions than men because women tend to live longer was held to violate Title VII, notwithstanding the policy's evenhandedness between men and women as groups. And in *Oncale* v. *Sundowner Offshore Services, Inc.*, 523 U.S. 75, a male plaintiff alleged a triable Title VII claim for sexual harassment by co-workers who were members of the same sex.

The lessons these cases hold are instructive here. First, it is irrelevant what an employer might call its discriminatory practice, how others might label it, or what else might motivate it. In *Manhart*, the employer might have called its rule a "life expectancy" adjustment, and in *Phillips*, the employer could have accurately spoken of its policy as one based on "motherhood." But such labels and additional intentions or motivations did not make a difference there, and they cannot make a difference here. When an employer fires an employee for being homosexual or transgender, it necessarily intentionally discriminates against that individual in part because of sex. Second, the plaintiff's sex need not be the sole or primary cause of the employer's adverse action. In *Phillips*, *Manhart*, and *Oncale*, the employer easily could have pointed to some other, nonprotected trait and insisted it was the more important factor in the adverse employment outcome. Here, too, it is of no significance if another factor, such as the plaintiff's attraction to the same sex or presentation as a different sex from the one assigned at birth, might also be at work, or even play a more important role in the employer's decision. Finally, an employer cannot escape liability by demonstrating that it treats males and females comparably as groups. *Manhart* is instructive here. An employer who intentionally fires an individual homosexual or transgender employee in part because of that individual's sex violates the law even if the employer is willing to subject all male and female homosexual or transgender employees to the same rule.

(c) The employers do not dispute that they fired their employees for being homosexual or transgender. Rather, they contend that even intentional discrimination against employees based on their homosexual or transgender status is not a basis for Title VII liability. But their statutory text arguments have already been rejected by this Court's precedents. And none of their other contentions about what they think the law was meant to do, or should do, allow for ignoring the law as it is.

(1) The employers assert that it should make a difference that plaintiffs would likely respond in conversation that they were fired for being gay or transgender and not because of sex. But conversational conventions do not control Title VII's legal analysis, which asks simply whether sex is a but-for cause. Nor is it a defense to insist that intentional discrimination based on homosexuality or transgender status is not intentional discrimination based on sex. An employer who discriminates against homosexual or transgender employees necessarily and intentionally applies sex-based rules. Nor does it make a difference that an employer could refuse to hire a gay or transgender individual without learning that person's sex. By intentionally setting out a rule that makes hiring turn on sex, the employer violates the law, whatever he might know or not know about individual applicants. The employers also stress that homosexuality and transgender status are distinct concepts from sex, and that if Congress wanted to address these matters in Title VII, it would have referenced them specifically. But when Congress chooses not to include any exceptions to a broad rule, this Court applies the broad rule. Finally, the employers suggest that because the policies at issue have the same adverse consequences for men and women, a stricter causation test should apply. That argument unavoidably comes down to a suggestion that sex must be the sole or primary cause of an adverse employment action under Title VII, a suggestion at odds with the statute.

(2) The employers contend that few in 1964 would have expected Title VII to apply to discrimination against homosexual and transgender persons. But legislative history has no bearing here, where no ambiguity exists about how Title VII's terms apply to the facts. See *Milner* v. *Department of Navy*, 562 U.S. 562, 574. While it is possible that a statutory term that means one thing today or in one context might have meant something else at the time of its adoption or might mean something different in another context, the employers do not seek to use historical sources to illustrate that the meaning of any of Title VII's language has changed since 1964 or that the statute's terms ordinarily carried some missed message. Instead, they seem to say when a new application is both unexpected and important, even if it is clearly commanded by existing law, the Court should merely point out the question, refer the subject back to Congress, and decline to enforce the law's plain terms in the meantime. This Court has long rejected that sort of reasoning. And the employers' new framing may only add new problems and leave the Court with more than a little law to overturn. Finally, the employers turn to naked policy appeals, suggesting that the Court proceed without the law's guidance to do what it thinks best. That is an invitation that no court should ever take up.

No. 17–1618, 723 Fed. Appx. 964, reversed and remanded; No. 17–1623, 883 F.3d 100, and No. 18–107, 884 F.3d 560, affirmed.

Gorsuch, J., delivered the opinion of the Court, in which Roberts, C. J., and Ginsburg, Breyer, Sotomayor, and Kagan, JJ., joined. Alito, J., filed a dissenting opinion, in which Thomas, J., joined. Kavanaugh, J., filed a dissenting opinion.

Notes

1 Together with No. 17–1623, *Altitude Express, Inc., et al.* v. *Zarda et al., as Co-Independent Executors of the Estate of Zarda*, on certiorari to the United States Court of Appeals for the Second Circuit, and No. 18–107, *R. G. & G. R. Harris Funeral Homes, Inc.* v. *Equal Employment Opportunity Commission et al.*, on certiorari to the United States Court of Appeals for the Sixth Circuit.

Source: https://supreme.justia.com/cases/federal/us/590/17-1618/ August 4, 2020

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7.10: BURLINGTON INDUSTRIES, INC. v. ELLERTH

The following U.S. Supreme Court case provides some guidance on the Court's interpretation of the law regarding sexual harassment in the workplace.

SUPREME COURT OF THE UNITED STATES

BURLINGTON INDUSTRIES, INC. v. ELLERTH

524 US 742 (1998)

(Case Syllabus edited by the Author)

Respondent Kimberly Ellerth quit her job after 15 months as a salesperson in one of petitioner Burlington Industries' many divisions, allegedly because she had been subjected to constant sexual harassment by one of her supervisors, Ted Slowik. Slowik was a mid-level manager who had authority to hire and promote employees, subject to higher approval, but was not considered a policy-maker. Against a background of repeated boorish and offensive remarks and gestures allegedly made by Slowik, Ellerth places particular emphasis on three incidents where Slowik's comments could be construed as threats to deny her tangible job benefits. Ellerth refused all of Slowik's advances, yet suffered no tangible retaliation and was, in fact, promoted once. Moreover, she never informed anyone in authority about Slowik's conduct, despite knowing Burlington had a policy against sexual harassment. In filing this lawsuit, Ellerth alleged Burlington engaged in sexual harassment and forced her constructive discharge, in violation of Title VII of the Civil Rights Act of 1964, 42 U. S. C. §2000e et seq. The District Court granted Burlington summary judgment. The Seventh Circuit en banc reversed in a decision that produced eight separate opinions and no consensus for a controlling rationale. Among other things, those opinions focused on whether Ellerth's claim could be categorized as one of quid pro quo harassment, and on whether the standard for an employer's liability on such a claim should be vicarious liability or negligence.

Held:

Under Title VII, an employee who refuses the unwelcome and threatening sexual advances of a supervisor, yet suffers no adverse, tangible job consequences, may recover against the employer without showing the employer is negligent or otherwise at fault for the supervisor's actions, but the employer may interpose an affirmative defense.

(a) The Court assumes an important premise yet to be established: a trier of fact could find in Slowik's remarks numerous threats to retaliate against Ellerth if she denied some sexual liberties. The threats, however, were not carried out. Cases based on carried-out threats are referred to often as "quid pro quo" cases, as distinct from bothersome attentions or sexual remarks sufficient to create a "hostile work environment." Those two terms do not appear in Title VII, which forbids only "discriminat[ion] against any individual with respect to his … terms [or] conditions … of employment, because of … sex." § 2000e—2(a)(1). In *Meritor Savings Bank, FSB v. Vinson*, 477 U. S. 57, this Court distinguished between the two concepts, saying both are cognizable under Title VII, though a hostile environment claim requires harassment that is severe or pervasive. *Meritor* did not discuss the distinction for its bearing upon an employer's liability for discrimination, but held, with no further specifics, that agency principles controlled on this point. Id., at 72. Nevertheless, in *Meritor's* wake, Courts of Appeals held that, if the plaintiff established a quid pro quo claim, the employer was subject to vicarious liability. This rule encouraged Title VII plaintiffs to state their claims in quid pro quo terms, which in turn put expansive pressure on the definition. For example, the question presented here is phrased as whether Ellerth can state a quid pro quo claim, but the issue of real concern to the parties is whether Burlington has vicarious liability, rather than liability limited to its own negligence. This Court nonetheless believes the two terms are of limited utility. To the extent they illustrate the distinction between cases involving a carried-out threat and offensive conduct in general, they are relevant when there is a threshold question whether a plaintiff can prove discrimination. Hence, Ellerth's claim involves only unfulfilled threats, so it is a hostile work environment claim requiring a showing of severe or pervasive conduct. This Court accepts the District Court's finding that Ellerth made such a showing. When discrimination is thus proved, the factors discussed below, not the categories quid pro quo and hostile work environment, control on the issue of vicarious liability.

(b) In deciding whether an employer has vicarious liability in a case such as this, the Court turns to agency law principles, for Title VII defines the term "employer" to include "agents." §2000e(b). Given this express direction, the Court concludes a uniform and

predictable standard must be established as a matter of federal law. The Court relies on the general common law of agency, rather than on the law of any particular State. *Community for Creative Non-Violence v. Reid*, 490 U. S. 730. The Restatement (Second) of Agency (hereinafter Restatement) is a useful beginning point, although common-law principles may not be wholly transferable to Title VII. See *Meritor*, *supra*, at 72.

(c) A master is subject to liability for the torts of his servants committed while acting in the scope of their employment. Restatement § 219(1). Although such torts generally may be either negligent or intentional, sexual harassment under Title VII presupposes intentional conduct. An intentional tort is within the scope of employment when actuated, at least in part, by a purpose to serve the employer. *Id.*, §§ 228(1)(c), 230. Courts of Appeals have held, however, a supervisor acting out of gender-based animus or a desire to fulfill sexual urges may be actuated by personal motives unrelated and even antithetical to the employer's objectives. Thus, the general rule is that sexual harassment by a supervisor is not conduct within the scope of employment.

(d) However, scope of employment is not the only basis for employer liability under agency principles. An employer is subject to liability for the torts of its employees acting outside the scope of their employment when, inter alia, the employer itself was negligent or reckless, Restatement § 219(2)(b), or the employee purported to act or to speak on behalf of the employer and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation, *id*., § 219(2)(d). An employer is negligent, and therefore subject to liability under § 219(2)(b), if it knew or should have known about sexual harassment and failed to stop it. Negligence sets a minimum standard for Title VII liability; but Ellerth seeks to invoke the more stringent standard of vicarious liability. Section 219(2)(d) makes an employer vicariously liable for sexual harassment by an employee who uses apparent authority (the apparent authority standard), or who was "aided in accomplishing the tort by the existence of the agency relation" (the aided in the agency relation standard).

(e) As a general rule, apparent authority is relevant where the agent purports to exercise a power which he or she does not have, as distinct from threatening to misuse actual power. Compare Restatement §§ 6 and 8. Because supervisory harassment cases involve misuse of actual power, not the false impression of its existence, apparent authority analysis is inappropriate. When a party seeks to impose vicarious liability based on an agent's misuse of delegated authority, the Restatement's aided in the agency relation rule provides the appropriate analysis.

(f) That rule requires the existence of something more than the employment relation itself because, in a sense, most workplace tortfeasors, whether supervisors or co-workers, are aided in accomplishing their tortious objective by the employment relation: Proximity and regular contact afford a captive pool of potential victims. Such an additional aid exists when a supervisor subjects a subordinate to a significant, tangible employment action, i.e., a significant change in employment status, such as discharge, demotion, or undesirable reassignment. Every Federal Court of Appeals to have considered the question has correctly found vicarious liability in that circumstance. This Court imports the significant, tangible employment action concept for resolution of the vicarious liability issue considered here. An employer is therefore subject to vicarious liability for such actions. However, where, as here, there is no tangible employment action, it is not obvious the agency relationship aids in commission of the tort. Moreover, Meritor holds that agency principles constrain the imposition of employer liability for supervisor harassment. Limiting employer liability is also consistent with Title VII's purpose to the extent it would encourage the creation and use of anti-harassment policies and grievance procedures. Thus, in order to accommodate the agency principle of vicarious liability for harm caused by misuse of supervisory authority, as well as Title VII's equally basic policies of encouraging forethought by employers and saving action by objecting employees, the Court adopts, in this case and in *Faragher v. Boca Raton*, post, p. ___, the following holding: An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence, see Fed. Rule. Civ. Proc. 8(c). The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. While proof that an employer had promulgated an antiharassment policy with a complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense. And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing any unreasonable failure to use any complaint procedure provided by the employer, a demonstration

of such failure will normally suffice to satisfy the employer's burden under the second element of the defense. No affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action.

(g) Given the Court's explanation that the labels quid pro quo and hostile work environment are not controlling for employer-liability purposes, Ellerth should have an adequate opportunity on remand to prove she has a claim which would result in vicarious liability. Although she has not alleged she suffered a tangible employment action at Slowik's hands, which would deprive Burlington of the affirmative defense, this is not dispositive. In light of the Court's decision, Burlington is still subject to vicarious liability for Slowik's activity but should have an opportunity to assert and prove the affirmative defense.

123 F. 3d 490, affirmed.

Kennedy, J., delivered the opinion of the Court, in which Rehnquist, C. J., and Stevens, O'Connor, Souter, and Breyer, JJ. joined. Ginsburg, J., filed an opinion concurring in the judgment. Thomas, J., filed a dissenting opinion, in which Scalia, J. joined.

NON-EMPLOYMENT DISCRIMINATION: In addition to the employment situations, anti-discrimination laws also apply to discrimination in credit, housing, and places of public accommodation.

CREDIT: It is unlawful for a lender to deny credit, because of age (other than to minors), or sex or marital status, in making personal or mortgage loans and/or in dealing with credit cards matters under both the federal Equal Credit Opportunity Act, 15 USC Sections 28-39, as well as NYS' HRL Section 296-a.

HOUSING: The federal Fair Housing Amendments Act of 1988, 11 USC Sections 357-358, makes it unlawful to discriminate in housing on the basis of race, color, religion, national origin, sex, disability and families with children. New York's HRL Section 296 subd 5 forbids housing discrimination on the basis of race, color, religion, national origin, sex, disability, families with children, age, and marital status.

It is unlawful to deny housing to a legally blind, severely handicapped, or mute person, or to evict such a person, because of a dog or other handicapped aiding pet, unless a public health hazard develops.

"Red lining," is also an unlawful practice. This occurs when banks and/or other financial institutions refuse to make loans to prospective home buyers in certain neighborhoods.

However, it is lawful in NYS to refuse to rent half of a two-family house, or even to rent a room in a house, where the landlord/owner lives in the house, based on age, sex, religion, disability, marital status, or the presence of children. Race is not included as a basis for such denial.

PUBLIC ACCOMMODATIONS: Theaters, restaurants, hotels, resorts, and public modes of transportation are considered public accommodations. It is unlawful to discriminate against patrons at such places, on the basis of ages, marital status, sex, race, color, national origin, disability, creed, and/or religion.

However, claims of religious liberty may override public accommodation laws as the following U.S. Supreme Court decision illustrates.

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7.11: MASTERPIECE CAKESHOP, LTD., ET AL. v. COLORADO CIVIL RIGHTS COMMISSION ET AL.

The following U.S. Supreme Court case provides some guidance on the Court's interpretation of the law regarding sexual harassment in the workplace.

SUPREME COURT OF THE UNITED STATES

MASTERPIECE CAKESHOP, LTD., ET AL. v. COLORADO CIVIL RIGHTS COMMISSION ET AL.

584 U. S. ____ (2018)

(Case Syllabus edited by the Author)

JUSTICE KENNEDY delivered the opinion of the Court.

Masterpiece Cakeshop, Ltd., is a Colorado bakery owned and operated by Jack Phillips, an expert baker and devout Christian. In 2012 he told a same-sex couple that he would not create a cake for their wedding celebration because of his religious opposition to same-sex marriages—marriages that Colorado did not then recognize—but that he would sell them other baked goods, e.g., birthday cakes. The couple filed a charge with the Colorado Civil Rights Commission (Commission) pursuant to the Colorado Anti-Discrimination Act (CADA), which prohibits, as relevant here, discrimination based on sexual orientation in a "place of business engaged in any sales to the public and any place offering services . . . to the public." Under CADA's administrative review system, the Colorado Civil Rights Division first found probable cause for a violation and referred the case to the Commission. The Commission then referred the case for a formal hearing before a state Administrative Law Judge (ALJ), who ruled in the couple's favor. In so doing, the ALJ rejected Phillips' First Amendment claims: that requiring him to create a cake for a same-sex wedding would violate his right to free speech by compelling him to exercise his artistic talents to express a message with which he disagreed and would violate his right to the free exercise of religion. Both the Commission and the Colorado Court of Appeals affirmed.

Held:

The Commission's actions in this case violated the Free Exercise Clause.

(a) The laws and the Constitution can, and in some instances must, protect gay persons and gay couples in the exercise of their civil rights, but religious and philosophical objections to gay marriage are protected views and, in some instances, protected forms of expression. See *Obergefell v. Hodges*, 576 U. S. ___, ___. While it is unexceptional that Colorado law can protect gay persons in acquiring products and services on the same terms and conditions as are offered to other members of the public, the law must be applied in a manner that is neutral toward religion. To Phillips, his claim that using his artistic skills to make an expressive statement, a wedding endorsement in his own voice and of his own creation, has a significant First Amendment speech component and implicates his deep and sincere religious beliefs. His dilemma was understandable in 2012, which was before Colorado recognized the validity of gay marriages performed in the State and before this Court issued *United States v. Windsor*, 570 U. S. 744, or *Obergefell*. Given the State's position at the time, there is some force to Phillips' argument that he was not unreasonable in deeming his decision lawful. State law at the time also afforded storekeepers some latitude to decline to create specific messages they considered offensive. Indeed, while the instant enforcement proceedings were pending, the State Civil Rights Division concluded in at least three cases that a baker acted lawfully in declining to create cakes with decorations that demeaned gay persons or gay marriages. Phillips too was entitled to a neutral and respectful consideration of his claims in all the circumstances of the case.

(b) That consideration was compromised, however, by the Commission's treatment of Phillips' case, which showed elements of a clear and impermissible hostility toward the sincere religious beliefs motivating his objection. As the record shows, some of the commissioners at the Commission's formal, public hearings endorsed the view that religious beliefs cannot legitimately be carried into the public sphere or commercial domain, disparaged Phillips' faith as despicable and characterized it as merely rhetorical and compared his invocation of his sincerely held religious beliefs to defenses of slavery and the Holocaust. No commissioners objected to the comments. Nor were they mentioned in the later state-court ruling or disavowed in the briefs filed here. The comments thus cast doubt on the fairness and impartiality of the Commission's adjudication of Phillips' case. Another indication of

hostility is the different treatment of Phillips' case and the cases of other bakers with objections to anti-gay messages who prevailed before the Commission. The Commission ruled against Phillips in part on the theory that any message on the requested wedding cake would be attributed to the customer, not to the baker. Yet the Division did not address this point in any of the cases involving requests for cakes depicting anti-gay marriage symbolism. The Division also considered that each bakery was willing to sell other products to the prospective customers, but the Commission found Phillips' willingness to do the same irrelevant. The State Court of Cite as: 584 U. S. ____ (2018) Appeals' brief discussion of this disparity of treatment does not answer Phillips' concern that the State's practice was to disfavor the religious basis of his objection.

(c) For these reasons, the Commission's treatment of Phillips' case violated the State's duty under the First Amendment not to base laws or regulations on hostility to a religion or religious viewpoint. The government, consistent with the Constitution's guarantee of free exercise, cannot impose regulations that are hostile to the religious beliefs of affected citizens and cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices. *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U. S. 520. Factors relevant to the assessment of governmental neutrality include "the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decision-making body." In view of these factors, the record here demonstrates that the Commission's consideration of Phillips' case was neither tolerant nor respectful of his religious beliefs. The Commission gave "every appearance," of adjudicating his religious objection based on a negative normative "evaluation of the particular justification" for his objection and the religious grounds for it, but government has no role in expressing or even suggesting whether the religious ground for Phillips' conscience-based objection is legitimate or illegitimate. The inference here is thus that Phillips' religious objection was not considered with the neutrality required by the Free Exercise Clause. The State's interest could have been weighed against Phillips' sincere religious objections in a way consistent with the requisite religious neutrality that must be strictly observed. But the official expressions of hostility to religion in some of the commissioners' comments were inconsistent with that requirement, and the Commission's disparate consideration of Phillips' case compared to the cases of the other bakers suggests the same.

370 P. 3d 272, reversed.

KENNEDY, J., delivered the opinion of the Court, in which ROBERTS, C. J., and BREYER, ALITO, KAGAN, and GORSUCH, JJ., joined. KAGAN, J., filed a concurring opinion, in which BREYER, J., joined. GORSUCH, J., filed a concurring opinion, in which ALITO, J., joined. THOMAS, J., filed an opinion concurring in part and concurring in the judgment, in which GORSUCH, J., joined. GINSBURG, J., filed a dissenting opinion, in which SOTOMAYOR, J., joined.

AFFIRMATIVE ACTION: Affirmative action allows, and sometimes requires, employers, prospective employers, schools and other institutions to take positive steps designed to eliminate current discrimination, remedy past discrimination, and prevent future discrimination. Affirmative action lawfully allows preferential treatment based on race, color, sex, creed and age. It is often referred to by some as "reverse" discrimination.

Two recent U.S. Supreme Court cases illustrate the state of affirmative action. If affirmative action is the patient, one could argue that while the patient is still alive, the patient is in very critical condition.

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7.12: SCHUETTE, ATTORNEY GENERAL OF MICHIGAN v. COALITION TO DEFEND AFFIRMATIVE ACTION

The following U.S. Supreme Court case provides some guidance on the Court's interpretation of the law regarding sexual harassment in the workplace.

SUPREME COURT OF THE UNITED STATES

SCHUETTE, ATTORNEY GENERAL OF MICHIGAN v. COALITION TO DEFEND AFFIRMATIVE ACTION

572 U. S. ____ (2014)

(Case Syllabus edited by the Author)

JUSTICE KENNEDY announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE and JUSTICE ALITO join.

After this Court decided that the University of Michigan's undergraduate admissions plan's use of race-based preferences violated the Equal Protection Clause, *Gratz v. Bollinger*, 539 U. S. 244, 270, but that the law school admission plan's more limited use did not, *Grutter v. Bollinger*, 539 U. S. 306, 343, Michigan voters adopted Proposal 2, now Art. I, §26, of the State Constitution, which, as relevant here, prohibits the use of race-based preferences as part of the admissions process for state universities. In consolidated challenges, the District Court granted summary judgment to Michigan, thus upholding Proposal 2, but the Sixth Circuit reversed, concluding that the proposal violated the principles of *Washington v. Seattle School Dist. No. 1*, 458 U. S. 457.

Held:

The judgment of the Sixth Circuit is reversed.

JUSTICE KENNEDY, joined by THE CHIEF JUSTICE and JUSTICE ALITO, concluded that there is no authority in the Federal Constitution or in this Court's precedents for the Judiciary to set aside Michigan laws that commit to the voters the determination whether racial preferences may be considered in governmental decisions, in particular with respect to school admissions.

(a) This case is not about the constitutionality, or the merits, of race-conscious admissions policies in higher education. Here, the principle that the consideration of race in admissions is permissible when certain conditions are met is not being challenged. Rather, the question concerns whether, and in what manner, voters in the States may choose to prohibit the consideration of such racial preferences. Where States have prohibited race-conscious admissions policies, universities have responded by experimenting "with a wide variety of alternative approaches." *Grutter, supra*, at 342. The decision by Michigan voters reflects the ongoing national dialogue about such practices.

(b) The Sixth Circuit's determination that Seattle controlled here extends *Seattle's* holding in a case presenting quite different issues to reach a mistaken conclusion.

(1) It is necessary to consider first the relevant cases preceding *Seattle* and the background against which *Seattle* arose. Both *Reitman v. Mulkey*, 387 U. S. 369, and *Hunter v. Erickson*, 393 U. S. 385, involved demonstrated injuries on the basis of race that, by reasons of state encouragement or participation, became more aggravated. In *Mulkey*, a voter-enacted amendment to the California Constitution prohibiting state legislative interference with an owner's prerogative to decline to sell or rent residential property on any basis barred the challenging parties, on account of race, from invoking the protection of California's statutes, thus preventing them from leasing residential property. In *Hunter*, voters overturned an Akron ordinance that was enacted to address widespread racial discrimination in housing sales and rentals had forced many to live in "'unhealthful, unsafe, unsanitary and overcrowded'" segregated housing, 393 U. S., at 391. In *Seattle*, after the school board adopted a mandatory busing program to alleviate racial isolation of minority students in local schools, voters passed a state initiative that barred busing to desegregate. This Court found that the state initiative had the "practical effect" of removing "the authority to address a racial problem . . . from the existing decision-making body, in such a way as to burden minority interests" of busing advocates who must now "seek relief from the state legislature, or from the statewide electorate." 458 U. S., at 474.

(2) *Seattle* is best understood as a case in which the state action had the serious risk, if not purpose, of causing specific injuries on account of race as had been the case in *Mulkey* and *Hunter*. While there had been no judicial finding of de jure segregation with respect to Seattle's school district, a finding that would be required today, see *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U. S. 701, 720–721, *Seattle* must be understood as *Seattle* understood itself, as a case in which neither the State nor the United States "challenge[d] the propriety of race-conscious student assignments for the purpose of achieving integration, even absent a finding of prior de jure segregation." 458 U. S. at 472, n. 15.

Seattle's broad language, however, went well beyond the analysis needed to resolve the case. Seizing upon the statement in Justice Harlan's concurrence in *Hunter* that the procedural change in that case had "the clear purpose of making it more difficult for certain racial and religious minorities to achieve legislation that is in their interest," 385 U. S., at 395, the Seattle Court established a new and far reaching rationale: Where a government policy "inures primarily to the benefit of the minority" and "minorities . . . consider" the policy to be " 'in their interest,' " then any state action that "place[s] effective decision making authority over" that policy "at a different level of government" is subject to strict scrutiny. 458 U. S., at 472, 474.

(3) To the extent *Seattle* is read to require the Court to determine and declare which political policies serve the "interest" of a group defined in racial terms, that rationale was unnecessary to the decision in *Seattle*; it has no support in precedent; and it raises serious equal protection concerns. In cautioning against "impermissible racial stereotypes," this Court has rejected the assumption that all individuals of the same race think alike, see *Shaw v. Reno*, 509 U. S. 630, 647, but that proposition would be a necessary beginning point were the Seattle formulation to control. And if it were deemed necessary to probe how some races define their own interest in political matters, still another beginning point would be to define individuals according to race. Such a venture would be undertaken with no clear legal standards or accepted sources to guide judicial decision. It would also result in, or impose a high risk of, inquiries and categories dependent upon demeaning stereotypes, classifications of questionable constitutionality on their own terms. Assuming these steps could be taken, the court would next be required to determine the policy realms in which groups defined by race had a political interest. That undertaking, again without guidance from accepted legal standards, would risk the creation of incentives for those who support or oppose certain policies to cast the debate in terms of racial advantage or disadvantage. Adoption of the Seattle formulation could affect any number of laws or decisions, involving, e.g., tax policy or housing subsidies. And racial division would be validated, not discouraged.

It can be argued that objections to the larger consequences of the *Seattle* formulation need not be confronted here, for race was an undoubted subject of the ballot issue. But other problems raised by *Seattle*, such as racial definitions, still apply. And the principal flaw in the Sixth Circuit's decision remains: Here there was no infliction of a specific injury of the kind at issue in *Mulkey* and *Hunter* and in the history of the Seattle schools, and there is no precedent for extending these cases to restrict the right of Michigan voters to determine that race-based preferences granted by state entities should be ended. The Sixth Circuit's judgment also calls into question other States' long-settled rulings on policies similar to Michigan's.

Unlike the injuries in *Mulkey*, *Hunter*, and *Seattle*, the question here is not how to address or prevent injury caused on account of race but whether voters may determine whether a policy of race-based preferences should be continued. By approving Proposal 2 and thereby adding § 26 to their State Constitution, Michigan voters exercised their privilege to enact laws as a basic exercise of their democratic power, bypassing public officials they deemed not responsive to their concerns about a policy of granting race-based preferences. The mandate for segregated schools, *Brown v. Board of Education*, 347 U. S. 483, and scores of other examples teach that individual liberty has constitutional protection. But this Nation's constitutional system also embraces the right of citizens to speak and debate and learn and then, as a matter of political will, to act through a lawful electoral process, as Michigan voters have done here. These precepts are not inconsistent with the well-established principle that when hurt or injury is inflicted on racial minorities by the encouragement or command of laws or other state action, the Constitution requires redress by the courts. Such circumstances were present in *Mulkey*, *Hunter*, and *Seattle*, but they are not present here.

JUSTICE SCALIA, joined by JUSTICE THOMAS, agreed that § 26 rightly stands, though not because it passes muster under the political process doctrine. It likely does not, but the cases establishing that doctrine should be overruled. They are patently atextual, unadministrable, and contrary to this Court's traditional equal protection jurisprudence. The question here, as in every case in which neutral state action is said to deny equal protection on account of race, is whether the challenged action reflects a racially discriminatory purpose. It plainly does not.

(a) The Court of Appeals for the Sixth Circuit held §26 unconstitutional under the so-called political-process doctrine, derived from *Washington v. Seattle School Dist. No. 1*, 458 U. S. 457, and *Hunter v. Erickson*, 393 U. S. 385. In those cases, one

level of government exercised borrowed authority over an apparently "racial issue" until a higher level of government called the loan. This Court deemed each revocation an equal-protection violation, without regard to whether there was evidence of an invidious purpose to discriminate. The relentless, radical logic of Hunter and Seattle would point to a similar conclusion here, as in so many other cases.

(b) The problems with the political-process doctrine begin with its triggering prong, which assigns to a court the task of determining Cite as: 572 U. S. ____ (2014) 5 Syllabus whether a law that reallocates policymaking authority concerns a "racial issue," Seattle, 458 U. S., at 473, i.e., whether adopting one position on the question would "at bottom inur[e] primarily to the benefit of the minority, and is designed for that purpose," *id.*, at 472. Such freeform judicial musing into ethnic and racial "interests" involves judges in the dirty business of dividing the Nation "into racial blocs," *Metro Broadcasting, Inc. v. FCC*, 497 U. S. 547, 603, 610 (O'Connor, J., dissenting), and promotes racial stereotyping, see *Shaw v. Reno*, 509 U. S. 630, 647. More fundamentally, the analysis misreads the Equal Protection Clause to protect particular groups, a construction that has been repudiated in a "long line of cases understanding equal protection as a personal right." *Adarand Constructors, Inc. v. Peña*, 515 U. S. 200, 224, 230.

(c) The second part of the *Hunter-Seattle* analysis directs a court to determine whether the challenged act "place[s] effective decision making authority over [the] racial issue at a different level of government," *Seattle*, *supra*, at 474; but, in another line of cases, the Court has emphasized the near-limitless sovereignty of each State to design its governing structure as it sees fit, see, e.g., *Holt Civic Club v. Tuscaloosa*, 439 U. S. 60, 71. Taken to the limits of its logic, *Hunter-Seattle* is the gaping exception that nearly swallows the rule of structural state sovereignty, which would seem to permit a State to give certain powers to cities, later assign the same powers to counties, and even reclaim them for itself.

(d) *Hunter* and *Seattle* also endorse a version of the proposition that a facially neutral law may deny equal protection solely because it has a disparate racial impact. That equal-protection theory has been squarely and soundly rejected by an "unwavering line of cases" holding "that a violation of the Equal Protection Clause requires state action motivated by discriminatory intent," *Hernandez v. New York*, 500 U. S. 352, 372–373 (O'Connor, J., concurring in judgment), and that "official action will not be held unconstitutional solely because it results in a racially disproportionate impact," *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U. S. 252, 264–265. Respondents cannot prove that the action here reflects a racially discriminatory purpose, for any law expressly requiring state actors to afford all persons equal protection of the laws does not— cannot—deny "to any person . . . equal protection of the laws," U. S. Const., Amdt. 14, §1.

JUSTICE BREYER agreed that the amendment is consistent with the Equal Protection Clause, but for different reasons. First, this case addresses the amendment only as it applies to, and forbids, race conscious admissions programs that consider race solely in order to obtain the educational benefits of a diverse student body. Second, the 6 *SCHUETTE v. BAMN* Syllabus Constitution permits, but does not require, the use of the kind of race-conscious programs now barred by the Michigan Constitution. It foresees the ballot box, not the courts, as the normal instrument for resolving debates about the merits of these programs. Third, *Hunter v. Erickson*, 393 U. S. 385, and *Washington v. Seattle School Dist. No. 1*, 458 U. S. 457, which reflect the important principle that an individual's ability to participate meaningfully in the political process should be independent of his race, do not apply here. Those cases involved a restructuring of the political process that changed the political level at which policies were enacted, while this case involves an amendment that took decision making authority away from unelected actors and placed it in the hands of the voters. Hence, this case does not involve a diminution of the minority's ability to participate in the political process. Extending the holding of Hunter and Seattle to situations where decision making authority is moved from an administrative body to a political one would also create significant difficulties, given the nature of the administrative process. Furthermore, the principle underlying Hunter and Seattle runs up against a competing principle favoring decision making through the democratic process.

701 F. 3d 466, reversed.

KENNEDY, J., announced the judgment of the Court and delivered an opinion, in which ROBERTS, C. J., and ALITO, J., joined. ROBERTS, C. J., filed a concurring opinion. SCALIA, J., filed an opinion concurring in the judgment, in which THOMAS, J., joined. BREYER, J., filed an opinion concurring in the judgment. SOTOMAYOR, J., filed a dissenting opinion, in which GINSBURG, J., joined. KAGAN, J., took no part in the consideration or decision of the case.

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7.13: FISHER v. UNIVERSITY OF TEXAS AT AUSTIN, ET AL

The following U.S. Supreme Court case provides some guidance on the Court's interpretation of the law regarding sexual harassment in the workplace.

SUPREME COURT OF THE UNITED STATES

FISHER ***v . UNIVERSITY OF TEXAS AT AUSTIN , ET AL***

579 U. S. ____ (2016)

(Case Syllabus edited by the Author)

JUSTICE KENNEDY delivered the opinion of the Court.

The University of Texas at Austin (University) uses an undergraduate admissions system containing two components. First, as required by the State's Top Ten Percent Law, it offers admission to any students who graduate from a Texas high school in the top 10% of their class. It then fills the remainder of its incoming freshman class, some 25%, by combining an applicant's "Academic Index"–the student's SAT score and high school academic performance–with the applicant's "Personal Achievement Index," a holistic review containing numerous factors, including race. The University adopted its current admissions process in 2004, after a year-long-study of its admissions process–undertaken in the wake of *Grutter* v. *Bollinger*, 539 U. S. 306, and *Gratz*v. *Bollinger*, 539 U. S. 244 led it to conclude that its prior race-neutral system did not reach its goal of providing the educational benefits of diversity to its undergraduate students.

Petitioner Abigail Fisher, who was not in the top 10% of her high school class, was denied admission to the University's 2008 freshman class. She filed suit, alleging that the University's consideration of race as part of its holistic-review process disadvantaged her and other Caucasian applicants, in violation of the Equal Protection Clause. The District Court entered summary judgment in the University's favor, and the Fifth Circuit affirmed. This Court vacated the judgment, *Fisher* v. *University of Tex. at Austin*, 570 U. S. ___ (*Fisher I*), and remanded the case to the Court of Appeals, so the University's program could be evaluated under the proper strict scrutiny standard. On remand, the Fifth Circuit again affirmed the entry of summary judgment for the University.

Held:

The race-conscious admissions program in use at the time of petitioner's application is lawful under the Equal Protection Clause.

(a) *Fisher I* sets out three controlling principles relevant to assessing the constitutionality of a public university's affirmative action program. First, a university may not consider race "unless the admissions process can withstand strict scrutiny," *i.e.*, it must show that its "purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is necessary" to accomplish that purpose. 570 U. S., at ___. Second, "the decision to pursue the educational benefits that flow from student body diversity is, in substantial measure, an academic judgment to which some, but not complete, judicial deference is proper.". Third, when determining whether the use of race is narrowly tailored to achieve the university's permissible goals, the school bears the burden of demonstrating that "available" and "workable" "race-neutral alternatives" do not suffice.

(b) The University's approach to admissions gives rise to an unusual consequence here. The component with the largest impact on petitioner's chances of admission was not the school's consideration of race under its holistic-review process but the Top Ten Percent Plan. Because petitioner did not challenge the percentage part of the plan, the record is devoid of evidence of its impact on diversity. Remand for further fact finding would serve little purpose, however, because at the time of petitioner's application, the current plan had been in effect only three years and, in any event, the University lacked authority to alter the percentage plan, which was mandated by the Texas Legislature. These circumstances refute any criticism that the University did not make good faith efforts to comply with the law. The University, however, does have a continuing obligation to satisfy the strict scrutiny burden: by periodically reassessing the admission program's constitutionality, and efficacy, in light of the school's experience and the data it has gathered since adopting its admissions plan, and by tailoring its approach to ensure that race plays no greater role than is necessary to meet its compelling interests.

(c) Drawing all reasonable inferences in her favor, petitioner has not shown by a preponderance of the evidence that she was denied equal treatment at the time her application was rejected.

(1) Petitioner claims that the University has not articulated its compelling interest with sufficient clarity because it has failed to state more precisely what level of minority enrollment would constitute a "critical mass." However, the compelling interest that justifies consideration of race in college admissions is not an interest in enrolling a certain number of minority students, but an interest in obtaining "the educational benefits that flow from student body diversity." *Fisher I*, 570 U. S., at ___. Since the University is prohibited from seeking a particular number or quota of minority students, it cannot be faulted for failing to specify the particular level of minority enrollment at which it believes the educational benefits of diversity will be obtained.

On the other hand, asserting an interest in the educational benefits of diversity writ large is insufficient. A university's goals cannot be elusory or amorphous–they must be sufficiently measurable to permit judicial scrutiny of the policies adopted to reach them. The record here reveals that the University articulated concrete and precise goals–*e.g.*, ending stereotypes, promoting "cross-racial understanding," preparing students for "an increasingly diverse workforce and society," and cultivating leaders with "legitimacy in the eyes of the citizenry"–that mirror the compelling interest this Court has approved in prior cases. It also gave a "reasoned, principled explanation" for its decision, in a 39-page proposal written after a year-long study revealed that its race-neutral policies and programs did not meet its goals.

(2) Petitioner also claims that the University need not consider race because it had already "achieved critical mass" by 2003 under the Top Ten Percent Plan and race-neutral holistic review. The record, however, reveals that the University studied and deliberated for months, concluding that race-neutral programs had not achieved the University's diversity goals, a conclusion supported by significant statistical and anecdotal evidence.

(3) Petitioner argues further that it was unnecessary to consider race because such consideration had only a minor impact on the number of minority students the school admitted. But the record shows that the consideration of race has had a meaningful, if still limited, effect on freshman class diversity. That race consciousness played a role in only a small portion of admissions decisions should be a hallmark of narrow tailoring, not evidence of unconstitutionality.

(4) Finally, petitioner argues that there were numerous other race-neutral means to achieve the University's goals. However, as the record reveals, none of those alternatives was a workable means of attaining the University's educational goals, as of the time of her application.

758 F. 3d 633, affirmed.

KENNEDY, J., delivered the opinion of the Court, in which GINSBURG, BREYER, and SOTOMAYOR, JJ., joined. THOMAS, J., filed a dissenting opinion. ALITO, J., filed a dissenting opinion, in which ROBERTS, C. J., and THOMAS, J., joined. KAGAN, J., took no part in the consideration or decision of the case.

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7.14: References

Affirmative Action Fast Facts. (2018, April 03). Retrieved July 27, 2018, from https://www.cnn.com/2013/11/12/us/affirmative-action-fast-facts/index.html

Age Discrimination. (n.d.). Retrieved July 27, 2018, from https://www.eeoc.gov/laws/types/age.cfm

Aranyos, S. (2018, May 04). Keeping up with changes in New York State and New York City employment laws. Retrieved July 27, 2018, from https://www.bizjournals.com/newyork/news/2018/05/04/keeping-up-with-changes-in-new-york-state-and-new.html

Bona Fide Occupational Qualification. (n.d.). Retrieved July 27, 2018, from https://smallbusiness.findlaw.com/employment-law-and-human-resources/bona-fide-occupational-qualification.html

Discrimination in Public Accommodations. (n.d.). Retrieved July 27, 2018, from https://civilrights.findlaw.com/enforcing-your-civil-rights/discrimination-in-public-accommodations.html

Disparate Impact Discrimination. (n.d.). Retrieved July 27, 2018, from https://employment.findlaw.com/employment-discrimination/disparate-impact-discrimination.html

Division of Human Rights. (n.d.). Retrieved July 27, 2018, from https://dhr.ny.gov/

Division of Human Rights. (n.d.). Retrieved July 27, 2018, from https://dhr.ny.gov/law

EEOC Home Page. (n.d.). Retrieved July 27, 2018, from https://www.eeoc.gov/

Employment Discrimination Laws. (n.d.). Retrieved July 27, 2018, from https://ag.ny.gov/civil-rights/employment-discrimination-laws

Facts About Equal Pay and Compensation Discrimination. (n.d.). Retrieved July 27, 2018, from https://www.eeoc.gov/eeoc/publications/fs-epa.cfm

Facts About Sexual Harassment. (n.d.). Retrieved July 27, 2018, from https://www.eeoc.gov/eeoc/publications/fs-sex.cfm

Facts About the Americans with Disabilities Act. (n.d.). Retrieved July 27, 2018, from https://www.eeoc.gov/eeoc/publications/fs-ada.cfm

Find Laws, Legal Information, and Attorneys. (n.d.). Retrieved July 25, 2018June 11, 2018, from https://www.findlaw.com/

FindLaw's United States Supreme Court case and opinions. (n.d.). Retrieved July 26, 2018, from https://caselaw.findlaw.com/court/us-supreme-court/index.html

How to File an Unemployment Claim. (n.d.). Retrieved July 27, 2018, from https://labor.ny.gov/equal-opportunity/how-to-file-a-discrimination-claim.shtm

Justia Law. (n.d.). Retrieved July 25, 2018, from https://law.justia.com/

New York State. (n.d.). New York State Unified Court System. Retrieved July 25, 2018, from http://nycourts.gov/

New York State Division of Human Rights Fair Housing Guide. (2017, April). Retrieved July 27, 2018, from https://dhr.ny.gov/sites/default/files/pdf/nysdhr-fair-housing-guide.pdf

Pogue, D. L., Clifford, E., & Schwartz, A. L. (2009). Understanding New York Law, 2013-14. Upstate Legal Publishers

Policy Guidance on Current Issues of Sexual Harassment. (n.d.). Retrieved July 27, 2018, from https://www.eeoc.gov/policy/docs/currentissues.html

Pregnancy Discrimination. (n.d.). Retrieved July 27, 2018, from https://www.eeoc.gov/laws/types/pregnancy.cfm

The Housing Council. (2007, November 12). Tenant Rights & Responsibilities. Retrieved July 27, 2018, from https://www.rochester.edu/reslife/assets/pdf/non/Tenants-Rights-Responsibilities.pdf

The Pregnancy Discrimination Act of 1978. (n.d.). Retrieved July 27, 2018, from https://www.eeoc.gov/laws/statutes/pregnancy.cfm

Title VII of the Civil Rights Act of 1964. (n.d.). Retrieved July 27, 2018, from https://www.eeoc.gov/laws/statutes/titlevii.cfm

Wang, V. (2018, June 01). The #MeToo Movement Came to Albany. But Will It Stick? Retrieved July 27, 2018, from https://www.nytimes.com/2018/06/01/nyregion/metoo-albany-sexual-harassment.html

Welcome to LII. (n.d.). Retrieved July 25, 2018, from https://www.law.cornell.edu/

What is Quid Pro Quo Harassment? (n.d.). Retrieved July 27, 2018, from https://employment.findlaw.com/employment-discrimination/what-is-quid-pro-quo-harassment.html

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CHAPTER OVERVIEW

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8.1: THE PATH OF A CIVIL TORT CASE

INTRO **DUCTION**

The previous chapter explained the path of a criminal case in NYS. This chapter will explain the path of a civil litigation case. While there are many similarities between a civil and criminal case, there are also many things that are different. It should be noted that there are far more attorneys who work in civil law on a daily basis than in criminal law.

The law in the United States is based on the common law legal system. We base our law on precedent. So, when we speak of civil law here in the United States, we are differentiating a lawsuit against a person or entity we feel has wronged us in some way versus a criminal act and the consequences of that act. This should not be confused with the civil law legal system which is the most common legal system in the world. The civil law legal system is not based on precedent, but on codified laws. It is very different than the common law legal system.

To complicate things even more, when we speak of civil law here in the United States, many lawyers will differentiate between transactional and litigation. Civil law that is transactional would be matters like drafting a contract or a will. It may involve real estate purchases and sales. Civil law that involves litigation may be a lawsuit that is a result of a breach of contract or contesting the validity of a will. It may involve instituting a lawsuit after a person is injured in an automobile accident.

While there are many different areas of the law that are in the civil law bucket, generally speaking they all follow the same litigation path. This chapter will focus on the law of torts and the path of a civil negligence litigation case.

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8.2: GENERAL LAW OF TORTS

WHAT IS A TORT?

A tort is an act or omission, other than a breach of contract, which gives rise to injury or harm to another, and amounts to a civil wrong for which courts impose liability. In other words, a wrong has been committed and the remedy is money damages to the person wronged.

There are three types of tort actions; negligence, intentional torts, and strict liability. The elements of each are slightly different. However, the process of litigating each of them is basically the same.

WHAT IS THE STANDARD OF PROOF IN A CIVIL TORT CASE?

As discussed in Chapter 2, there are different standards of proof for criminal and civil cases. Within civil cases there are also two different standards of proof. For civil tort cases, the standard of proof is preponderance of the evidence. Preponderance of the evidence means that it is more likely than not that the defendant is legally responsible for the plaintiff's injuries. If the plaintiff proves their case by more than 50 percent of the evidence, the jury must come back with a verdict in favor of the plaintiff.

NEGLIGENCE:

Negligence is the most common of tort cases. At its core negligence occurs when a tortfeasor, the person responsible for committing a wrong, is careless and therefore responsible for the harm this carelessness caused to another.

There are four elements of a negligence case that must be proven for a lawsuit to be successful. All four elements must exist and be proven by a plaintiff. The failure to prove any one of these four elements makes a lawsuit in negligence deficient. The four elements are:

- Duty
- Breach
- Causation
- Harm

A basic negligence lawsuit would require a person owing a duty to another person, then breaching that duty, with that breach being the cause of the harm to the other person.

DUTY:

The first element of negligence is duty, also referred to as duty of care. What is a duty? In its most simplistic terms, it is an obligation to either do or not do something that will harm someone else. Think of duty as an obligation. We all have a duty or an obligation to act reasonably or reasonably refrain from certain actions, in such a way as to not cause injury or harm to another person. For example, as drivers of automobiles on public roads, we all have a duty to follow the rules of the road. It is our obligation as a licensed driver to do so. We understand that rules like speed limits are imposed to protect others. A reasonable person understands that the failure to follow the rules of the road may result in harm to another person.

S cope of one's duty :

The relationship between parties creates the existence or nonexistence of your duty to them. Depending on what our relationship is to others changes our obligations. For example, a manufacturer's duty of care is to make sure that products they sell are reasonably safe and to provide warnings of any potential dangers that the use of the product may cause. Therefore, the scope of a manufacturer's duty of care is to a consumer who uses the product as intended and properly. The manufacturer may have no duty of care to a consumer who uses the product for a different purpose than intended or if the product is used improperly. Here is another example. A property owner has a duty of care to make sure that her/his property is reasonable safe to those that may enter onto the property. That level of duty of care may be different depending on the relationship of the property owner to those entering the property. The duty of care owed a visitor may be different than one owed a trespasser.

The reasonable person standard :

A duty of care is based on what a reasonable person, in the same or similar circumstance, would do. A reasonable person is a legal fiction. It is an objective test on not what a person honestly thought was the right thing to do, but what that person should have done based on what a reasonable person would have done in the same or similar circumstance. Note that while the standard of reasonableness does not change, the "same or similar circumstance" usually does change. The trier of fact, in other words a jury (or judge in a bench trial) decides what a reasonable person would have done based on the circumstances presented to them. Who the members of a jury are matters. That is the point of voir dire as previously discussed in Chapter 5. Voir dire is also part of the civil jury selection process. What is considered reasonable to a jury in NYC may not be so to a jury in Batavia, N.Y., and yet both juries can be right.

G ood Samaritan Laws :

Unless a person has a particular relationship with another person, such as a doctor/patient relationship, a person is not legally responsible to help someone who is in need. A person cannot be sued or arrested for failing to do so. The law does not force people to make moral decisions to help others. There can me many reasons why a person may not volunteer to help someone who is in need. One of them may be the fear that they will be sued by the person in need if they make things worse. To elevate that concern and thereby encourage people to help others in need, we have what are called "Good Samaritan" laws. These laws provide immunity to those who choose to help others who are injured in the event they unintentionally make matters worse.

BREACH :

Once a plaintiff has established and proven that a defendant owned a duty of care to the plaintiff, the second element of negligence a plaintiff must prove is a breach of that duty of care. This is when a person or company has a duty of care to another and fails to live up to that standard of care. A plaintiff must prove that the defendant's act or omission caused the plaintiff to be exposed to unreasonable risk of injury and/or harm. In other words, the defendant failed to meet their obligation to the plaintiff and therefore put the plaintiff in harm's way.

R es Ipsa Loquitur :

Bad things happen all the time to people that shouldn't. In some circumstances, a defendant may be in the best, or only, position to prove why this bad thing happened to someone. This is the legal theory of *res ipsa loquitur*, which is Latin for "the thing speaks for itself." Just the fact that a certain event occurred and caused harm to someone establishes the defendant's breach of duty of care. Airplane crashes would be an example of this. To establish *res ipsa loquitur*, three requirements must be met which are:

This event is not something that normally happens without negligence.

This negligence would be attributed to the defendant since this is an event they are responsible for preventing.

Neither the plaintiff nor any other third party is responsible for the harm to the plaintiff.

Taking our example of an airplane crash, we can answer all three requirements. First, airplane crashes do not normally occur without negligence. They are rare events. Second, the negligence of an airplane crash would be with the airline since they are responsible for preventing them. Third, the passengers are not responsible for the harm caused them when a plane crashes. We therefore have *res ipsa loquitur*, the negligence of an airline when a plane crashes speaks for itself. The burden would then be on the airline to show they did not breach their duty of care to its passengers.

N egligence per se :

We have numerous criminal and civil statutes that prohibit certain acts or omissions that are safety related. The violation of such a statute may establish the breach of a duty of care. This is the legal theory called *negligence per se*. For example, we mentioned above that there are rules of the road such as speed limits that all drivers are expected to obey. If a defendant is therefore speeding while involved in an accident with a plaintiff, the defendant's violation of the speed limit statute may be *negligence per se*, and therefore established the breach of a duty of care to the plaintiff by the defendant.

CAUSATION:

The third element of negligence is causation. There are two types of negligent causation, actual cause and proximate cause. Actual cause is sometimes referred to as cause in fact. It means that "but for" the negligent act or omission of the defendant, the plaintiff

would not have been harmed. This is known as the “but for” test. For example, driver A is passing through an intersection with a green light. Driver B runs the red light and strikes driver A’s vehicle and injures driver A. Clearly, “but for“ the running of the red light by driver B, driver A’s vehicle would not have been struck by driver B, and drive A would not have been harmed.

The second type of negligent causation is proximate cause. Proximate cause requires the natural, direct, and uninterrupted consequence of a negligent act or omission to be the cause of a plaintiff’s injury. Proximate cause also requires foreseeability. It must be foreseeable as to the result, and also as to the plaintiff. If the result is too remote, too far removed, or too unusual from the defendant’s act or omission so as to make them unforeseeable, then the defendant is not the proximate cause of the plaintiff’s harm.

For example, driver A is speeding. A squirrel runs in front of driver A’s car so driver A swerves, and because of the high rate of speed of which he is traveling, loses control of his vehicle and hits a mailbox. The mailbox flies so violently up in the air from the impact that it hits an overhead powerline. The force of the mailbox hitting the powerline forces the powerline to break off the utility pole onto the sidewalk where it is still electrified. A pedestrian approaching the scene steps on the powerline and is injured by the live powerline. A jury may find that driver A’s actions are not the proximate cause of the pedestrian’s injuries, because the resulting harm is so remote and so unusual as to render them unforeseeable.

E **ggshell theory :**

The “eggshell theory” is the legal doctrine regarding causation that a tortfeasor takes their victim as they find them. So, if a plaintiff is more severely harmed than a normal person because of a preexisting condition, the defendant will still be held as the cause of the harm. For example, let’s say our plaintiff has a blood disorder that causes her to bleed and bruise more easily than most people. The plaintiff’s injuries due to an automobile accident caused by the defendant are far more severe than would be expected from the low impact of the accident. In fact, most normal people would have been able to just walk away from the accident with no harm. However, the plaintiff was required to receive blood transfusions and remain in the hospital for two weeks as a result of this accident. Under the eggshell theory, the defendant’s actions would still be the cause of the harm to the plaintiff even though the results were not foreseeable.

HARM **:**

Harm can come in many forms. It can be economic, like medical costs and loss wages. It can be non-economic, like pain and suffering or extreme emotional distress. It can be harm to a person’s body, to a family member, or to property. However, if one is not harmed in some way, the fourth element of negligence is not met and the lawsuit in negligence will not prevail.

Harm and causation in some ways are like the chicken and the egg. Which came first? Without harm there is really no causation, just a duty and breach of that duty. However, without causation there is no harm since again, we just have the duty and its breach. Just know this, if there is a duty and breach of that duty, and a subsequent harm or injury, it must be caused by that breach of duty.

If there is a harm or injury, then the law allows for compensation to the person harmed or injured in the form of damages. Damages are typically monetary in nature. In other words, we pay someone money when we injure them due to our negligence. There is in most situations no other way to make a person “whole” again. If you lose your leg in an automobile accident caused by someone’s negligence, they cannot get you your leg back. They can however, pay you money to allow you to buy a prosthetic leg, reimburse you for your medical expenditures and loss wages, pay you for future medical expenses, and pay you for all the pain and suffering associated with the injury. These are known as compensatory damages.

Compensatory Damages:

Compensatory damages are categorized as either general damages or special damages. General damages are non-economic while special damages are economic.

General Damages:

Below are some examples of general damages.

- Pain and suffering
- Disfigurement
- Severe emotional Distress
- Loss of consortium

Pain and suffering:

Some damages are quantifiable. You can do the math and figure them out like loss earnings. However, some damages are based on the experience, common sense, and judgment of the jury like pain and suffering. Pain and suffering damages not only include what has already happened, but will likely happen in the future because of the injury. If a person loses their arm, there is pain and suffering associated with the initial injury and recovery. There will also be future pain and suffering as that individual copes with the everyday difficulties, i.e. suffering, of not having that arm.

Disfigurement:

Disfigurement includes any scarring on the body or loss of a body part. It includes scarring caused by surgery that is a result of the injury. The damages are not quantifiable. Damages are again determined by the experience, common sense, and judgment of the jury.

Severe e **motional distress:**

Physical injury is not necessary to prove a person has suffered severe emotional distress. However, physical injury can also cause severe emotional distress. As is the case with pain and suffering and disfigurement, severe emotional distress is not quantifiable.

Loss of consortium:

The spouse of a person that is injured can sue for damages based on the loss of consortium. This in includes the loss of a sexual relationship between the injured person and their spouse. However, it is important to remember that the loss of consortium is the loss of any and all services provided by one's spouse, not just those that is sexual in nature. For example, if the spouse that is injured was the one that typically took care of the household duties but can no longer do so because of their injuries, the cost of hiring someone to do so for the life expectancy of the injured person could be considered as loss of consortium damages.

Special Damages:

Below are some examples of special damages.

- Medical bills
- Loss of income
- Loss of future earnings
- Custodial care

Medical bills:

Medical expenses both current and future are recoverable damages. However, they must be reasonable and necessary. Overtreatment is not recoverable and is something that a jury may be asked to scrutinize by the defendant. Regarding future medical expenses, those that can be reasonable ascertained as required in the future can be calculated.

Loss of income:

The loss of income is a calculation. What income did the plaintiff lose due to the injury suffered? If a person works on commission this may be more difficult to calculate than the loss of income of a person who receives a salary. In those situations, looking at historical earnings can be obtained and used to calculate a reasonable estimate of loss.

Loss of future earnings:

The loss of future earnings can be calculated based on injury suffered, how it will reasonably impact the ability of the injured person to work in the future, what those earnings would reasonable be, and the life expectancy of the person injured.

Custodial care:

Custodial care necessary due to the injury can also be calculated based on the reasonable and necessary past and future custodial care required.

Punitive Damages:

The purpose of punitive damages is to a) punish a tortfeasor and b) discourage further such acts by the tortfeasor and others. Punitive damages are appropriate when the actions of a tortfeasor are deemed by a jury to intentional, malicious, fraudulent,

violent, or otherwise outrageous in nature. They are over and above compensatory damages.

A good example of when punitive damages are awarded would be the *Liebeck v McDonald's* case. In that case, in 1992, the plaintiff, a 79-year-old grandmother, ordered coffee at a drive-thru McDonald's window. She was a passenger in her grandson's vehicle. While the vehicle was still parked in the parking lot of McDonald's, she attempted to take the cover off the cup of coffee when it spilled in her lap. The coffee was so hot that it caused her third degree burns on six percent of her body. She was rushed to emergency. Like many burn victims, she had to endure surgical skins grafts due to her injuries. She was hospitalized for 3 weeks.

She sued McDonald's and won. She was awarded compensatory damages, but the jury also awarded her $2.7 million dollars in punitive damages. The evidence presented to that jury showed that McDonald's sold its coffee at 180-190 degrees Fahrenheit. That coffee at that temperature on a person's skin could cause third degree burns in two to seven seconds. The evidence presented also showed that McDonald's knew about this risk for more than 10 years based on the fact that there were more than 700 other claims or reports from other customers that were also burned by McDonald's coffee being too hot. At that time, McDonald's was generating revenues of about $1.3 million daily from the sale of coffee. After the verdict, the parties agreed to a final settlement which included a non-disclosure agreement. Therefore, the exact amount of damages McDonald's paid to Mrs. Liebeck is unknown. After this verdict, McDonald's decided to lower the temperature of its coffee.

Nominal D**amages**:

There are situations where a plaintiff proves their tort case, but a jury finds they have suffered little if any harm. When a jury verdict reaches such a result, they will award nominal damages. Nominal damages are a very small or token award of money to a plaintiff who has proven his/her legal case, but has little in the way of an injury or harm.

DEFENSES TO NEGLIGENCE:

Often in a negligence lawsuit, the defense will raise what are called "affirmative defenses." This could mean that even if a plaintiff's claims of negligence are true, the defendant may not be responsible if the affirmative defenses can be proven.

Comparative Negligence:

Sometimes, there is negligence on the part of both parties involved in a negligence lawsuit. When this happens, the jury will be asked by the defendant to consider the comparative negligence of the plaintiff and reduce the percentage of the plaintiff's recovery of damages by that percentage. New York is a pure comparative negligence state pursuant to CPLR §1411.

Assumption of Risk **:**

The assumption of risk defense means the plaintiff, either expressly or by implication, understands that the risk of injury is inherent with the situation or plaintiff's conduct and therefore waives the right to recover damages if injured. Sometimes, this is by contract. You want to go skydiving and sign a waiver with the company providing that service assuming the risk of injury if things don't go as planned. Jumping out of an airplane by its very nature is risky.

Another example would be playing high school sports. There are inherent risks associated with playing sports in general, and students who participate in those activities assume the risk of injury.

Statutes of Limitations:

The law puts deadlines on when most legal actions can be commenced, both civil and criminal. These limits are called "statutes of limitations." They are set by statute. In NYS, most, not all can be found in either the CPLR for civil cases or the CPL for criminal cases. There are numerous reasons for having statutes of limitations. For example, over time memories of witnesses diminish, evidence gets more difficult to obtain or may be lost, and people move. In NYS, a general personal injury negligence case has, pursuant to CPLR § 214(5), a three-year statute of limitations Medical malpractice on the other hand, even though it is based on negligence, has a two-year six-month statute of limitations pursuant to CPLR § 214-a.

Tolling of the Statute of Limitations:

In some instances, the statute of limitations may be extended or tolled. Under NYS law, a minor usually has three years from the date of their eighteenth birthday to commence their lawsuit. However, if the minor's lawsuit is a medical malpractice claim, the statute of limitations cannot be extended for more than ten years from the date of the act or omission giving rise to the injury. In some situations, such as mental incapacity, the statute of limitations may be tolled three years.

INTENTIONAL TORTS:

Intentional torts require an intended act by a wrongdoer against another. Some intentional torts can also be criminal. For example, if a person batters someone and causes them harm, this is also a criminal act and the person can be arrested and sued at the same time.

Common intentional torts include:

- Assault
- Battery
- Trespass to Land
- Conversion
- Defamation
- Intentional Infliction of Emotional Distress
- False Imprisonment

Assault:

Civil assault is an intentional act by the defendant that causes reasonable apprehension or fear of harmful or offensive contact of the plaintiff. Actual contact is not required. This is a bit different than its counterpart in criminal law where contact is usually required. Assault is an intentional tort to a person.

Battery:

Battery is an intentional act by the defendant that causes harmful or offensive contact of the plaintiff. The tort of battery often accompanies the tort of assault where it is referred to as assault and battery. Battery is most similar to criminal assault. Battery is an intentional tort to a person.

Trespass **to Land:**

Trespass to land requires an intentional act by the defendant which causes the defendant to enter or intrude on the plaintiff's land. Trespass to land is most similar to criminal trespass. It is an intentional tort to property.

Conversion:

Conversion is an intentional act by the defendant that causes either the substantial invasion thereof or the outright possession by the defendant of the plaintiff's personal property without the plaintiff's consent. Conversion is an intentional tort to property. It is most similar to the criminal statutes of larceny.

Defamation **:**

Defamation is the intentional communication (sometimes referred to as publication) by the defendant to a third person of a false statement about the plaintiff that causes harm to the reputation of the plaintiff resulting in damages. The communication can be in writing, which is called libel, or verbally, which is called slander. The communication or publication must be false. It must also cause damage to plaintiff by either lowering the plaintiff's reputation or exposing the plaintiff to some form of hate, contempt, or ridicule. Defamation is an intentional tort to a person. There is no criminal statute that directly correlates to this tort.

There are First Amendment constitutional restrictions to the tort of defamation. The landmark U.S. Supreme Court case of *New York Times Co. v. Sullivan*, 376 U.S. 254, (1964) established the standard that for a public official to recover damages for defamation, there must be "actual malice" on the part of the defendant publishing the defamatory statement. The Court defined actual malice as either the actual knowledge that the statement the defendant is publishing is false or that the defendant acted with reckless disregard for the truth.

In the *New York Times Co. v. Sullivan*, the plaintiff, Mr. Sullivan, was the Commissioner of Public Safety which included his duty to supervise the police in Montgomery Alabama. He sued the New York Times for a full-page advertisement they published titled "Heed Their Rising Voices" that was paid for by the Committee to Defend Martin Luther King and Struggle for Freedom in the South. The advertisement contained several inaccurate accusations against the police that were defamatory. While the plaintiff won a judgment of $500,000 in an Alabama state court, the Supreme Court in a 9-0 decision, held that news publications could not be sued for libel by public officials unless the plaintiff was able to establish actual malice in the false reporting of a news story. The

Court found that the law applied by the Alabama courts was constitutionally deficient in its failure to protect the First Amendment rights of freedom of speech and of the press. The Court therefore held that the evidence presented in the case was insufficient to support a judgment for Sullivan and ruled that the First Amendment protects the publication of all statements about public officials, even those found to be false, unless the statements are made with actual malice.

Case law has also established the standard of actual malice also applies to public figures. Public figures have been defined as people that have achieved great publicity, fame, or notoriety.

Intentional Infliction of Emotional Distress:

Intentional infliction of emotional distress is an intentional act by words or actions of extreme or outrageous conduct by the defendant that causes severe emotional distress of the plaintiff. The extreme and outrageous conduct must exceed all bounds of decent behavior. The emotional distress of the plaintiff must also be severe and far outside that which is ordinary. Intentional infliction of emotional distress is an intentional tort to a person.

The U.S. Supreme court case of *Snyder v. Phelps*, 562 U.S. 443 (2011) illustrates how difficult it is to prove a case intentional infliction of emotional distress. The facts of the case are that on March 3, 2006, Matthew A. Snyder was killed while serving as a Marine in Iraq. On March 10, the Westboro Baptist Church picketed Matthew Snyder's funeral. They did so while on public property, but in view of those attending the funeral service. This was not new to the Westboro Baptist Church as they had picketed a large number of military funerals throughout the country in protest of what they considered an increase in tolerance of homosexuality in the United States. The picketers displayed posters such as "America is doomed", "You're going to hell", "and God hates you "," Fag troops", and "Thank God for dead soldiers."

The Snyder family sued the Westboro Baptist Church for invasion of privacy and intentional infliction of emotional distress. The jury found in their favor and awarded the Snyder family $2.9 million in compensatory damages, $6 million in punitive damages for invasion of privacy, and an additional $2 million for causing emotional distress for a total of $10.9 million. The case was reversed on appeal by the Fourth Circuit Court of Appeals in favor of the Westboro Baptist Church finding the trial court had erred in its instructions to the jury and that the actions by the church was protected speech. The Snyder family appealed that decision to the U.S. Supreme Court. In an 8-1 decision, the Supreme Court agreed with the Fourth Circuit Court of Appeals determining that the Westboro Baptist Church's speech was related to a public issue and therefore was protected speech that could not be prevented as it was on public property. Intentional infliction of emotional distress is an intentional tort to a person. There is no criminal statute that directly correlates to this intentional tort.

False Imprisonment:

False imprisonment is an intentional act by the defendant that causes the confinement of the plaintiff without the plaintiff's consent. The plaintiff must have no known reasonable means of escape. The confinement can be in the form of fixed barriers like a room or just a corner. False imprisonment is an intentional tort to a person. It often involves store security who detains people suspected with shoplifting. It is most similar to criminal statutes of false imprisonment.

DEFENSES TO INTENTIONAL TORTS:

Consent:

The consent by a plaintiff to a defendant's intentional tort, whether orally or in writing, is a legitimate defense. For example, being a participant in fight club would be considered giving your consent. (It should be noted that we have just broken the first rule of fight club.) Consent can also be implied. By being in the middle of a crowd as you try to enter a concert, you have giving your implied consent that you will be touched to some extent by others in the crowd. Your action for battery in such a situation would probably fail by the fact that you gave your implied consent to the unwanted touching.

Self-Defense:

A defendant in certain situations may have a claim of self-defense to an intentional tort. The law recognizes that we have the right to defend ourselves by using physical force when we reasonably believe that we are going to suffer imminent harm or offensive contact. There are limits to self-defense. A person can only use the amount of force necessary to protect themselves or protect a third person. In NYS, a person has the duty to leave a situation if possible rather than use physical force in self-defense. The only

situation that this does not apply to is the defense of one's home. A homeowner has no duty to retreat or leave their home. When a person is in their home, they may use physical force to defend their person and/or property.

Immunity:

Under both the state and federal constitutions, government officials may be immune for certain lawsuits. This is called sovereign immunity. The Eleventh Amendment of the U.S. Constitution grants the states sovereign immunity from being sued in federal courts unless they give their consent. For example, in NYS, government officials are entitled to qualified immunity when they act in their governmental capacity and owe no special duty to a plaintiff. Actions by the police, firefighters, and EMTs fall into this category. If government official actions are more a proprietary function, they can be sued like anyone else. Proprietary functions are generally when the government is doing much the same thing a private enterprise would traditionally do.

Statutes of Limitations:

As discussed in the negligence section above, there are statutes of limitations for intentional torts. Assault, Battery, Defamation, False Imprisonment, and Intentional Infliction of Emotional Distress all have one-year statute of limitations under CPLR §215 (3).

STRICT LIABILITY:

Strict Liability is a very limited theory of tort liability. It has nothing to do with negligence or intent. It applies to situations that are abnormally dangerous. This would include those who work with explosives, fireworks, radioactive materials, or own or control certain dangerous animals. If a person is injured by a defendant while engaged in these activities, liability is imposed regardless of a defendant's intentions or lack of negligence. The law imposes liability as a matter of public policy. In NYS, strict liability even applies to products liability cases.

The New York's Pattern Jury Instruction that defines strict products liability is Section 2:120 which states: "A (manufacturer, wholesaler, distributor, retailer, processor of materials, maker of a component part) that sells a product in a defective condition is liable for injury that results from use of the product when the product is used for its intended or reasonably foreseeable purpose. A product is defective if it is not reasonably safe — that is, if the product is so likely to be harmful to (persons, property) that a reasonable person who had actual knowledge of its potential for producing injury would conclude that it should not have been marketed in that condition."

PRODUCT**S LIABILITY:**

Depending on the situation, a products liability claim in NYS may be based in negligence, intentional tort, strict liability, and even contract law for breach of warranties. It includes defects in condition, in manufacturing, in design, and for insufficient or inadequate warnings. The *Liebeck v McDonald's* discussed above in the punitive damages section was a products liability case. One of the claims by the plaintiff Mrs. Liebeck was that the product, coffee, was defective and unreasonably dangerous because it was too hot, which was direct factor in causing her substantial injuries. The *Liebeck v McDonald's* case was under the state of New Mexico law.

New York is a strict products liability state holding the seller, manufacturer, and others in the line of distribution of a defective consumer product, strictly liable when said defective product is a substantial factor in causing a plaintiff harm or injury because the product is not reasonably safe. While most courts throughout the country use the standard of an unreasonably dangerous product as set forth in the Restatement of Torts, Section 402A, New York does not.

The NY Court of Appeals in the *Voss v. Black & Decker Manufacturing Company* 59 N.Y.2d 102 (1983) established a lower standard for strict products liability ruling "In order to establish a prima facie case in strict products liability for design defects, the plaintiff must show that the manufacturer breached its duty to market safe products when it marketed a product designed so that it was not reasonably safe and that the defective design was a substantial factor in causing plaintiff's injury." [59 N.Y.2d 108] The NYS standard is an advantage to a plaintiff because requiring that a jury find a product must be unreasonable safe implies to a jury that a product must somehow be extra hazardous. The standard of not being reasonable safe does not.

DOG BITE LAWSUITS **AND STRICT LIABILITY:**

According to a study by the Insurance Information Institute and State Farm in 2015, dog bites accounted for one third of all homeowner claims. The study found 880 claims for dog bites in NYS with the average damages award being about $44,000.

NYS does have strict liability for plaintiffs who are injured when bitten by a dog. However, plaintiffs in dog bite cases in NYS must prove that an owner had prior knowledge before the dog bit the plaintiff, of the dog's vicious propensity. The New York Court of Appeals in the case of *Collier v Zambito*, 1 NY3d 444 (2004) ruled that a jury is entitled to consider any evidence of vicious propensity with a prior bite being only one type of such evidence. The Court pointed out that vicious propensity can be proven by something less than an actual prior bite. The court gave examples such as a dog that growls, snaps, or bares its teeth could be evidence of vicious propensity. Other actions like jumping up on people and/or knocking people off their bicycles could be interpreted by a jury as vicious propensity.

The New York Pattern Jury Instruction 2:220 defines vicious propensity as "a natural inclination or usual habit to act in a way that endangers people or property". The plaintiff also has to prove the dog owner knew, or should have known, of the vicious propensities. A dog owner is responsible for any injury on a strict liability basis if the owner continues to harbor the dog with knowledge of the dog's vicious propensities. The requirement of vicious propensity applies to other animals besides dogs. In NYS, there is no claim in negligence for dog bites.

There is also strict liability under the Section 121 of the Agricultural & Markets statute which makes the "owner or lawful custodian" of a "dangerous dog" "strictly liable" for medical costs resulting from "injury" caused by such dog to a person, "companion animal," farm animal, or "domestic animal."

THE PATH OF A NEGLIGENCE CASE:

While similar in some ways to the path of criminal case, there are significant differences. First, the attorneys are not working for the government like a district attorney in a criminal case. The path of a typically negligence case is as follows:

- Summons & Complaint
- Service of the Summons and Complaint
- Answer
- Discovery
- Deposition/Examination Before Trial
- Request for Judicial Intervention
- Motion for Summary Judgment
- Note of Issue
- Settlement
- Trial

Summons & Complaint:

In NYS, the filing of a summons and complaint is the start of a civil action. A summons is a document that states a lawsuit against a defendant has been started against her/him. It also states that the defendant must answer the complaint. The complaint is a document that sets for the grounds, facts, and damages required to establish a lawsuit against the named defendant. It is known as a pleading. A plaintiff must file a summons and complaint with the county clerk where the lawsuit will be brought. The venue, or place the lawsuit is brought, must be proper. The proper venue is set out by statute in the CPLR. Once the summons is filed, and the fees paid, the county clerk will issue an Index Number that will be added to the summons and all pleadings of the lawsuit.

Service of the Summons & Complaint:

Once the index number is purchased and the lawsuit has been started by filing the summons and complaint with the county clerk, the summons and complaint must be properly served on the defendant. Proper service is set out by statute in the CPLR. Depending on the situation, the statute may require personal service on a defendant or allow service by mail. A plaintiff cannot serve a summons and complaint on a defendant themselves. The CPLR establishes who is allowed to serve these pleadings. Most plaintiffs use a professional process service person or company.

Answer

Once a defendant is served with a summons and complaint, they will have either twenty or thirty days, depending on how they were served, to provide their answer to the complaint. The answer is a document that is a response to the complaint. It is a pleading.

The failure to serve this answer in timely manner could result in a default against the defendant, which means the plaintiff will be granted by a court the relief they are demanding against the defendant.

Discovery:

Discovery is the process by which both parties are required upon demand by the other, to provide information that relates to the lawsuit. The law allows and demands that the parties cooperate with each other in this process. There are many forms of discovery, and the process is extremely important to both parties in a lawsuit. Both parties need access to information that only the other party has control over to either prove their case or properly defend against. For example, in an automobile negligence case, the plaintiff may be claiming that the defendant was distracted while driving because he was texting on his cell phone. The records that could prove whether this assertion is accurate are under the control of the cell service provider of the defendant. The plaintiff may demand upon the defendant a discovery demand that the defendant obtain and forward said records to the plaintiff. In the same lawsuit, the defendant may assert that the plaintiff is not as injured as he claims. and serve a discovery demand on the plaintiff requiring the plaintiff to submit to a medical examination by the defendant's doctor.

Deposition/Examination Before Trial:

The taking of a deposition or examination before trial (EBT) is one of the most significant parts of a lawsuit and discovery. This is typically the first time in the process that the parties and their attorneys will see each other. The party being deposed will be put under oath and will be asked questions by the opposing counsel. Lying at a deposition is subject to perjury penalties. The proceeding will be before a stenographer. The stenographer will record precisely word for word what is being asked, answered, and said at the EBT. The stenographer will then create a written transcript that can be used at trial by either party. EBTs are an extremely important part of the process of a civil lawsuit.

Request for Judicial Intervention:

The Request for Judicial Intervention is a formal legal document filed with the county clerk, usually by the plaintiff, asking the court assigned to the lawsuit to now get involved. The court will set up times for the parties to meet with the court to determine where the parties are in the process, and whether the court needs to get involved in moving the process along. At some point, the court will inquire from the parties whether there is a possibility of settlement. If so, the court may get involved in getting the parties together to move the settlement along to a mutually agreeable conclusion.

Motion for Summary Judgment:

A motion for a summary judgment is an application before the court by either party. The parties in a motion for summary judgment are asking the court to find that there is no question of fact for a jury to decide and that as a matter of law the judge should therefore rule in their favor thus ending the case. The plaintiff would be asking for a judgment against the defendant without the need to go to trial, while the defendant would be asking for a judgment against the plaintiff dismissing the case.

Note of Issue:

Once the entire discovery phase of the lawsuit is completed and the parties feel they are ready for trial, the plaintiff will file a formal document known as a Note of Issue with the county clerk. This will put the case on the court's trial calendar. It would not be unusual for it to take up to eighteen months or more to for a case to get to trial once the Note of Issue is filed.

Settlement:

Settlement is the process where the parties agree to a result between themselves. It can occur anywhere in the path of a lawsuit, even after a jury verdict. The strength or weakness of a case determines whether a lawsuit will settle or not. It also determines the amount of a settlement. The funds available also greatly influence the settlement process. Is there insurance coverage involved and if so, what are the limits of said insurance policy? For example, a serious injury suffered by a plaintiff without the ability to collect the money damages that would be appropriate for such an injury because the defendant is not adequately insured and financially incapable, may affect the settlement process. Just as it is the case that most criminal defendants will take a plea bargain instead of going to trial, so too will the vast majority of parties in civil lawsuits agree to a settlement before trial.

Trial:

A civil negligence trial will be similar in format to a criminal trial. There will be a jury selection which is the same as that of a criminal trial. For a civil case, there are six jurors. The judge will speak to the jury at the start of the trial to explain to them what their role is, the rules they must follow, and how the trial will proceed. The attorneys will have the opportunity to make opening statements to the jury. Since the plaintiff has the burden of proof, the plaintiff's attorney will go first, followed by the defense attorney. The plaintiff will then present evidence through various witnesses with the defense attorney having the opportunity to cross exam said witnesses. Once the plaintiff is done with their side of the case, the defense has the opportunity to present their witnesses and evidence in their defense. There will then be closing statements to the jury with the plaintiff going first. The judge will then charge the jury with the law. They jury will then deliberate and deliver a verdict. The standard of proof for a civil negligence case is preponderance of the evidence. The jury verdict does not have to be unanimous, just five of the six jurors are needed to decide a case and deliver a verdict. The verdict will include the remedy. If the plaintiff wins, the amount of damages will be decided by jury. If the defendant wins, the case is dismissed.

There are situations in civil trials where both parties are suing each other. It makes the trial more complicated, but the process and format are basically the same.

WHAT ARE THE THREE MOST COMMON CIVIL REMEDIES?

The most common remedy in civil cases is money damages. However, there are two other types of remedies available to plaintiffs and civil courts; injunctions and specific performance orders.

Injunction:

An injunction is a court order telling a defendant to stop doing something. For example, a plaintiff may sue a defendant developer asking the court to issue an injunction to stop the developer from cutting down trees on land the developer owns because the plaintiff thinks the developer is hurting wildlife, and therefore violating the law by doing so. Sometimes, judges will issue a preliminary injunction to stop certain actions until the judge can make final more informed decision. When this happens, the judge will give the parties' time to present evidence to support their respective positions before the judge decides on whether to issue a permanent injunction.

Specific Performance:

Specific performance is an order from the court telling a defendant to actually do something. While rare, specific performance is appropriate when money damages just won't cut it. For example, if the object of the lawsuit is a unique antique which the defendant now refuses to sell to the plaintiff pursuant to a valid contract between the parties, the court would order the turning over of that specific antique to the plaintiff pursuant to the terms of the contract by issuing a specific performance order.

WORKERS' COMPENSATION:

What happens when an employee is injured on the job? For these types of cases, New York State (and most other states) has adopted a no-fault system called workers' compensation. In workers' compensation cases, an administrative board decides if the injury was sustained in the course of employment, and, if it was, the worker will receive a fixed award, predetermined by a regulated schedule, for both wage replacement and medical expenses. A worker is not required to hire an attorney, although many do.

THE ROLE OF INSURANCE IN TORT LAW :

Lawsuits can be expensive and stressful. Insurance protection can often be purchased to protect a person or business from potential monetary damages from some tort lawsuits. It should be noted that there is no insurance available for intentional torts.

Common examples of insurance coverage include:

Homeowners Insurance

Most homeowners have insurance not only to protect them from fire damage, but from lawsuits such as a guest who trips and falls on their property or is bitten by their pet dog.

Malpractice Insurance

Most doctors and hospitals have insurance to protect and defend them from lawsuits brought by patients who sue for inadequate or improper medical care. Lawyers and other professionals also carry malpractice insurance.

Business Liability Insurance

Businesses usually have insurance to protect them from lawsuits brought by customers for slip and fall cases, false arrest claims, or product liability.

Workers' Compensation Insurance

Employers in NYS are required to have this insurance to provide coverage for their employees that are injured while on the job.

Automobile Insurance

In NYS, all registered vehicles are required by law to have insurance. Automobile accident lawsuits are regulated by the NYS no-fault insurance statute.

NO-FAULT AUTOMOBILE INSURANCE

In 1974, NYS passed Article 51 of the New York State Insurance Law, formally titled "Motor Vehicle Reparations Act", and commonly known as "no-fault."

Under this law, anyone registering a motor vehicle in New York State is required to have at least the minimal amount of automobile insurance coverage for that vehicle. If that vehicle is involved in any kind of an auto accident, whether they are the driver or someone else with their permission is, their insurance carrier will be responsible up to $50,000 of the medical expenses and economic losses caused by the accident to the driver and occupants of that vehicle regardless of who is at fault. Thus, we get the name no-fault insurance.

Under this statute, lawsuits for automobile accident cases are only allowed when a plaintiff is seriously injured, as defined by the statute. Insurance Law § 5104(a), (b) provides that a plaintiff in a personal injury action arising out of negligence in the use or operation of a motor vehicle must establish that he/she has incurred a basic economic loss exceeding $50,000 or must establish that he/she has suffered "serious injury".

Insurance Law § 5102(d) defines serious injury as personal injury which results in one of the following:

- Death
- Dismemberment
- Significant disfigurement
- Fracture
- Loss of a fetus
- Permanent loss of use of a body organ, member, function, or system
- Permanent consequential limitation of a body organ or member
- Significant limitation of use of a body function or system

Medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence of the injury or impairment.

The minimal amount of liability coverage you can purchase in NYS is:

- $10,000 for property damage for a single accident
- $25,000 for bodily injury and $50,000 for death for a person involved in an accident
- $50,000 for bodily injury and $100,000 for death for two or more people in an accident

There are three objectives of this law:

(1) Reduce automobile accident litigation to only the most serious injured plaintiffs.

(2) Provide automobile accident victims with more prompt compensation for their economic losses caused by the accident.

(3) Lower the cost of automobile insurance, since there would be less litigation.

DO ALL DRIVERS CARRY THE MINIMUM INSURANCE?

No. Many drivers purchase more insurance than the minimal insurance required by law. They do so in case they are responsible for an accident and the injured plaintiff is seriously injured or killed. In those situations, the damages can easily exceed the minimum insurance amounts. If this happens, the injured plaintiff can sue and obtain a judgment for more than the insurance amount. The defendant is responsible for damages that exceed their insurance coverage.

This could place the defendant in financial jeopardy if they have to pay such judgment out of their own assets. If cash and assets are insufficient to cover the judgment, a long-term wage garnishment could be placed on the insured wages as a collection tool.

DOES NEW YORK MANDATE COVERAGE TO PROTECT YOUR OWN VEHICLE?

No. NYS does not require what is called collision insurance. However, most lenders and lease agreements do require the owner or person registering the vehicle to purchase said insurance. Collision insurance pays for damage to your vehicle caused by an accident. It does not take into consideration fault in providing payment or repairs to the vehicle. However, fault could affect future premiums or cost of your insurance. Most collision insurance requires what is called a deductible amount. This is the amount you as the insured must pay first for damages to your vehicle before the carrier. Typical deductible amounts are $500 to $1,000. Collision insurance will cover the repairs to your vehicle even in situations where you may accidentally hit a tree or post, and no other vehicle is involved.

There are also other coverages a consumer can purchase as part of an automobile insurance policy. Typically, glass coverage, car rental costs, and comprehensive coverage for damages caused by fire, theft, and vandalism are available.

All NYS automobile insurance policies have uninsured coverage provisions. In the event you are seriously injured by a vehicle that is uninsured, your insurance carrier will reimburse you up to the amount of uninsured coverage provided in your policy. There is also underinsured coverage available for purchase in the event the defendant you are suing has coverage that does not meet the amount of your damages.

WHAT IS NOT COVERED BY NEW YORK'S **NO-FAULT I NSURANCE?**

While NYS's no-fault insurance covers the majority of every-day insurance claims, there several exclusions.

a) Injuries to a driver or passenger of an uninsured vehicle.

b) Injuries to a driver or passenger who acts intentionally causing his/her own personal injury.

c) Injuries to an intoxicated driver or a driver who is impaired by drug use.

d) Injuries to the driver of a stolen car.

e) Injuries to a driver operating a car in a race or speed test.

f) Injuries sustained by a driver who is committing a felony or fleeing from pursuing law enforcement officer.

g) Injuries to a driver or passenger of a motorcycle.

Where a policy limits the insurer's liability to certain designated uses of the insured vehicle, like personal use, then damages will not be paid by the insurer if, at the time of the accident, the vehicle is being used for other purposes like delivering pizzas or as an Uber driver.

MOTORCYCLE INSURANCE:

Motorcycle insurance and liability rules in New York are very different than that for cars. A motorcycle is not a motor vehicle as defined under the no-fault insurance law. Therefore, a motorcyclist is not a covered person under the no-fault insurance law which also means they are not entitled to the medical and lost wage benefits of said law. However, motorcyclists injured in motor vehicle accidents are also not subject to the serious injury threshold that motor vehicle drivers are subject to. So, a person injured on a motorcycle can bring a claim against the defendant driver even for minor injuries that would not pass the no-faulty insurance threshold.

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8.3: References

Gair, Gair, Conason, Rubinowitz, Bloom, Hershenhorn, Steigman & Mackauf. (2018, July 24). Retrieved July 27, 2018, from https://www.gairgair.com/motorcycle-accidents.html

Jeffries, R. N. (2014). *Torts and personal injury law for the paralegal: Developing workplace skills*. Boston: Pearson.

Justia Law. (n.d.). Retrieved July 26, 2018, from https://law.justia.com/

New York State. (n.d.). New York State Unified Court System. Retrieved July 26, 2018, from http://nycourts.gov/

Pogue, D. L., Clifford, E., & Schwartz, A. L. (2009). Understanding New York Law, 2013-14. Upstate Legal Publishers.

Potoski, L. (2018, May 30). New York State Insurance Requirements. Retrieved July 27, 2018, from https://dmv.ny.gov/insurance/insurance-requirements

Serious Injury Threshold. (n.d.). Retrieved July 27, 2018, from https://www.nysba.org/workarea/DownloadAsset.aspx?id=28534

Staff, L. (2017, June 14). Tort. Retrieved July 27, 2018, from https://www.law.cornell.edu/wex/tort

Your voice for a more bicycle-friendly New York State since 1990. (2016) Retrieved July 27, 2018, from http://www.nybc.net/understanding-no-fault-laws-in-new-york/

Understanding No Fault Laws in New York. Retrieved July 27, 2018, from http://www.nybc.net/understanding-no-fault-laws-in-new-york/

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CHAPTER OVERVIEW

9: MARRIAGE, DIVORCE AND FAMILY LAW

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9.1: MARRIAGE, DIVORCE AND FAMILY LAW

INTRODUCTION

This chapter discusses legal issues relating to marriage, divorce, and various family court matters in NYS.

FAMILY

While the traditional family of a wife, husband, and children constitutes the majority of “families” in the United States, the law also recognizes that families are blended, single-parent, same-sex spouses/parents, and a host of other variations. While it is now very common for couples to live together, marriage is still an option many couples take part in. Part I will discuss what constitutes a valid marriage in New York State. Part II will discuss annulments, divorce, and all the issues typically encountered in divorce cases. Part III will discuss family law matters pertaining to adoption, paternity, and juveniles in Family Court accused of crimes.

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9.2: PART I- MARRIAGE

What constitutes a valid marriage in NYS?

Domestic Relations Law (DOM) Sections 5-25 spell out the rules for getting married in New York.

- **Is a marriage license required?** Yes. A couple who intends to be married in New York must apply in person for a marriage license to any town or city clerk in NYS. That application must be signed by both parties in the presence of the town or city clerk. A marriage ceremony cannot take place until 24 hours after the license is time-stamped. The license is valid for 60 days, beginning the day after it is issued.
- **Is a blood test required?** No. Blood testing is not required to get married in NYS.
- **What is the age requirement?** With the consent of both parents (in some instances only one parent's consent is necessary) and the approval by a Supreme Court judge (in some instances a Family Court judge), you can get married at age 17. Otherwise it is 18 years of age.
- **Do you have to be single to get married in NYS?** Yes, you must be single. This is true in every state. Polygamy is illegal in the United States.
- **Can you get married if you have been married before?** Yes. If you have been married and divorced, you must provide proof of the divorce.
- **Familial Restrictions:** NYS does not allow a marriage between an ancestor and descendant, siblings whether full or half-blood, an uncle and niece or nephew, or an aunt and niece or nephew.

Court of Appeals of New York.

Huyen V. NGUYEN, Petitioner, v. Eric H. HOLDER, Jr., United States Attorney General, Respondent.

NY Slip Op 07290

Decided: October 28, 2014

Michael E. Marszalkowski, for petitioner. Michael C. Heyse, for respondent.

The United States Court of Appeals for the Second Circuit has asked us whether a marriage between a half-uncle and half-niece is void as incestuous under Domestic Relations Law § 5(3). I agree, for the following reasons, that we should answer that it is not.

I

Petitioner is a citizen of Vietnam. In January of 2000, at the age of 19, she was married in Rochester, New York to Vu Truong, who was 24 and a naturalized American citizen. Later that year, petitioner was granted the status of a conditional permanent resident in the United States on the basis of her marriage.

According to the factual findings of the United States Board of Immigration Appeals, which the Second Circuit accepted as supported by substantial evidence, petitioner's mother was born in 1950 to a woman named Nguyen Thi Ba. Twenty-five years later, Nguyen Thi Ba gave birth to Vu Truong. Petitioner's mother and Vu Truong had different fathers. Thus, petitioner's mother was Vu Truong's half-sister, and petitioner is his half-niece.

An immigration judge ordered petitioner removed from the country on the ground that her purported marriage to an American citizen was void, and the Board of Immigration Appeals affirmed. Petitioner sought review of that ruling in the Second Circuit, and the Second Circuit certified the following question to us:

"Does section 5(3) of New York's Domestic Relations Law void as incestuous a marriage between an uncle and niece 'of the half blood' (that is, where the husband is the half-brother of the wife's mother)?"

II

Section 5 of the Domestic Relations Law reads in full:

"A marriage is incestuous and void whether the relatives are legitimate or illegitimate between either:

"1. An ancestor and a descendant;

"2. A brother and sister of either the whole or the half blood;

"3. An uncle and niece or an aunt or nephew.

"If a marriage prohibited by the foregoing provisions of this section be solemnized it shall be void, and the parties thereto shall each be fined not less than fifty nor more than one hundred dollars and may, in the discretion of the court in addition to said fine, be imprisoned for a term not exceeding six months. Any person who shall knowingly and wilfully solemnize such marriage, or procure or aid in the solemnization of the same, shall be deemed guilty of a misdemeanor and shall be fined or imprisoned in like manner."

We must decide whether subdivision 3 of this statute should be read to include a half-uncle and half-niece (or half-aunt and half-nephew). There is something to be said on both sides of this question.

In common speech, the half-brother of one's mother or father would usually be referred to as an uncle, and the daughter of one's half-sister or half-brother would usually be referred to as a niece; the terms "half-uncle" and "half-niece" are not in common use. Thus, it is perfectly plausible to read subsection 3 as including half-blood relatives. On the other hand, the authors of Domestic Relations Law § 5(2), when prohibiting brother-sister marriages, went to the trouble of adding the words "of either the whole or the half blood." No similar words appear in section 5(3), arguably implying that the Legislature did not intend the uncle-niece prohibition to reach so far. The statute is ambiguous. Perhaps the likeliest inference is that the authors of section 5(3) gave no particular thought to the half-uncle/half-niece question, since if they had they could easily have clarified it either way.

Nor does New York case law point to any clear conclusion. In *Audley v. Audley*, (196 App.Div. 103 [1st Dept 1921]), the Appellate Division held a marriage between a half-uncle and a half-niece to be void under section 5(3). But in *Matter of Simms*, (26 N.Y.2d 163, 166 [1970]) we, without deciding the question, expressed doubt about *Audley's* conclusion:

"If the Legislature had intended that its interdiction on this type of marriage should extend down to the rather more remote relationship of half blood between uncle and niece, it could have made suitable provision. Its failure to do so in the light of its explicit language relating to brothers and sisters suggests it may not have intended to carry the interdiction this far."

Thus, there is a holding from the Appellate Division pointing in one direction, and dictum from this Court pointing in the other. Neither is binding on us. I would resolve the issue by considering the nature and the purpose of the statute we interpret.

Domestic Relations Law § 5 is in part a criminal statute: it says that the participants in a prohibited marriage may be fined, and may be imprisoned for up to six months. Penal Law § 255.25, using language very similar to that of Domestic Relations Law § 5 ("ancestor, descendant, brother or sister of either the whole or half blood, uncle, aunt, nephew or niece"), makes entry into a prohibited marriage a class E felony. Where a criminal statute is ambiguous, courts will normally prefer the more lenient interpretation, and the courts of several other states have followed that rule in interpreting their criminal laws not to prohibit relationships between uncles and nieces, or aunts and nephews, of the half blood (*State v. Craig*, 254 Kan 575, 580, 867 P.2d 1013, 1016 [1994]; *People v. Baker*, 69 Cal2d 44, 50, 442 P.2d 675, 678 [1968]; *State v. Bartley*, 304 Mo 58, 62, 263 SW 95, 96 [1924]). The Government says that these cases are distinguishable because they were criminal cases; but we are here interpreting a statute that applies in both civil and criminal cases, and it would be strange at best to hold that the same words in the same statute mean different things in different kinds of litigation.

I also conclude that the apparent purpose of section 5(3) supports a reading that excludes half-uncle/half-niece marriages from its scope. Section 5 as a whole may be thought of as serving two purposes: it reflects long-held and deeply-rooted values, and it is also concerned with preventing genetic diseases and defects. Sections 5(1) and 5(2), prohibiting primarily parent-child and brother-sister marriages, are grounded in the almost universal horror with which such marriages are viewed-a horror perhaps attributable to the destructive effect on normal family life that would follow if people viewed their parents, children, brothers and sisters as potential sexual partners. As the Appellate Division explained in *Matter of May*, (280 App.Div. 647, 649 [3d Dept 1952], aff'd 305 N.Y. 486 [1953]), these relationships are "so incestuous in degree as to have been regarded with abhorrence since time immemorial."

There is no comparably strong objection to uncle-niece marriages. Indeed, until 1893 marriages between uncle and niece or aunt and nephew, of the whole or half blood, were lawful in New York (see L 1893, ch. 601; *Audley*, 196 AD at 104). And sixty years after the prohibition was enacted we affirmed, in May, a judgment recognizing as valid a marriage between a half-uncle and half-niece that was entered into in Rhode Island and permitted by Rhode Island law. It seems from the Appellate Division's reasoning in

May that the result would have been the same even if a full uncle and full niece had been involved. Thus, Domestic Relations Law § 5(3) has not been viewed as expressing strong condemnation of uncle-niece and aunt-nephew relationships.

The second purpose of section 5's prohibition of incest is to prevent the increased risk of genetic disorders generally believed to result from "inbreeding." (It may be no coincidence that the broadening of the incest statute in 1893 was roughly contemporaneous with the development of the modern science of genetics in the late 19th century.) We are not geneticists, and the record and the briefs in this case do not contain any scientific analysis; but neither party disputes the intuitively correct-seeming conclusion that the genetic risk in a half-uncle, half-niece relationship is half what it would be if the parties were related by the full blood. Indeed, both parties acknowledged at oral argument that the risk in a half-uncle/half-niece marriage is comparable to the risk in a marriage of first cousins. First cousins are allowed to marry in New York, and I conclude that it was not the Legislature's purpose to avert the similar, relatively small, genetic risk inherent in relationships like this one.

Under our longstanding principles of statutory construction, I conclude that a marriage between a half-uncle and half-niece, or a half-aunt and half-nephew, is permissible in New York based on the structure of Domestic Relations Law § 5. As this Court observed in *Matter of Simms*, (26 N.Y.2d 163 [1970]), the Legislature included language in subdivision two of this statute that prohibits a marriage between a brother and sister of "the half blood," but there is no comparable clause in subdivision three voiding marriages between uncles and nieces or aunts and nephews. When the Legislature includes a condition in one provision but excludes it from another within the same statute, there arises an "irrefutable inference" that the omission was intentional (*Matter of Raynor v. Landmark Chrysler*, 18 NY3d 48, 56 [2011] [internal quotation marks and citation omitted]; see also McKinney's Cons Laws of NY, Book 1, Statutes § 240). Hence, the contrast in the plain language of Domestic Relations Law § 5(2) and (3) compels the conclusion that marriages between half-siblings are outlawed but marriages involving half-uncles and half-nieces or half-aunts and half-nephews are permissible.

Nevertheless, I write separately to emphasize that the Legislature may see fit to revisit this provision. The record before us does not address the question of genetic ramifications for the children of these unions. Some of my colleagues assert that marriages between half-uncles and half-nieces, or half-aunts and half-nephews, are no different than marriages between first cousins. Perhaps there is no genetic basis for precluding such unions, but this Court was not presented with any scientific evidence upon which to draw an informed conclusion on this point.

From a public policy perspective, there may be other important concerns. Such relationships could implicate one of the purposes underlying incest laws, i.e., "maintaining the stability of the family hierarchy by protecting young family members from exploitation by older family members in positions of authority, and by reducing competition and jealous friction among family members" *(Benton v. State*, 265 Ga 648, 650, 461 S.E.2d 202, 205 [1995, Sears, J., concurring]). Similar intrafamilial concerns may arise regardless of whether the uncle or aunt in the marriage is of whole or half blood in relation to the niece or nephew. The issue of unequal stature in a family or cultural structure may not be implicated in this case but certainly could exist in other contexts, and a number of states have retained statutory prohibitions involving such marriages.[1] These considerations are more appropriately evaluated in the legislative process.

Chief Judge LIPPMAN and Judges GRAFFEO, READ, SMITH, PIGOTT and RIVERA concur. Judge SMITH concurs in an opinion in which Chief Judge LIPPMAN and JUDGE Rivera concur. Judge GRAFFEO concurs in an opinion in which Judges READ and PIGOTT concur. Judge ABDUS–SALAAM took no part.

Who can perform the ceremony?

A marriage ceremony must be performed by one of the individuals specified in Section 11 of the New York State Domestic Relations Law which includes:

- The current or a former governor;
- The mayor of a city or village;
- The former mayor, the city clerk, or one of the deputy city clerks of a city of more than one million inhabitants;
- A marriage officer appointed by the town or village board or the city common council;
- A justice or judge of the following courts: the U.S. Court of Appeals for the Second Circuit, the U.S. District Courts for the Northern, Southern, Eastern, or Western Districts of New York, the New York State Court of Appeals, the Appellate Division of the New York State Supreme Court, the New York State Supreme Court, the Court of Claims, the Family Court, a Surrogates

Court, the Civil and Criminal Courts of New York City (including Housing judges of the Civil Court), and other courts of record;
- A village, town, or county justice;
- A member of the clergy or minister who has been officially ordained and granted authority to perform marriage ceremonies from a governing church body in accordance with the rules and regulations of the church body;
- A member of the clergy or minister who is not authorized by a governing church body, but who has been chosen by a spiritual group to preside over their spiritual affairs;
- Other officiants as specified by Section 11 of the Domestic Relations Law.

If the marriage is being performed in NYC, the person performing the ceremony must be registered with the City of New York. The officiant does not have to be a resident of New York State. The fact that you are a ship captain does not authorize one to perform marriage ceremonies in New York State.

- **Where must the marriage take place?** A NYS marriage license is only good within New York State.
- **What is required of the ceremony?** There is no particular form or ceremony required, except that the parties must state in the presence of the officiant that they take each other as spouses.
- **Are witnesses required?** In addition to the officiant, there must be a least one witness to the wedding ceremony. There is no age requirement for the witness. However, the witness must be old enough to be able to testify in court in the event that was to become necessary.
- **Must the parties be a man and a woman?** No. In 2011, New York became the sixth state to legalize "same sex marriage" through legislation. However, the right for same sex couples to get married under the U.S. Constitution was decided in *Obergefell v. Hodges*, 576 U.S.____, (2015), a landmark civil rights case in which the Supreme Court of the United States ruled in a 5–4 decision that the fundamental right to marry is guaranteed to same-sex couples.

SUPREME COURT OF THE UNITED STATES

OBERGEFELL et al. ***v . HODGES, DIRECTOR, OHIO DEPARTMENT OF HEALTH, et al.***

576 U.S. ____ (2015)

(Case Syllabus edited by Author)

Michigan, Kentucky, Ohio, and Tennessee define marriage as a union between one man and one woman. The petitioners, 14 same-sex couples and two men whose same-sex partners are deceased, filed suits in Federal District Courts in their home States, claiming that respondent state officials violate the Fourteenth Amendment by denying them the right to marry or to have marriages lawfully performed in another State given full recognition. Each District Court ruled in petitioners' favor, but the Sixth Circuit consolidated the cases and reversed.

Held:

The Fourteenth Amendment requires a State to license a marriage between two people of the same sex and to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-State.

(a) Before turning to the governing principles and precedents, it is appropriate to note the history of the subject now before the Court.

(1) The history of marriage as a union between two persons of the opposite sex marks the beginning of these cases. To the respondents, it would demean a timeless institution of marriage were extended to same-sex couples. But the petitioners, far from seeking to devalue marriage, seek it for themselves because of their respect—and need—for its privileges and responsibilities, as illustrated by the petitioners' own experiences.

(2) The history of marriage is one of both continuity and change. Changes, such as the decline of arranged marriages and the abandonment of the law of coverture, have worked deep transformations in the structure of marriage, affecting aspects of marriage once viewed as essential. These new insights have strengthened, not weakened, the institution. Changed understandings of marriage are characteristic of a Nation where new dimensions of freedom become apparent to new generations.

This dynamic can be seen in the Nation's experience with gay and lesbian rights. Well into the 20th century, many States condemned same-sex intimacy as immoral, and homosexuality was treated as an illness. Later in the century, cultural and political developments allowed same-sex couples to lead more open and public lives. Extensive public and private dialogue followed, along with shifts in public attitudes. Questions about the legal treatment of gays and lesbians soon reached the courts, where they could be discussed in the formal discourse of the law. In 2003, this Court overruled its 1986 decision in *Bowers* v. *Hardwick*, 478 U. S. 186, which upheld a Georgia law that criminalized certain homosexual acts, concluding laws making same-sex intimacy a crime "demea[n] the lives of homosexual persons." *Lawrence* v. *Texas*, 539 U. S. 558, 575. In 2012, the federal Defense of Marriage Act was also struck down. *United States* v. *Windsor*, 570 U. S. ___. Numerous same-sex marriage cases reaching the federal courts and state supreme courts have added to the dialogue.

(b) The Fourteenth Amendment requires a State to license a marriage between two people of the same sex.

(1)The fundamental liberties protected by the Fourteenth Amendment's Due Process Clause extend to certain personal choices central to individual dignity and autonomy, including intimate choices defining personal identity and beliefs. See, *e.g.*, *Eisenstadt* v. *Baird*, 405 U. S. 438, 453; *Griswold* v. *Connecticut*, 381 U. S. 479, 484–486. Courts must exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect. History and tradition guide and discipline the inquiry but do not set its outer boundaries. When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed.

Applying these tenets, the Court has long held the right to marry is protected by the Constitution. For example, *Loving* v. *Virginia*, 388 U. S. 1, 12, invalidated bans on interracial unions, and *Turner* v. *Safley*, 482 U. S. 78, 95, held that prisoners could not be denied the right to marry. To be sure, these cases presumed a relationship involving opposite-sex partners, as did *Baker* v. *Nelson*, 409 U. S. 810, a one-line summary decision issued in 1972, holding that the exclusion of same-sex couples from marriage did not present a substantial federal question. But other, more instructive precedents have expressed broader principles. See, *e.g.*, *Lawrence*, *supra*, at 574. In assessing whether the force and rationale of its cases apply to same-sex couples, the Court must respect the basic reasons why the right to marry has been long protected. See, *e.g.*, *Eisenstadt*, *supra*, at 453–454. This analysis compels the conclusion that same-sex couples may exercise the right to marry.

(2) Four principles and traditions demonstrate that the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples. The first premise of this Court's relevant precedents is that the right to personal choice regarding marriage is inherent in the concept of individual autonomy. This abiding connection between marriage and liberty is why *Loving* invalidated interracial marriage bans under the Due Process Clause. See 388 U. S., at 12. Decisions about marriage are among the most intimate that an individual can make. See *Lawrence*, *supra*, at 574. This is true for all persons, whatever their sexual orientation.

A second principle in this Court's jurisprudence is that the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals. The intimate association protected by this right was central to *Griswold* v. *Connecticut*, which held the Constitution protects the right of married couples to use contraception, 381 U. S., at 485, and was acknowledged in *Turner*, *supra*, at 95. Same-sex couples have the same right as opposite-sex couples to enjoy intimate association, a right extending beyond mere freedom from laws making same-sex intimacy a criminal offense. See *Lawrence*, *supra*, at 567.

A third basis for protecting the right to marry is that it safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education. See, *e.g.*, *Pierce* v. *Society of Sisters*, 268 U. S. 510. Without the recognition, stability, and predictability marriage offers, children suffer the stigma of knowing their families are somehow lesser. They also suffer the significant material costs of being raised by unmarried parents, relegated to a more difficult and uncertain family life. The marriage laws at issue thus harm and humiliate the children of same-sex couples. See *Windsor*, *supra*, at ___. This does not mean that the right to marry is less meaningful for those who do not or cannot have children. Precedent protects the right of a married couple not to procreate, so the right to marry cannot be conditioned on the capacity or commitment to procreate.

Finally, this Court's cases and the Nation's traditions make clear that marriage is a keystone of the Nation's social order. See *Maynard* v. *Hill*, 125 U. S. 190, 211. States have contributed to the fundamental character of marriage by placing it at the center of many facets of the legal and social order. There is no difference between same- and opposite-sex couples with respect to this principle, yet same-sex couples are denied the constellation of benefits that the States have linked to marriage and are consigned to

an instability many opposite-sex couples would find intolerable. It is demeaning to lock same-sex couples out of a central institution of the Nation's society, for they too may aspire to the transcendent purposes of marriage.

The limitation of marriage to opposite-sex couples may long have seemed natural and just, but its inconsistency with the central meaning of the fundamental right to marry is now manifest.

(3) The right of same-sex couples to marry is also derived from the Fourteenth Amendment's guarantee of equal protection. The Due Process Clause and the Equal Protection Clause are connected in a profound way. Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always co-extensive, yet each may be instructive as to the meaning and reach of the other. This dynamic is reflected in *Loving*, where the Court invoked both the Equal Protection Clause and the Due Process Clause; and in *Zablocki* v. *Redhail*, 434 U. S. 374, where the Court invalidated a law barring fathers delinquent on child-support payments from marrying. Indeed, recognizing that new insights and societal understandings can reveal unjustified inequality within fundamental institutions that once passed unnoticed and unchallenged, this Court has invoked equal protection principles to invalidate laws imposing sex-based inequality on marriage, see, *e.g.*, *Kirchberg* v. *Feenstra*, 450 U. S. 455, 460–461, and confirmed the relation between liberty and equality, see, *e.g.*, *M. L. B. v. S. L. J.*, 519 U. S. 102, 120–121.

The Court has acknowledged the interlocking nature of these constitutional safeguards in the context of the legal treatment of gays and lesbians. See *Lawrence*, 539 U. S., at 575. This dynamic also applies to same-sex marriage. The challenged laws burden the liberty of same-sex couples, and they abridge central precepts of equality. The marriage laws at issue are in essence unequal: Same-sex couples are denied benefits afforded opposite-sex couples and are barred from exercising a fundamental right. Especially against a long history of disapproval of their relationships, this denial works a grave and continuing harm, serving to disrespect and subordinate gays and lesbians.

(4) The right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty. Same-sex couples may exercise the fundamental right to marry. *Baker* v. *Nelson* is overruled. The State laws challenged by the petitioners in these cases are held invalid to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples.

(5) There may be an initial inclination to await further legislation, litigation, and debate, but referenda, legislative debates, and grassroots campaigns; studies and other writings; and extensive litigation in state and federal courts have led to an enhanced understanding of the issue. While the Constitution contemplates that democracy is the appropriate process for change, individuals who are harmed need not await legislative action before asserting a fundamental right. *Bowers*, in effect, upheld state action that denied gays and lesbians a fundamental right. Though it was eventually repudiated, men and women suffered pain and humiliation in the interim, and the effects of these injuries no doubt lingered long after *Bowers* was overruled. A ruling against same-sex couples would have the same effect and would be unjustified under the Fourteenth Amendment.

The petitioners' stories show the urgency of the issue they present to the Court, which has a duty to address these claims and answer these questions. Respondents' argument that allowing same-sex couples to wed will harm marriage as an institution rests on a counterintuitive view of opposite-sex couples' decisions about marriage and parenthood. Finally, the First Amendment ensures that religions, those who adhere to religious doctrines, and others have protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths.

(c) The Fourteenth Amendment requires States to recognize same-sex marriages validly performed out of State. Since same-sex couples may now exercise the fundamental right to marry in all States, there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character. Pp. 27–28.

772 F. 3d 388, reversed.

Kennedy, J., delivered the opinion of the Court, in which Ginsburg, Breyer, Sotomayor, and Kagan, JJ., joined. Roberts, C. J., filed a dissenting opinion, in which Scalia and Thomas, JJ., joined. Scalia, J., filed a dissenting opinion, in which Thomas, J., joined. Thomas, J., filed a dissenting opinion, in which Scalia, J., joined. Alito, J., filed a dissenting opinion, in which Scalia and Thomas, JJ., joined.

Notes

1 Together with No. 14–562, *Tanco et al*. v. *Haslam, Governor of Tennessee, et al*., No. 14–571, *DeBoer et al.* v. *Snyder, Governor of Michigan, et al.*, and No. 14–574, *Bourke et al*. v. *Beshear, Governor of Kentucky*, also on certiorari to the same court.

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1. (see Ala Code § 13A–13–3 [a][4]; Alaska Stat Ann §§ 11.41.450[a] [3]; 25.05.021[2]; Colo Rev Stat Ann § 14–2–110[1][c]; 750 Ill Comp Stat Ann § 5/212 [a][3]; Ky Rev Stat Ann § 530.020[1]; La Civ Code Ann art 90[A] [2]; Minn Stat Ann § 517.03[3]; Mont Code Ann § 40–1–401[1][c]; NJ Stat Ann § 37:1–1[a], [b]; ND Cent Code Ann § 14–03–03[3]; Or Rev Stat Ann § 106.020 [2]; Tex Fam Code Ann § 6.201[3], [4]; Utah Code Ann § 76–7–102[1][b][i]; Va Code Ann § 20–38.1[a][3]; Wash Rev Code § 26.04.020[1][b]; W Va Code § 48–2–302[a], [b]; Wis Stat Ann § 765.03[1]). ↵

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9.3: PART II- DIVORCE

The grounds for divorce in New York are set out in Domestic Relations Law (DOM) § 170. The addition of a no fault provision in 2010 significantly changed divorce case litigation. Plaintiffs no longer have to prove why they should be granted a divorce which in many divorce cases before 2010 was no easy task. So, while most divorce lawyers and clients now utilize the no fault provision of DOM § 170 (7), the other grounds for divorce are still on the books and are still available for plaintiffs and their divorce actions.

There are circumstances where a marriage should be annulled. In other words, one of the parties is seeking a court order to dissolve the marriage and have a court declare the marriage null and void, like it never happened. Some marriages are void by law, and some are voidable. What follows are the grounds for annulment in New York. This is followed by the actual statute for divorce grounds including a brief summary of each. It is important to know that the only court that can hear and issue a judgment of divorce is the New York Supreme Court, not Family Court.

Void Marriages and **Annulment**:

- If your spouse was legally married to someone else when you got married and that person is still living, you can seek an annulment. This ground can be asserted at any time during the lifetime of the parties. This marriage is void under the law. DOM § 6
- If the marriage is incestuous, it is a void marriage. You cannot marry someone that is an ancestor and a descendant like a father-daughter or mother-son, nor can a brother and sister whether half or whole blood, or an uncle and niece or an aunt and nephew get married. See Part I Marriage section above. DOM § 5
- A marriage which was solemnized by someone other than a person authorized under the law is void. See Part I Marriage section above.
- If one of the parties to the marriage was underage at the time of the marriage you can seek an annulment. This ground can be asserted until the underage party is legal of the age of consent. This is a voidable ground for marriage. See Part I Marriage section above. DOM § 7, DOM § 140
- If one of the parties has an incurable mental illness at the time of marriage, that is unknown to the other party, the court may grant an annulment. The non-ill spouse must commence the action as soon as they learn of the mental illness, and the mental illness is present when the annulment is commenced. This is a voidable ground. DOM § 7, DOM § 140, DOM § 141
- If one the parties is physical incapable of sexual relations with the other spouse at the time of the marriage, and this is not known to the other spouse at the time of the marriage, the court may grant an annulment within five years of the marriage. This is a voidable ground. DOM § 7, DOM § 140
- If consent for the marriage was obtained by force, duress, or fraud, the marriage is voidable. DOM § 7, DOM§ 140
- If one or both of the parties is incapable of consent for want of understanding due to mental incapacity, then the marriage is voidable. DOM § 7, DOM § 140

Children of an annulled marriage are legitimate. (DOM § 24) Child custody, visitation, and child support are determined by statute in the same manner as in a divorce action. The same is true of property obtained during the marriage. It is divided by the court in the same manner as in a divorce. (See appropriates sub-sections below.)

Domestic Relations Law § 170

“An action for divorce may be maintained by a husband or wife to procure a judgment divorcing the parties and dissolving the marriage on any of the following grounds:

(1) The cruel and inhuman treatment of the plaintiff by the defendant such that the conduct of the defendant so endangers the physical or mental well-being of the plaintiff as renders it unsafe or improper for the plaintiff to cohabit with the defendant.

(2) The abandonment of the plaintiff by the defendant for a period of one or more years.

(3) The confinement of the defendant in prison for a period of three or more consecutive years after the marriage of plaintiff and defendant.

(4) The commission of an act of adultery, provided that adultery for the purposes of articles ten, eleven, and eleven-A of this chapter, is hereby defined as the commission of an act of sexual intercourse, oral sexual conduct or anal sexual conduct, voluntarily

performed by the defendant, with a person other than the plaintiff after the marriage of plaintiff and defendant. Oral sexual conduct and anal sexual conduct include, but are not limited to, sexual conduct as defined in subdivision two of section 130.00 and subdivision three of section 130.20 of the penal law.

(5) The husband and wife have lived apart pursuant to a decree or judgment of separation for a period of one or more years after the granting of such decree or judgment, and satisfactory proof has been submitted by the plaintiff that he or she has substantially performed all the terms and conditions of such decree or judgment.

(6) The husband and wife have lived separate and apart pursuant to a written agreement of separation, subscribed by the parties thereto and acknowledged or proved in the form required to entitle a deed to be recorded, for a period of one or more years after the execution of such agreement and satisfactory proof has been submitted by the plaintiff that he or she has substantially performed all the terms and conditions of such agreement. Such agreement shall be filed in the office of the clerk of the county wherein either party resides. In lieu of filing such agreement, either party to such agreement may file a memorandum of such agreement, which memorandum shall be similarly subscribed and acknowledged or proved as was the agreement of separation and shall contain the following information: (a) the names and addresses of each of the parties, (b) the date of marriage of the parties, (c) the date of the agreement of separation and (d) the date of this subscription and acknowledgment or proof of such agreement of separation.

(7) The relationship between husband and wife has broken down irretrievably for a period of at least six months, provided that one party has so stated under oath. No judgment of divorce shall be granted under this subdivision unless and until the economic issues of equitable distribution of marital property, the payment or waiver of spousal support, the payment of child support, the payment of counsel and experts' fees and expenses as well as the custody and visitation with the infant children of the marriage have been resolved by the parties, or determined by the court and incorporated into the judgment of divorce."

DOM § 170 **Summary**

Cruel and Inhuman Treatment **DOM § 170(1):**

- Physical or mental cruelty by one spouse against the other.
- Must prove it is not safe or proper for the parties to continue the marriage.
- Must have occurred within five years of divorce.

Abandonment **DOM § 170(2):**

- Must be for one year or more without consent.
- Can be "constructive abandonment" if you refuse to have relations without justification.

Imprisonment **DOM § 170(2):**

- Must be for three years or more.
- Must be without interruption.

Adultery **DOM § 170(4):**

- Sex outside of marriage within five years of divorce action.
- Must be proven by more than just the testimony of the spouse.
- Plaintiff must prove opportunity, inclination, and intent.
    - Defenses
        - If a spouse gives their consent to the sex outside of the marriage, it is not adultery.
        - If a spouse has sexual relations with their adulterous spouse after they know about it, they have forgiven the act and can no longer use the adultery as grounds for divorce.
        - The action for divorce based on adultery must be brought within five years of discovery, or it is beyond the Statute of Limitations.
        - If both spouses committed adultery, neither can use the grounds of adultery against the other.

Living Separate **and Apart for More Than One Year Pursuant to a Separation Judgment DOM § 170(5):**

- Similar to a separation agreement conversion divorce.
- This cause of action is very rare.

Living Separate and Apart **for More Than One Year Pursuant to a Separation Agreement DOM § 170(6):**

- Must be a valid separation agreement.
- The agreement must have been substantially followed.
- This is also known as a “conversion” divorce.
- Divorce is not automatic, must be filed for.

Irretrievable Breakdown **o f t he Marriage f or a t Least Six Months DOM § 170(7):**

- New York’s version of a no-fault divorce.
- Either party can make the claim.
- Economic issues must also be resolved.
- Only available for marriages that are of six or more months in duration.
- If claimed by a spouse, there is no defense.

TYPICAL DIVORCE ISSUES

Once the grounds for a divorce have been established, the parties must also resolve the economic and parental responsibilities if children are involved. The following are very typical divorce issues that must be resolved by the parties or by a court.

- Child Custody
- Child Visitation
- Spousal Support/Maintenance
- Child Support
- Dividing Marital Property pursuant to Equitable Distribution

Child Custody:

Child custody is often the most contested and contentious part of divorce litigation. It is also an issue for non-married parents who are seeking orders of custody and support in Family Court. Regardless of the marital status of the parties, the standard for custody is the same, what is in the best interest of the child.

The following are factors a judge may consider in deterring what is in the best interest of a child.

- Which parent has been the child’s primary caretaker.
- The quality of each parent’s home environment.
- How “fit” the judge thinks each parent is based on the following:
  - Parent has a stable home and lifestyle.
  - Parent has demonstrated good judgment.
  - Parent is employed.
  - Parent has demonstrated good mental and physical health.
- Which parent the child is living with now, and for how long.
- Each parent’s ability to provide emotional and intellectual support for the child.
- Which parent allows the other parent to be involved in the child’s life and does not try to cut out the other parent.
- If the child is old enough and mature enough, which parent the child wants to live with.
- Whether the child would be separated from any siblings.
- Whether either parent has been abusive.

Types of Custody :

There are several different types of custody arrangements that parties can agree to. When custody is contentious and being litigated, it would be unusual for a court to award anything but sole custody to one of the parents. The rationale is that if the parties cannot come to an agreement regarding the custody of their child or children, ordering anything but sole custody will just lead to more problems between the parents.

- Sole Custody: The legal right to make all major decisions affecting a child under the age of 18. Usually includes the physical custody of the child and the child’s primary residence with the sole custody parent.

- Joint Custody: Equally shared decision making even if child spends more physical custody time with the other parent.
- Joint Physical Custody: Equally shared decision making but the child resides about 50% of the time with each parent.

It is a legal presumption that natural parents should have custody of their children. A non-parent seeking custody would need to prove extraordinary circumstances to rebut the presumption like unfitness, surrender, abandonment, persistent neglect, or other extraordinary circumstances and then prove it is in the best interest of the child for that non-parent to have custody.

Child **Visitation:**

Parents can agree to whatever visitation arrangements they want. If a court must decide, visitation will be based on the best interest of the child. Common visitation is alternating weekends, allowing one day during the week for dinner during the school year, alternating holidays and birthdays, and allowing for extended time during the school summer vacation period. If determined to be necessary, supervised visitation may be ordered.

Generally, parents get to decide whether grandparents will be allowed visitation with their children. In *Troxel v Granville*, 530 US 57 (2000) a 6-3 opinion written by Justice O'Connor, the U.S. Supreme Court held that a Washington State ruling allowing grandparents to have weekend visits with their grandchildren, to which the parents objected, was unconstitutional. The Court invoked the "best interests of the child" principle and decided that "special weight" should be given parents in determining what is in their child's "best interests" in regard to allowing the grandparent's visitation rights as a matter of law.

New York law follows the *Troxel* ruling. However, there are exceptions under NY law. If a parent dies and leaves children behind, and that parent parents (the grandparents) had normal and regular visitation with their grandchildren while their child (the parent) was alive, NY courts will grant grandparent visitation under those circumstances.

Legal Representation of a Child:

An Attorney for the Child must be appointed for all contested custody cases. This attorney will be appointed by the court. The attorney must meet with the child and represent to the court, the child's preference for custody. The attorney can only deviate from this if the attorney determines the child is not capable of understanding the ramifications of their preference to live with one parent over the other and it is not in their best interest.

Lincoln Hearing:

A Lincoln Hearing is an in camera interview by judge of the child to help the judge determine what is in the child's best interest in terms of custody and visitation. The judge meets with the child in the judge's chambers without the parents or parents' lawyers present. The only other people present are the Attorney for the Child and the court reporter who is recording the interview. The older and more mature the child is, the more a judge should take into consideration the child's wishes.

Modification of Custody:

Custody can be modified at any time when there is a change in circumstances. The change must usually be substantial regarding the emotional, financial, or physical condition of one or both parents, justifying a modification of a child custody or child support order.

Relocation:

Circumstances sometimes arise where the parent with custody wants to relocate out of the area. This relocation will affect the other parent's visitation rights. The standard regarding relocation cases is the best interest of the child. In a relocation case, the court will consider the impact of the move on the child, the relationship the child has with the non-moving parent, the reason for the move, and the benefits versus the harm that the child may experience from the move.

Spousal Support/Maintenance **:**

Spousal support used to be called alimony, and in some parts of the United States, it still is. There are two types of maintenance, temporary and durational. Temporary maintenance is ordered by the court from the time a court action is filed and a party requests temporary maintenance, until the divorce decree is issued. Durational maintenance is ordered after the divorce decree is issued and is for a specific amount of time.

The amount of temporary maintenance ordered is determined by Domestic Relations Law (DOM) § 236(B). It is a calculation based on the income of the parties, who has child custody, and the legal child and maintenance support obligations of the parties. Generally, the party with the greater income will pay temporary and durational maintenance. The fault of the parties is not a factor in determining support. The maintenance calculation is a rather complicated formula. So much so that to assist parties and lawyers in divorce actions, the New York State Unified Court system provides a variety of tools online, including a calculator to help parties and lawyers determine the actual maintenance calculation. Use the following link for more detail on how to calculate spousal maintenance.

https://www.nycourts.gov/divorce/MaintenanceChildSupportTools.shtml

Durational maintenance is determined in the same manner as temporary maintenance. The amount of time that durational maintenance is ordered to be paid is determined by the number of years the parties were married. The statute only provides guidelines to judges on how long they should order durational maintenance to be paid. The longer the term of the marriage was, the longer the term of durational maintenance order. Again, fault is not considered in determining spousal support.

Maintenance is generally meant to be a short-term obligation. It always terminates upon the obligor's death. It usually terminates upon the recipient's remarriage unless a separation agreement states otherwise. Recipient's cohabitation with someone else may terminate the obligation.

Child Support:

Parents are responsible for the support of their children up to the age of 21. In determining child support, whether in a divorce action or in family court with parents who are not married, the amount of child support to be paid is determined by the Child Support Standards Act of 1989. Child support is paid to the parent with custody of the child by the non-custodial parent. A court will determine who has custody of a child, even in situations of joint custody based on who the child resides with more, even if that means counting the number of nights a child sleeps in the home of one parent over the other.

The basic child support obligation is determined by a percentage the non-custodial parent's income and the number of children the non-custodial parent is responsible for with that particular custodial parent. Note that in determining the percentage to be paid based on the number of children one is paying child support for, it is not based on the total number of children one is responsible for with multiple custodial parents.

The basic child support percentages are as follows:

- 1 child = 17%
- 2 children = 25%
- 3 children = 29%
- 4 children = 31%
- 5 or more children = 35%

Income of a parent includes:

- Workers' compensation
- Disability benefits
- Unemployment benefits
- Social security benefits
- Veterans' benefits
- Pensions and retirement benefits
- Fellowship and stipends
- Annuity payments
- Maintenance received from a former spouse

In determining income, certain deductions are also allowed. They include:

- Maintenance actually paid to nonparty spouse
- Maintenance paid to the current spouse
- Child support actually paid to a nonparty

- Certain business or employment expenses
- FICA

What is FICA?

FICA is the acronym for the Federal Insurance Contributions Act. This is the law passed in 1935 that created Social Security. FICA is a contribution, (not technically a tax) that all employees and employers pay for Social Security and Medicare benefits. It is withheld from an employee's paycheck and paid to the federal government. Employers also match these payments. If a person is self-employed, the pay the employee and employer amount. The percentage of an employee's income that is used to determine FICA is 6.2% for Social Security plus 1.45% for Medicare. There is a cap on income at which point the 6.2% for Social Security is no longer deducted from an employee's paycheck. That amount in 2018 is $128,700 and can change each year pursuant the tax code.

Since child support and maintenance paid to other parties is deductible, the allowable deductions can affect that amount of child support a parent pays to various children they are responsible for with different custodial parents. For example, if Parent A is paying child support to Parent B first for one child and then also to Parent C for one child, the amount of support being paid to both Parent B and C will be different. The 17% percentage of Parent A's will be paid to both but since Parent B's obligation will be deducted from Parent A's income, the amount paid to Parent C will be less. Here is an illustration of this possibility

Parent A's income is $100,000.00 after the FICA deduction. Parent A will pay 17% of the $100,000.00 or $17,000.00 annually to Parent B for their one child. Parent A will pay 17% of $83,000.00 or $14,110.00 annually to Parent C for their one child.

Dividing Marital Property **P ursuant to Equitable Distribution:**

In 1980, NY adopted the equitable distribution system for dividing marital property. It is not the same as community property. Marital property is not necessarily divided up equally. It is not equal distribution. Property is divided "fairly."

The underlying principle of equitable distribution is that marriage is an "economic partnership." This partnership includes both wage and intangible contributions towards this economic partnership. Ordinary marital fault not considered in equitable distribution. Fault must be "egregious fault" so much so that it "shocks the conscience of the court."

The parties are required to provide each other with full financial disclosure of their assets, liabilities, and income. This financial disclosure is certificated by their counsel.

The following factors are considered by the court in making an equitable distribution award:

(1) The income and property of each party at the time of marriage, and at the time of the commencement of the action;

(2) The duration of the marriage and the age and health of both parties;

(3) The need of a custodial parent to occupy or own the marital residence and to use or own its household effects;

(4) The loss of inheritance and pension rights upon dissolution of the marriage as of the date of dissolution;

(5) The loss of health insurance benefits upon dissolution of the marriage;

(6) Any award of maintenance under subdivision six of this part;

(7) Any equitable claim to, interest in, or direct or indirect contribution made to the acquisition of such marital property by the party not having title, including joint efforts or expenditures and contributions and services as a spouse, parent, wage earner, and homemaker, and to the career or career potential of the other party;

(8) The liquid or non-liquid character of all marital property;

(9) The probable future financial circumstances of each party;

(10) The impossibility or difficulty of evaluating any component asset or any interest in a business, corporation, or profession, and the economic desirability of retaining such asset or interest intact and free from any claim or interference by the other party;

(11) The tax consequences to each party;

(12) The wasteful dissipation of assets by either spouse;

(13) Any transfer or encumbrance made in contemplation of a matrimonial action without fair consideration;

(14) Any other factor which the court shall expressly find to be just and proper.

Equitable distribution is for marital property only. This means property that is accumulated during the marriage up and until the filing for the divorce. Who has title to marital property is of no consequence. For example, if a couple has separate bank accounts that they have their paychecks deposited in, those accounts are still marital property. The income is being accumulated during the course of marriage. However, not all property accumulated during the marriage is martial property and is considered separate property. Property accumulated before the marriage is separate property, but can become marital property. The following is a list of what is considered separate property under DOM § 236(1) (d).

- Property acquired before the marriage
- Property acquired by inheritance
- Gifts to one spouse from anyone other than the other spouse
- Compensation for punitive damages and pain and suffering from a personal injury
- Separate property acquired in exchange for separate property
- Appreciation of separate property remains separate if passive or the non-titled spouse did not contribute towards the appreciation
- Property designated as separate by a validly executed marital agreement

Separate property that is comingled with martial property can become marital property. For example, if a spouse inherits money from her parents, but then deposits the money in a joint bank account with her husband and they use the money to pay marital bills, that inherited money could be considered by a court to be comingled. If comingled, the once separate property is now martial property subject to equitable distribution.

Prenuptial Agreements:

Some couples sign a contract prior to getting married contemplating for the possibility of a divorce. These contracts are called prenuptial agreements. Prenuptial agreements settle issues of property division and support in the event of divorce. Prenuptial agreements are valid in NYS. They must be in writing and signed before a notary. Provisions that relate to children both born and unborn are not necessarily enforceable. Again, this is because the standard as to what is in the best interest of a child overrides any such agreement. A prenuptial agreement doesn't take effect until a couple actually marries. There is no obligation to disclose finances to each other before signing a prenuptial agreement. However, if a potential spouse chooses to disclose their assets and misrepresents their financial condition, the prenuptial agreement may be found by a court to be invalid. It is a misconception that only wealthy people sign prenuptial agreements. Couples who would not consider themselves wealthy find good reasons for signing prenuptial agreements.

SEPARATION AGREEMENTS

A separation agreement is a legal contract between the parties that resolves all the matrimonial issues like support, custody, visitation, and equitable distribution. Many, if not most, divorce actions will eventually have a separation agreement as part of the final disposition of the divorce. Why? Because eventually, most parties to a divorce action decide that they would rather compromise and work out all the custody, support, property, and financial issues of a divorce than have a judge do so for them. It saves them attorney fees, is faster, and provides them with the opportunity to negotiate a result that is at least acceptable. You never know what a judge will decide.

Many divorce litigants will negotiate and sign a separation agreement with one of the parties then filing for a divorce pursuant to DOM § 170(7) which is the no fault divorce provision called Irretrievable Breakdown of the Marriage for at Least Six Months. DOM § 170(7) requires that the "economic issues of equitable distribution of marital property" be resolved as part of the divorce action which a separation agreement fulfills.

A separation agreement can be used as grounds for a divorce. (DOM § 170(6)) This is often called a conversion divorce. When the parties live separate and apart pursuant to a valid written separation agreement for at least one year, either party can file for divorce

on that basis alone. However, a divorce does not happen automatically. One of the parties actually has to file for a divorce. Some people never get a divorce after signing an agreement. They are still married but legally separated.

Separation agreements must be in writing. They must also be signed by the parties before a notary public and properly notarized. Separation agreements only need to be filed in the county clerk's office if being used for a conversion divorce. They can be filed at any time before or during the divorce proceedings.

Separation agreements can be found to be overreaching and therefore invalid. Fraud or duress is one way of proving overreaching. Having one attorney represent both parties is disfavored by the courts, and could be used as evidence of overreaching. If a separation agreement is overwhelmingly unfair in favor of one party over the over, it may be evidence of overreaching, but that fact along may not be enough. An agreement that is overreaching can be ratified by the parties by their actions. If a party lives by an overreaching agreement for a substantial amount of time, it can be viewed by the court as ratification of the agreement and negate the overreaching.

Separation agreements are just what they say they are; an agreement to live separate and apart. But what happens if the parties decide to reconcile after signing one? Usually there is a provision in the agreement that dictates what happens if the parties reconcile. Reconciliation indicates an abandonment of the agreement which can occur by the actions of the parties. For example, it can occur when the parties move back into the marital home together living as married spouses again for an extended period of time. A weekend would not be long enough for this to happen, but six months probably would.

Judicial separation agreements are a cause of action where a legal separation is granted by a Supreme Court judge. They are very rare. However, divorce stipulations are very common. A divorce stipulation is a voluntary agreement stated in open court during divorce litigation. It is an oral version of a separation agreement that is recorded by the stenographer.

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9.4: PART III- FAMILY LAW

ADOPTION

Adoption is the legal process whereby a parent or parents take a non-birth child as their own. Both Family Court and Surrogate Court have jurisdiction over adoptions. All adoptions in NYS must be judicially sanctioned by a judge in either Family Court or Surrogate Court. Note that Surrogate Court judges are also called Surrogates and are defined as such in DOM § 109(3).

An adopted child acquires all the same legal rights, obligations, and duties of a biological child.

After an adoption, a new birth certificate is issued that reflects the child's new surname if it is actually being changed, and names the adopting parents as the parents of that child. The child's original birth certificate, as well as the entire adoption file, is then sealed, and is to be opened only by a court order upon a showing of good cause.

TYPES OF ADOPTIONS :

Agency Adoption: This is when the placement of a child for adoption is made through a NYS agency that is licensed and authorized by law to receive and place children for adoption within NYS.

Private Placement Adoption: Any adoption, other than through an agency, is a private placement adoption. In these situations, the biological parents of the child choose who will adopt their child.

Step-parent Adoption: This is when a single parent with a child or children gets married, and the new spouse (step-parent) adopts the child or children. This is still considered a private placement adoption.

International Adoption: Many couples adopt children from other countries. The rules and regulations of the various countries that allow international adopts vary greatly. If a child is adopted in another country, the parents can readopt the child in NYS, which provides a court order recognizing the foreign adoption in NYS.

WHO MAY ADOPT?

In New York State just about any adult who is 18 years of age or older can adopt. (See DOM § 110) This includes:

- an unmarried person,
- a married couple,
- two unmarried intimate partners,
- a married person who is legally separated from his or her spouse, or
- a married person who has been living apart from his or her spouse for at least three years before the adoption case is filed. (DOM § 110)

The standard for adoption is what is in the best interest of the child, just as it is for child custody. An adult with a felony conviction may not be able to get approval to adopt.

NYS ADOPTION CONSENTS AND NOTICE REQUIREMENTS

In agency adoptions, the agency consents to the adoption of the child in its care and guardianship. In private placement adoptions, the private individuals must give their consent. This consent can be given in front of a judge. This is called a judicial consent. If the consent is given, but not in front of a judge, this is called an extra-judicial consent.

The consent to an adoption given in writing in court in front of a judge is immediately irrevocable. The biological parent(s) cannot change their mind and have their child returned. However, if the consent is not given in front of a judge, the parents have 45 days to change their mind and withdraw their consent. If this happens, this does not mean the child will automatically be returned to the biological parents. If the adoptive parents oppose the withdrawal of the consent, then a hearing will be required. The judge will then determine if the consent was properly withdrawn in time and if so, then decide the custody of the child based on what is in the best interest of the child.

Required Consents:

Domestic Relations Law § 111 states:

"1. Subject to the limitations hereinafter set forth consent to adoption shall be required as follows:

(a) Of the adoptive child, if over fourteen years of age, unless the judge or surrogate in his discretion dispenses with such consent;

(b) Of the parents or surviving parent, whether adult or infant, of a child conceived or born in wedlock;

(c) Of the mother, whether adult or infant, of a child born out of wedlock;

(d) Of the father, whether adult or infant, of a child born out-of-wedlock and placed with the adoptive parents more than six months after birth, but only if such father shall have maintained substantial and continuous or repeated contact with the child…"

Under certain circumstances, consent is not required of a parent who does not have contact with their child for six months or more after birth. Domestic Relations Law § 111 states:

"2. The consent shall not be required of a parent or of any other person having custody of the child:

(a) who evinces an intent to forego his or her parental or custodial rights and obligations as manifested by his or her failure for a period of six months to visit the child and communicate with the child or person having legal custody of the child, although able to do so;"

GENERAL INFORMATION ABOUT NEW YORK STATE ADOPTIONS

- Court adoption records in NYS are sealed. No one can see the court records of an adoption including the public, the adoptive parents, the birth parents, or the adopted child.
- Children cannot be sold or bought for adoption (or for any other purpose). It is a crime to do so. If suspected, the parties will be subject to criminal investigation and prosecution in New York.
- Parents who participate in an international adoption may petition for a readoption in New York State. When an adoption is completed in a foreign country, a Petition for Registration of Foreign Adoption Order can be filed in either the Family Court or Surrogate's Court in the county of residence. By doing so, the adoptive parents can obtain a New York court order that recognizes the foreign adoption. This will allow the parents to get a New York birth certificate for their adoptive child from the Department of Health. Sometimes, a readoption case may be necessary to satisfy federal immigration requirements.
- Surrogate parent agreements are not legally binding in New York. Surrogate motherhood is against public policy in NYS. (DOM § 122.) A surrogate mother that is paid for carrying a child for another person may be subject to a civil fine. (DOM § 123(2)(a)) New York courts will not force a surrogate birth mother to give up her child to another person, even if she agreed to do so by written contract.
- Pursuant to the Interstate Compact on the Placement of Children (ICPC), adopting parents must get approval before a child from another state is brought into New York State for adoption. Requests for such are processed through the NYS Office of Children and Family Services' ICPC Unit.
- New York State has an Adoption Information Registry. This Registry can help an adopted person get medical information or general information about their birth parents or, in some cases, siblings. However, no information that can identify either the adoptee or birth parents is given without the appropriate legal permission of the parties involved. The Registry is under the jurisdiction of NYS' Department of Health. For more information regarding this Registry, use the following link.
- https://www.health.ny.gov/vital_records/adoption.htm?PHPSESSID=55729bfebab7670d004fde3ce3fa0a12
- A NYS adoption must be initiated, and eventually "finalized", in a Family or Surrogate Court in the county in which the adoptive parents reside.
- The adoption process is initiated by the filing with the court of a petition to adopt.
- Adoptive parents seeking to adopt through private placement are required to obtain certification by the appropriate court, as qualified adoptive parents, prior to taking custody of an adoptive child. Part of this process includes criminal background checks and a home study.

- The final order of adoption will not be signed by the court until at least six months after the initiation of the adoption proceeding, unless the court determines that signing the order sooner is in the child's best interest.

PATERNITY

Paternity is defined as the state or condition of being a father. Paternity suits are family court proceedings where the court will determine who is the legal father of a child. In some circumstances, this may not be the biological father. The typical paternity suit occurs when a mother is seeking child support for a child born out of wedlock. Before a court can order a person, who is not married to the mother of a child to pay child support, that person must either admit they are the father of said child or if they do not, family court must determine he is the father. The following are some common legal terms used in paternity cases.

Order of Filiation: An order establishing the paternity of a child or unborn child born out of wedlock issued by a court.

Putative Father: Person assumed to be the father of a child born out of wedlock, by actions or deeds such as parenting, providing physical and/or monetary support.

- **Presumed Father:** The man to whom the mother was married to at the time of the birth of the child.
- **Adjudicated Father:** Non-marital father whose paternity has been established by court order.
- **Putative Father Registry:** Out of Wedlock data bank with NYS Dept. of Social Services for:
- Men adjudicated as fathers
- Men acknowledged to be fathers
- Men claiming to be fathers who have filed
- **Acknowledgment of Paternity:** This is a written instrument whereby a person admits that he is the biological father of a child born out of wedlock.
- **Birth Certificate with the Father Named:** Having the father's name on the Birth Certificate does not constitute proof of paternity.

Family court exclusively uses DNA testing to establish paternity. DNA testing establishes a 95% or higher probability of paternity. The standard of proof in paternity suits is clear and convincing evidence. This is a higher standard than the preponderance of the evidence but lower than beyond a reasonable doubt. Respondents have the right to remain silent during paternity suits but unlike criminal cases, that silence can be used by family court against the respondent.

If the court determines that a person is the father of a child, the court will issue an order of filiation. The effects of an order of filiation are that the support obligations of the adjudicated father are the same as those born in wedlock. Support will be retroactive to the date of the filing of the paternity petition. The court has discretion to order payments for money spent on the child before filing including expenses of the pregnancy.

It is presumed that a child born in wedlock is the child of the husband. This is a rebuttable presumption. A husband that suspects he is not the father of a child that his wife gives birth to can institute a paternity suit to determine whether he is the biological father.

Equitable Estoppel: There is a common law doctrine that states that the delay in bringing a court case will preclude a person from asserting their rights against another person who has justifiably relied on the conduct and who would suffer damage if the person were now allowed to assert such rights. This is known as equitable estoppel. NYS has codified this doctrine to apply to paternity suits. (Family Ct Act § 418 [a]; § 532 [a]) The following case illustrates how the doctrine is applied to paternity suits.

Matter of Shondel J. v Mark D.

7 NY3d 320 (**2006)**

Court of Appeals

OPINION OF THE COURT

(Dissenting Opinion and Footnotes Not Included)

Rosenblatt, J.

In this child support proceeding, we hold that a man who has mistakenly represented himself as a child's father may be estopped from denying paternity, and made to pay child support, when the child justifiably relied on the man's representation of paternity, to the child's detriment. We reach this conclusion based on the best interests of the child as set forth by the Legislature.

I.

In January 1996, Shondel J. gave birth to a daughter in Guyana, where she then resided, and in a birth registration document named Mark D. as the father. Shondel and Mark had dated the previous spring in Guyana and had sexual intercourse.

Although Mark was in New York when the child was born, he provided financial support for the child and returned to Guyana later in the year to see her. In a sworn statement, notarized by the Guyana Consul-General in New York in January 1996, Mark declared that he was "convinced" that he was the child's father and accepted "all paternal responsibilities including child support." In 1998 he signed a Guyana registry, stating that he was her father and authorizing the change of her last name to his. Mark named the child the primary beneficiary on his life insurance policy, identifying her as his daughter. He also sent Shondel money monthly for the child's support from her birth until June 1999 and then less regularly through the summer of 2000.

In August 2000, Shondel commenced a Family Court Act article 5 proceeding alleging that Mark is the father and seeking orders of filiation and support. Initially, Mark did not contest paternity. On the contrary, in September 2000, when the child was 4½ years old, Mark commenced a Family Court Act article 6 proceeding, seeking visitation. In his petition, he stated that he was the child's father, and that he loved her and wished to "spend quality time with her on a regularly scheduled basis."

In October 2000, however, when appearing before a Family Court hearing examiner to answer Shondel's petition, Mark requested DNA testing. The hearing examiner ordered genetic marker tests, which revealed that Mark is not the child's biological father. The hearing examiner then dismissed Shondel's paternity petition, and Mark abandoned his petition for visitation, having severed his relationship with the child. Shondel objected to the hearing examiner's order, expressing doubts about the laboratory tests and stating that she would be able to show that Mark had always recognized the child as his. Realizing that the hearing examiner had exceeded her authority in dismissing Shondel's petition, Family Court sustained her objection and appointed a law guardian for the child.

In October 2001, the Law Guardian reported that Mark had acted as the father of the child, who in turn considered him her father. Family Court set the matter down for a trial on equitable estoppel and ordered another set of tests. A blood genetic marker test confirmed that Mark is not the child's biological father.

At the estoppel trial, Family Court heard widely diverging testimony from Shondel and Mark. According to Shondel's testimony, Mark spent time with her and the child when they traveled to the United States in 1996 and 1997, seeing them "every day" for about six weeks in the summer of 1997 in New York; continued to visit the child and take her out after his relationship with Shondel soured in 1998; bought the child toys, clothes and other gifts; took the child to meet his parents; told his family that she was his daughter; regularly spoke with the child by telephone; referred to himself as "daddy" when talking with the child; and visited the child "almost every other day" in August 1999 and "almost every other day" between the time Shondel and the child moved to New York in January 2000 and the commencement of this litigation.

Mark denied all of this, asserting that he had seen the child only four times since her birth; that he had not acknowledged the child as his; that he had not introduced the child to his family or friends as his child; that he had not sent the child birthday or Christmas gifts; and that he had never visited her. Mark testified that he twice asked Shondel to submit to a blood test to determine whether he was the father of her child. Shondel insisted that he did not.

Family Court believed Shondel "entirely" and found Mark's testimony incredible. It ruled that Mark "held himself out as [the] child's father and behaved in every way as if he was the father, albeit a father who didn't reside for a good part of the child's life, in the same country." These affirmed findings of Family Court have support in the record and are binding on this Court.

Family Court entered an order of filiation and awarded child support retroactive to the date Shondel commenced the Family Court proceeding. The Appellate Division affirmed, concluding that "Family Court properly determined that it was in the best interests of the subject child to equitably estop [Mark] from denying paternity" (6 AD3d 437 [2004]). We agree, based on our precedents, the affirmed findings of fact and the legislative recognition of paternity by estoppel.

II.

The purpose of equitable estoppel is to preclude a person from asserting a right after having led another to form the reasonable belief that the right would not be asserted, and loss or prejudice to the other would result if the right were asserted. The law imposes the doctrine as a matter of fairness. Its purpose is to prevent someone from enforcing rights that would work injustice on the person against whom enforcement is sought and who, while justifiably relying on the opposing party's actions, has been misled into a detrimental change of position (see generally *Nassau Trust Co. v Montrose Concrete Prods. Corp.*, 56 NY2d 175, 184 [1982]).

New York courts have long applied the doctrine of estoppel in paternity and support proceedings. Our reason has been and continues to be the best interests of the child (*Jean Maby H. v Joseph H.*, 246 AD2d 282, 285 [2d Dept 1998]; see generally *Matter of L. Pamela P. v Frank S.*, 59 NY2d 1, 5 [1983]).

Although it originated in case law, paternity by estoppel is now secured by statute in New York (see Family Ct Act § 418 [a]; § 532 [a]). For that reason, and contrary to Mark's assertions, it is not for us to decide whether the doctrine has a rightful place in New York law. Clearly it does, in the absence of legislative repeal or a determination of unconstitutionality. Mark argues for the first time in this appeal that sections 418 (a) and 532 (a) are unconstitutional and deprive him of due process. As this claim was not raised in the courts below, we do not entertain it.

Equitable estoppel is gender neutral. In *Matter of Sharon GG. v Duane HH.* (63 NY2d 859 [1984], *affg* 95 AD2d 466 [3d Dept 1983]), we affirmed an order of the Appellate Division dismissing a paternity petition in which a mother sought to compel her husband to submit to a blood test as a means of challenging his paternity. We agreed with the Appellate Division that the mother should be estopped. As that Court pointed out, the mother expressed no question about her child's paternity until some 2½ years after the child's birth. She had held the child out as her husband's, accepted his support for the child while she and her husband lived together and after they separated, and permitted her husband and child to form strong ties together.

Estoppel may also preclude a man who claims to be a child's biological father from asserting his paternity when he acquiesced in the establishment of a strong parent-child bond between the child and another man. The rationale is that the child would be harmed by a determination that someone else is the biological father. For example, in *Purificati v Paricos* (154 AD2d 360 [2d Dept 1989]), a boy's biological father who did not seek to establish his paternity until more than three years after the child's birth, and who acquiesced as a relationship flourished between the boy and his mother's former husband, was estopped from claiming paternity. The courts "impose equitable estoppel to protect the status interests of a child in an already recognized and operative parent-child relationship" (*Matter of Baby Boy C.*, 84 NY2d 91, 102 n [1994]).

Finally, the Appellate Division has repeatedly concluded that a man who has held himself out to be the father of a child, so that a parent-child relationship developed between the two, may be estopped from denying paternity. Where a child justifiably relies on the representations of a man that he is her father with the result that she will be harmed by the man's denial of paternity, the man may be estopped from asserting that denial.

III.

Mark represented that he was the father of the child, and she justifiably relied on this representation, changing her position by forming a bond with him, to her ultimate detriment. He is therefore estopped from denying paternity.

Mark expressly represented that he was the father of Shondel's child in the notarized sworn statement and in the Guyana registry in which he gave the child his name, as well as in the visitation petition filed with Family Court. Further, Mark held himself out as the child's father, and behaved in every way as if he was the father. Mark and the child had a close relationship, in which he referred to himself as her "daddy," and which involved regular telephone conversations, frequent visits when she and Mark were in the same city and contact with his parents. Moreover, Mark named the child as the primary beneficiary on his life insurance policy and sent money monthly for the child's support until June 1999, and then less regularly through the summer of 2000.

The record also establishes that the child justifiably relied on Mark's representations, accepting and treating him as her father. The Law Guardian's October 2001 oral report to Family Court on her interview with the child (conducted when she was 5½ years old) concluded that she

"considers Mark [D.] to be her father. She enjoys spending time with him, she knew his name, she described what he looks like, different things about his appearance, she talked about some of the things they did together, she enjoyed the visits a lot, he brought

her presents in the past, he took her out without the mother sometimes, there's a picture album with pictures of [Mark] in it and she wanted me to express that she misses him and she wants to know when he's going to come back to see her."

In the best interests of the child, Family Court properly applied estoppel, to impose support obligations on Mark, after he left the child with the detrimental effects of a relationship in which she was misled into believing that he was her father. A mother who had perfect foresight and knew that her child's relationship with a father figure would be severed when the child was 4½ might well choose never to inform him of her child's birth.

IV.

Mark attacks the statutory basis for the application of paternity by estoppel. In 1990, the Legislature amended Family Court Act § 418 (a), which governs the procedures related to scientific testing of biological paternity in support proceedings, so as to read, in pertinent part:

"The court, on its own motion or motion of any party, when paternity is contested, shall order the mother, the child and the alleged father to submit to one or more genetic marker or DNA marker tests . . . to aid in the determination of whether the alleged father is or is not the father of the child. No such test shall be ordered, however, upon a written finding by the court that it is not in the best interests of the child on the basis of res judicata, equitable estoppel or the presumption of legitimacy of a child born to a married woman." (Family Ct Act § 418 [a] [emphasis supplied]; see L 1990, ch. 818, § 12.)

Arguing that the statute is self-contradictory, Mark asserts that the law mandates scientific testing of biological paternity in support proceedings and then in the next sentence makes such tests discretionary. We view the statute differently.

By providing a limited "best interests of the child" exception to mandatory biological tests of disputed paternity, the statute requires Family Court to justify its refusal to order biological tests when paternity is in issue. Before the amendment, Family Court was authorized, but not required, to order biological tests, and the court did not have to justify its refusal to do so. Now, in a support proceeding in which paternity is disputed, Family Court must explain why it denies a motion for biological paternity testing. The court may deny testing based on "res judicata, equitable estoppel or the presumption of legitimacy of a child born to a married woman," if denial is in the best interests of the child.

It is true that a child in a support proceeding has an interest in finding out the identity of her biological father. But in many instances a child also has an interest—no less powerful—in maintaining her relationship with the man who led her to believe that he is her father. The 1990 amendment to Family Court Act § 418 (a) appropriately balances these interests in accordance with the primary purpose of the Family Court Act—to protect and promote the best interests of children.

The procedure contemplated by section 418 (a) is that Family Court should consider paternity by estoppel before it decides whether to test for biological paternity. Here, the process was inverted early in the proceeding. Instead of referring the matter to a Family Court judge, the hearing examiner ordered genetic marker tests of paternity when the parties appeared in October 2000. As a result, the child's biological paternity had been addressed before Family Court conducted its trial on the issue of estoppel. Nevertheless, even though the tests had been conducted, Family Court was authorized to decide the estoppel issue.

V.

In allowing a court to declare paternity irrespective of biological fatherhood, the Legislature made a deliberate policy choice that speaks directly to the case before us. The potential damage to a child's psyche caused by suddenly ending established parental support need only be stated to be appreciated. Cutting off that support, whether emotional or financial, may leave the child in a worse position than if that support had never been given. Situations vary, and the question whether extinguishing the relationship and its attendant obligations will disserve the child is one for Family Court based on the facts in each case. Here, Family Court found it to be in the best interests of the child that Mark be declared her father and the Appellate Division properly affirmed.

Asserting that the equities are with Mark, our dissenting colleagues argue that we do not acknowledge the fraud or misrepresentation exception to the doctrine of equitable estoppel. This argument is misplaced for three reasons. To begin with, the child is the party in whose favor estoppel is being applied and there can be no claim here that she was guilty of fraud or misrepresentation. Secondly, to the extent that it matters, we note that there is no evidence of fraud or willful misrepresentation even on Shondel's part. It is not likely that she would have initiated paternity proceedings, with the predictable prospect of biological testing, if she expected tests to rule him out as the father. There is every reason to believe that she thought Mark was the

biological father and that the tests would confirm her belief. Finally, the issue does not involve the equities between the two adults; the case turns exclusively on the best interests of the child.

We appreciate the dissenters' concern over applying estoppel to a case in which, as between Mark and Shondel, it was she who misrepresented Mark to be the father (even though she may have earnestly believed he was). The dissenters' position, however, appears not to recognize that fatherhood by estoppel does not contemplate a contest between two adults to see who is the more innocent. The child is entirely innocent and by statute the party whose interests are paramount.

To the child, Mark represented himself as her father. The Legislature did not create an exception for men who take on the role of fatherhood based on the mother's misrepresentation. That would eviscerate the statute and, with it, the child's best interests. Under the enactment, the mother's motivation and honesty are irrelevant; the only issue for the court is how the interests of the child are best served.

Here, Family Court found, and the Appellate Division affirmed, that Mark represented himself to be the father and that the child's best interests would be served by a declaration of fatherhood. Under our decisional law, and contrary to the dissenters' suggestion, equitable estoppel does not require that Mark, to be estopped, necessarily knew that his representation was false. A party who, like Mark, does not realize that his representation was factually inaccurate may yet be estopped from denying that representation when someone else—here the child—justifiably relied on it to her detriment (*see Romano v Metropolitan Life Ins. Co.*, 271 NY 288, 293-294 [1936]; *Triple Cities Constr. Co. v Maryland Cas. Co.*, 4 NY2d 443, 448 [1958]).

The dissenters cite *Simcuski v Saeli* (44 NY2d 442 [1978]), which holds that a defendant may be estopped to plead the statute of limitations after having wrongfully induced the plaintiff to refrain from filing a timely suit. *Simcuski* prevents defendants from profiting from their misconduct. It does not bear on estoppel as between a man and the child with whom he has formed a father-daughter relationship.

Our dissenting colleagues point out that Mark has renounced fatherhood and now has no relationship with the child. This state of affairs, however, does not preclude the application of estoppel. If it did, a man could defeat the statute simply by severing all ties with the child.

Given the statute recognizing paternity by estoppel, a man who harbors doubts about his biological paternity of a child has a choice to make. He may either put the doubts aside and initiate a parental relationship with the child, or insist on a scientific test of paternity *before* initiating a parental relationship. A possible result of the first option is paternity by estoppel; the other course creates the risk of damage to the relationship with the woman. It is not an easy choice, but at times, the law intersects with the province of personal relationships and some strain is inevitable. This should not be allowed to distract the Family Court from its principal purpose in paternity and support proceedings—to serve the best interests of the child.

Accordingly, the order of the Appellate Division should be affirmed, without costs.

Chief Judge Kaye and Judges Ciparick, Graffeo and Read concur with Judge Rosenblatt; Judge G.B. Smith dissents in a separate opinion in which Judge R.S. Smith concurs.

Artificial Insemination

A child born to a married woman by artificial insemination is legitimate if:

- Insemination was performed by a person authorized to practice medicine
- There is written consent of woman and husband
- The doctor certifies she/he rendered the service
- However, NYS case law is not clear and definitive regarding artificial insemination rights and responsibilities.

ORDERS OF PROTECTION

Court procedure for NYS family offenses is found in the Family Court Act (FCT) § 812. Family Court and criminal courts have concurrent jurisdiction. Victims may proceed in either or both courts.

Family court's objective is to stop the violence, protect the victims and offer rehabilitation services to the parties. Criminal court's objective is to stop the violence, protect the victims and punish the offender.

Victims must be related to the perpetrator by consanguinity or affinity, or as a former spouse or have a child with the perpetrator for standing to bring action. The statute also applies to persons in an intimate relationship. An intimate relationship is one that is deeper than an ordinary friendship and not necessarily sexual.

To obtain an Order of Protection from Family Court, the victim will submit a Petition and appear before a family court judge. The judge then issues a Summons or a Warrant for the offender to appear. The judge may also issue a Temporary Order of Protection at that time. After service or arrest, a fact-finding hearing is held by the judge. This is akin to a trial. The standard of proof for this fact-finding hearing is preponderance of the evidence. After the fact-finding a dispositional hearing is held but often rolled into fact-finding hearing. A dispositional hearing is akin the sentencing portion of a criminal trial.

The duration of a Family Court Order of Protection is a maximum of 2 years unless the court finds Aggravating Circumstances. Aggravating Circumstances can extend the order to 5 years.

The definition of Aggravating Circumstances can be found in FCT § 827 (vii).

> …For the purposes of this section aggravating circumstances shall mean physical injury or serious physical injury to the petitioner caused by the respondent, the use of a dangerous instrument against the petitioner by the respondent, a history of repeated violations of prior orders of protection by the respondent, prior convictions for crimes against the petitioner by the respondent or the exposure of any family or household member to physical injury by the respondent and like incidents, behaviors and occurrences which to the court constitute an immediate and ongoing danger to the petitioner, or any member of the petitioner's family or household.

There is a statewide Order of Protection Registry. It was created by the Domestic Violence Intervention Act of 1994. It is attached to the New York State Police Information Network. It contains orders of protection issued by criminal, matrimonial and Family Court cases. All orders of protection must be issued on official uniform forms and filed with this registry.

Under New York State Criminal Procedure Law Section 140.10(4)(b), police officers shall arrest the enjoined party for violating a duly served Order of Protection involving a family or household member whenever they have reasonable cause to believe that the enjoined party:

- Violated a "stay-away" provision of the Order of Protection, or
- Committed a family offense in violation of such Order of Protection.

PINS **(Person In Need of Supervision)**

A person in need of supervision (PINS) is an individual under the age of 18 who:

- Does not attend school
- Behaves in a way that is incorrigible, ungovernable, or habitually disobedient
- Is beyond the control of a parent, guardian or lawful authority
- Is suspected of drug abuse
- And requires supervision or treatment

Parents, guardians, schools and government agencies are usually the petitioners in PINS cases. After a Petition for PINS is filed with Family Court, there will usually be a meeting between the petitioner which is typically the parents or guardian and the child with the probation department. This is called the adjustment process. The purpose is to resolve the case without court intervention.

If this is not possible, there will be an initial court appearance where the child, now officially the respondent is accompanied by a parent or guardian, is informed of his or her rights, which includes the right to an attorney. The court can appoint an Attorney for the Child and if necessary a guardian ad litem to represent the respondent. It is rare in PINS cases that a child is remanded to a detention facility pending a fact-finding hearing.

At the fact-finding hearing, the judge will decide whether the child is "incorrigible, ungovernable, or habitually disobedient", to such a degree that the child is out of the control of a parent or guardian, or is abusing drugs.

If the child is found to be a person in need of supervision, the judge may order any of the following:

- Discharge or release of the respondent with a warning
- Adjournment in contemplation of dismissal (ACD)

- Suspension of judgment for up to 1 year
- Placement of the respondent in his or her own home, in the custody of a suitable relative, or in a group or a foster home for up to 18 months
- Probation for up to 1 year
- The respondent, if over the age 10, to make restitution through community service or other means
-

JUVENILE JUSTICE

In 2017, New York passed the Raise the Age law that changes the law in regards to juveniles who commit crimes significantly because by October 2019, New York will no longer automatically prosecute 16- and 17-year-olds as adults.

The following is New York State's official summary of the law as found at the following link: http://raisetheageny.com/get-the-facts

KEY COMPONENTS OF THE LEGISLATION

The presumptive age of juvenile accountability is raised for 16 year olds effective 10/1/18 and for 17 year olds effective 10/1/19. Except as otherwise noted, all components described below are pursuant to this timeline.

The law will change cases for 16-17 year olds in the following ways:

Parental Notification

- Parents must be notified when their children are arrested.
- Questioning of youth must take place in age-appropriate settings, with parental involvement (including with regards to waiving Miranda rights), and for developmentally appropriate lengths of time.

Court Processing

The vast majority of cases of 16-17-year olds will ultimately be heard in the Family Court, either originating there or being transferred there from the new Youth Part of the adult criminal court.

Misdemeanors:

- All misdemeanor cases (other than vehicle and traffic law misdemeanors) will be heard in Family Court pursuant to the Family Court Act. This includes Family Court Act procedures for adjustment and confidential records.

Felonies:

- All felony cases will start in the Youth Part of the adult criminal court.
- All non-violent felonies will be transferred from the Youth Part to the Family Court unless the District Attorney (DA) files a motion within 30 days showing "extraordinary circumstances" as to why the case should remain in the Youth Part. If DA files motion, there can be a hearing and the Judge must decide within 5 days of the hearing or motions whether to prevent the transfer of the case to Family Court.
- Violent felonies can also be transferred from the Youth Part to the Family Court. If the charges do NOT include the accused displaying a deadly weapon in furtherance of the offense, causing significant physical injury, or engaging in unlawful sexual conduct, the case will transfer to Family Court unless the DA files a motion within 30 days showing "extraordinary circumstances" as to why the case should remain in the Youth Part. If the charge does include an element listed above, removal to Family Court is only possible with consent of the DA. Vehicle and Traffic Law cases and Class A felonies other than Class A drug offenses cannot be transferred.
- 16 and 17-year olds whose cases remain in the Youth Part will be referred to as "Adolescent Offenders." Adult sentencing will apply, but the Judge must take the youth's age into account when sentencing. Adolescent Offenders are eligible for Youthful Offender treatment, as is the current law with respect to 16 and 17-year olds charged as adults.
- Adolescent offenders may voluntarily participate in services while their case is pending.

Violations:

- Violations will be heard in adult criminal/local courts, as is the current law.

Family Court:

- Youth whose cases are heard in the Family Court will be processed pursuant to existing Juvenile Delinquency (JD) laws, which includes the opportunity for adjustment. They will not have a permanent criminal record.

Youth Part of Adult Court:

- New “Youth Parts” will be created. All 13-15-year-old Juvenile Offenders and all 16-17-year Adolescent Offenders will have their cases in the Youth Part.
- Family Court judges will preside over cases in the Youth Parts.

Facilities

- No 16 or 17-year-old will be sentenced to or detained in a facility with adults. To the extent practicable, no youth under 18 will be held at Rikers by 4/1/18 and as of 10/1/18, a full prohibition against youth under the age of 18 being held at Rikers will be in effect.
- Youth whose cases are heard in Family Court will be detained or placed in OCFS-operated, OCFS-licensed, or ACS facilities (including Close to Home), as Juvenile Delinquents currently are.
- Adolescent Offenders who are detained pre-trial will be held in a specialized secure juvenile detention center for older youth, which will be certified and regulated by OCFS in conjunction with the state commission of correction. Judges have the discretion to order that Adolescent Offenders who are sentenced to less than a year serve such sentences in a specialized juvenile detention center for older youth.
- Adolescent Offenders who are sentenced to state imprisonment will be placed in an Adolescent Offender facility developed by the state with enhanced security managed by DOCCS with the assistance of OCFS.

Sealing

- Anyone convicted of an eligible offense in an adult court may seek to have his/her record sealed pursuant to C.P.L. § 160.59 after ten years from the imposition of the sentence or discharge from incarceration, whichever is latest. Violent felonies, sex offenses, and Class A felonies are not eligible offenses. In addition, sealing is only available for people who have no more than 2 convictions, one of which may be for a felony.
- The court will create a standardized form for a person to use to apply for sealing. There will be no fee for applying.

Raise the Age Implementation Task Force

- The Governor will appoint members of a Task Force to coordinate the implementation of these changes.
- The Task Force will issue a report on planning and implementation one year after the effective date (April 2018) and after an initial year of implementation (by August 2019).

Effective Dates

- Sealing Provisions: People may begin to apply for sealing 180 days after enactment (10/6/17).
- Raise the age for 16-year olds: 10/1/18.
- Raise the age for 17-year olds: 10/1/19.
- Sections related to state reimbursement to the counties for probation are effective 4/1/18.
- Sections related to reimbursement for detention and alternative to detention are effective 10/1/18.
- Elimination of state support for detained PINS will start 1/1/2020.

Youthful Offenders

- The Youthful Offender (YO) laws remain the same.

Juvenile Justice Categories:

In NYS, children that commit crimes are put into different categories depending on their age and the severity of the alleged criminal act. Children under the age of 7 cannot be charged with a crime. The following are the three categories:

1. Juvenile Delinquents: Is a child between ages 7 and 15 who has committed a criminal offense. All juvenile delinquency cases are heard in Family Court

2. Juvenile Offenders: A child, who is 13, 14 or 15 years old and has committed a very serious felony, may be tried as an adult in a criminal court. If found guilty, the child is called a juvenile offender, and is subject to more serious penalties than a juvenile delinquent.
3. Youthful Offenders: A 16, 17, or 18-year-old who commits a crime is treated as an adult, but can be considered for youthful offender status at the sentencing. Being a youthful offender gives a child a chance to have no criminal record even after a felony conviction.

Generally, to be treated as a youthful offender, the child must:

- Be least 16 and under 19 at the time the crime is committed.
- Have no prior felony convictions
- Have never been treated as a youthful offender before

Children accused of felonies or other serious violent offenses may not be given youthful offender status. It is up to the judge. A youthful offender record is not a criminal record and is automatically sealed. A youthful offender does not have to report their conviction on any applications for college or work. It also does not disqualify the youthful offender from holding public office, or public jobs. The maximum sentence of incarceration for a youthful offender can be no more than four years.

The U.S. Supreme Court case *InRe Gault* 387 U.S. 1 (1967) held that children who are accused of committing crimes in family court proceedings are entitled to the same basic constitutional protections afforded adult criminals, namely that they be notified of the charges against them, that they have the right of counsel, that they are entitled to remain silent, and that they can confront and cross-examine witnesses against them. The only right they are not entitled to is a jury trial.

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9.5: References

Department of Health. (2017, September). Retrieved July 27, 2018, from https://www.health.ny.gov/publications/4210/

FindLaw's United States Supreme Court case and opinions. (n.d.). Retrieved July 27, 2018, from https://caselaw.findlaw.com/us-supreme-court/14-556.html

Handling a Family Law Case in New York, By Gary Muldoon, 2018 Dempsey Publishing

Matter of Shondel J. v Mark D. (2006 NY Slip Op 05238). (n.d.). Retrieved July 27, 2018, from http://courts.state.ny.us/Reporter/3dseries/2006/2006_05238.htm

New York Consolidated Laws, Domestic Relations Law – DOM § 170. (n.d.). Retrieved July 27, 2018, from https://codes.findlaw.com/ny/domestic-relations-law/dom-sect-170.html

New York State. (n.d.). About Adoption. Retrieved July 27, 2018, from http://www.nycourts.gov/Courthelp/family/adoptionBasics.shtml

New York State. (2016, January 19). Divorce Information & Frequently Asked Questions. Retrieved July 27, 2018, from https://www.nycourts.gov/divorce/info_faqs.shtml

New York State. (2016, July 06). Obtaining An Order of Protection. Retrieved July 27, 2018, from https://www.nycourts.gov/faq/orderofprotection.shtml

New York State. (2017, April 03). Custody. Retrieved July 27, 2018, from https://www.nycourts.gov/courthelp/family/custody.shtml

New York State. (2017, April 03). Visitation. Retrieved July 27, 2018, from https://www.nycourts.gov/courthelp/family/visitation.shtml

New York State. (2018, June 07). What's New in Matrimonial Legislation, Court Rules & Forms. Retrieved July 27, 2018, from https://www.nycourts.gov/divorce/legislationandcourtrules.shtml

New York State. (2018, January 22). Glossary of Legal Terms. Retrieved July 27, 2018, from https://www.nycourts.gov/divorce/glossary.shtml

(n.d.). NGUYEN v. HOLDER | 24 N.Y.3d 1017 (2014) | By SMITH | 20141028242. Retrieved July 27, 2018, from https://www.leagle.com/decision/innyco20141028242

Pogue, D. L., Clifford, E., & Schwartz, A. L. (2009). Understanding New York Law, 2013-14. Upstate Legal Publishing

Office of Children and Family Services. (n.d.). Retrieved July 27, 2018, from https://ocfs.ny.gov/adopt/

Raise the Age. (2018, July 03). Retrieved July 27, 2018, from https://www.ny.gov/programs/raise-age-0

Raise the Age Home. (n.d.). Retrieved July 27, 2018, from http://raisetheageny.com/

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CHAPTER OVERVIEW

10: COMMON ESTATE PLANNING PROCESSES AND DOCUMENTS

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10.1: COMMON ESTATE PLANNING PROCESSES AND DOCUMENTS

INTRODUCTION

This chapter will explain the legal requirements for a valid will in New York, and what happens to a person's property if they die without a will. Basic estate planning terms will be defined. Alternatives to wills, or "will substitutes," will be discussed, such as jointly held bank accounts, jointly held real estate, trusts, and life insurance. Finally, other documents related to estate planning will be explained such as a Power of Attorney, living wills, and a health care proxy.

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10.2: WILLS AND ESTATES

TERMS ASSOCIATED WITH WILLS AND ESTATES:

Administrator – When an individual dies intestate (without a will), the Surrogate's Court appoints an administrator to protect the assets of the estate and to make sure they are distributed in accordance with law. An administrator receives Letters of Administration from the court, which are proof that this person has authority to act on behalf of the estate.

Beneficiary – A person who receives money or property under a will, trust or insurance policy.

Decedent/Deceased – The person who died.

Dying Intestate – Dying without a will.

Estate – An estate is all the personal and real property owned by a person when he/she dies.

Estate Taxes – Taxes owed to the federal government or the State of New York by a person's estate when they die.

Executor/Executrix – A person (executor is a male, executrix is a female) who is appointed (named) in a will to run the estate after the testator/testatrix dies. It is the role of the executor to protect the assets of the estate and to ensure that assets are distributed in the manner set forth in the will. An executor or executrix receives Letters Testamentary from the Surrogate's Court as proof that he or she has authority to act on behalf of and for the estate.

Guardian – A person appointed by a court to make decisions regarding the care for a minor or persons unable to make their own decisions.

Health Care Proxy – A formal legal document that a person signs designating another individual to make critical medical decisions on the person's behalf if the person is unable to do so for them self. A Health Care Proxy is usually signed in conjunction with a Living Will.

Holographic Will – A will made by a person entirely in his/her handwriting.

Intestate – When a person dies without a will.

Life Insurance – Life insurance is a contract between an individual and a life insurance company where the company collects a yearly premium in exchange for the promise to pay a stated sum upon the death of the individual.

Living Will – A formal legal document made by a person prior to a life-threatening disease or injury, outlining the medical treatment a person wants if the person cannot express such themselves. A Living Will is usually signed in conjunction with a Health Care Proxy.

Nuncupative Will – A will is nuncupative when it is unwritten, and the making thereof by the testator and its provisions are clearly established by at least two witnesses.

Power of Attorney – A formal legal document that a person signs giving another person to sign certain legal documents on his/her behalf.

Probate – Probate means to formally bring the will before the Surrogate's Court. Once all the procedures have been completed, all the proper forms signed, all estate taxes paid, and the assets distributed according to the wishes of the testator/testatrix, the will is said to have "gone through probate."

Publishing a Will – Publishing a will means that the testator/testatrix declares the will to be his/her Last Will and Testament in front of the witnesses.

Surrogate's Court – The court in New York State where wills are probated.

Testamentary Trust – A trust created by will that comes into existence upon the death of the decedent and the probate of the will.

Testator – A man who makes a will.

Testatrix – A woman who makes a will.

Will – A formal legal document that passes property from one person to another upon the death of the first person.

Witnesses – In New York, at least two witnesses must be present when the testator/testatrix makes or executes (signs) the will.

WILLS: Wills require very specific legal formalities to be valid.

- A will must be in writing (New York Estates, Powers and Trusts Law [EPTL] Section 3-2.2). New York does not recognize oral wills.
- The person making the will, must be of sound mind, and be 18 years of age or older. (EPTL Section 3-1.1)
- There must be two witnesses (EPTL Section 3-2.1 [4]) that are unrelated to the decedent present when the will is being signed.
- New York does not recognize nuncupative or holographic wills. The only exception is if the nuncupative or holographic will is made by a soldier or sailor in time of war (EPTL Section 3-2.2).

WHY DO I NEED A WILL? The main reason you need a will is so you can decide who gets your property upon your death. If you have a spouse and children, this can be very important as the intestate statute may not distribute your property as you may wish. If you have a child, you can name a guardian in your will that you want to care for your child in the event your spouse cannot do so. You can also create a trust to care for the financial needs of your child upon your death.

WHAT HAPPENS IF I DIE WITHOUT A WILL? Contrary to popular misconceptions, the government rarely takes your property if you die without a will. EPTL Section 4-1.1 sets out how a person's property will be distributed if they die without a will or intestate. NYS will only take an intestates estate if there is no will and no living relatives. Note, intestacy does not extend beyond first cousins once removed.

To determine who is a first cousin once removed, remember that first cousins share a grandparent, second cousins share a great-grandparent, third cousins share a great-great-grandparent. The term "removed" refers to the number of generations separating cousins. Your parent's first cousin is your first cousin once removed. The child of your first cousin is also your first cousin once removed: your grandparent is that child's great-grandparent.

The following chart explains intestate distribution pursuant to EPTL Section 4-1.1 up to nieces and nephews.

Status of Person Upon Death	Recipient of Money or Property
Single, parents alive	All to parents
Married, parents alive	All to surviving spouse
Married with children, parents alive	Wife gets $50,000 plus one-half of the balance of the estate, remainder to children in equal shares
Single, with children	All to children in equal shares
Single, no surviving spouse, parents, children, grandchildren, brothers, or sisters	All to nieces and nephews in equal shares

CAN I DISINHERIT MY CHILDREN IN MY WILL? Yes. There is nothing under the law that prohibits a person from doing so. There are legitimate reasons for doing so besides estrangement. People often distribute funds to one child while they are alive for college or the buying of a home and consider that that child's inheritance. Or perhaps other children have greater needs than some due to age, abilities, or education.

IF I MAKE A WILL, CAN I COMPLETELY DISINHERIT MY SPOUSE? No. New York law protects the surviving spouse from such. If a testator leaves a will leaving nothing or little to a surviving spouse, the law provides an option to this spouse. The surviving spouse has the choice to "elect against the will" and thereby claim $50,000.00, or one-third of the estate whichever amount is greater pursuant to EPTL Section 5.1.

COMMON TERMS OF A SIMPLE WILL: The following are common terms found in most simple NYS wills.

1. The first paragraph of a will usually declares that this is the Last Will and Testament of the maker (testator), and states that he is of sound mind and understands what he is doing. It also generally states the name and place of residence of the person making the will.
2. Most wills recite that the debts and funeral expenses will be paid by the estate.
3. Often a simple will may set forth a specific bequest, such as a wedding ring, a sum of money, or a particular item of furniture to a specific loved one.
4. Most simple wills give the remainder of the entire estate to the surviving spouse with a provision that if the other spouse does not in fact survive the testator (testatrix), or if both die as a result of a common accident or illness, the estate shall be given to some other alternate beneficiary which is usually their children.
5. A will almost always names an executor/executrix and an alternate in the event that the named executor/executrix is unable to serve, or has predeceased the testator.
6. If the testator has minor children, the will usually names a guardian and an alternate guardian to care for the infant children in the event the other parent has predeceased the testator or dies at the same time.
7. If the testator has minor children, the will usually has provisions for a Testamentary Trust to care for their children's financial needs. This duration of the trust is set by the testator. The age of the child that the trust will be terminated with the remaining trust funds distributed to the child is determined by the testator. The trustee or person who administers the trust is named by the testator. It may or may not be the same person as the guardian.

The following is an example of a simple will of a married couple with two minor children.

LAST WILL AND TESTAMENT

OF

MARY C. SMITH

I, **Mary C. Smith**, presently residing in the City of Rochester, County of Monroe, State of New York, being of sound mind and memory, do make, publish, and declare this to be my Last Will and Testament, in the manner following, that is to say:

FIRST: I direct that all legally enforceable debts and my funeral expenses be paid, and I hereby revoke all former Wills and Codicils heretofore made by me.

SECOND: I bequeath my wedding ring to my daughter **Sarah Smith**. All the rest, residue, and remainder of my estate both real and personal, including but not limited to all household goods, personal effects, jewelry, clothing, and any other items of personal property, of whatsoever nature and wheresoever situate, I give, devise, and bequeath, absolutely to my husband, **John T. Smith.**

THIRD: If my husband predeceases me, I hereby give, devise and bequeath my estate to my children **Sarah Smith** and **Anthony Smith** in equal shares, per stirpes, and I hereby give, devise, and bequeath each such share to my Trustee, hereinafter named, on separate and distinct trusts, for the benefit of each of them for the following uses and purposes:

A. To hold, manage, invest, and reinvest in said property; to collect and receive the income there from; to accumulate the said income; to invest and reinvest the said accumulated income; and to pay so much of said income and accumulated income as each Trustee shall deem necessary for the support, maintenance, welfare, education, and comfort of each of them who are under the age of thirty (30) years.

B. I hereby authorize my Trustee to deliver to the beneficiaries of these trusts, any such articles of tangible personal property as he/she deems appropriate or retain for later delivery of such article, as in his sole discretion he deems advisable, or sell any and all personal property for the benefit of the trusts. All the determinations made by the Trustee regarding this tangible personal property shall be final and not subject to judicial review. As each beneficiary shall attain the age of thirty (30) years, the Trustee shall thereupon pay over and distribute to each beneficiary the then principal and any accumulated income of the trust. The separate trust for each beneficiary shall then terminate. Should any them who is a beneficiary of one of these trusts, die before attaining the age of thirty (30) years, the interest of such beneficiary and the income or principal of the trust shall be paid over and distributed to the surviving issue of each beneficiary, per stirpes, or if my beneficiary shall die without issue surviving, I direct that their such share

be paid and poured over to either the trust for the benefit of my surviving beneficiaries established pursuant to this Will or directly to my surviving beneficiaries if he/she is of an appropriate age to receive this bequest free of trust.

FOURTH: I nominate, constitute and appoint my sister **Michele Jones** as Trustee of this, my Last Will and Testament for the above-named trusts. In the event that my Trustee shall predecease me or for any reason be disabled, unwilling, or unable to act either at the time of my death or during the administration of my estate and/or said trusts, in any such events, I nominate, constitute, and appoint my brother **Charles Jones** as Alternate Trustee of this, my Last Will and Testament, with the full power herein stated. In addition to and without limitation upon the general powers and authority of my Trustee, I hereby authorize my Trustee:

A. To sell mortgage, lease, or hold for investment or for the use of my beneficiaries, if determined to be in the best interest of my beneficiaries, any real property forming part of any trust, in such manner and upon such terms as he/she may deem proper.

B. To pay either from principal or income of the trust any taxes, upkeep, costs of repair or other expenses that may be necessary on, or to maintain real property retained in the trust for the use and benefit of my beneficiaries.

C. To retain any investment forming part of my estate so long as he/she deems it proper and to invest and reinvest the funds of any trust in such common or preferred stocks, bonds, common trust funds, or other personal or real property as he/she may select, without restriction to the investments prescribed by law for the trust funds.

D. To set off and distribute in kind to the respective beneficiaries any and all of the securities or investment forming part of any trust at its termination, at the duly appraised value thereof and in such proportions and amounts as to the respective securities and as to the respective beneficiaries as the Trustee may determine, in his/her discretion, to be equitable and for the best interests of the trust.

E. To adequately and properly provide for the health, wealth, maintenance, education, support, or comfort of my beneficiaries, and to draw from the trust any funds that he/she might need for these purposes.

FIFTH: In the event my husband **John T. Smith**, predeceases me, I hereby nominate, constitute and appoint my sister, **Emma Gardner**, as Guardian of the person and property of my children who shall be minors at the time of my death. In the event my sister **Emma Gardner**, predeceases me, or dies while my children are minors, or chooses not to act as Guardian of my children, I hereby nominate, constitute and appoint my sister-in-law, **Kathryn Williams** as Alternative Guardian over the person and property of my children who shall be minors at the time of my death.

SIXTH: I hereby nominate, constitute, and appoint my husband **John T. Smith**, Executor/Executrix of this, my Last Will and Testament. I direct that no fiduciary named herein need give bond or surety. I further give my Executor/Executrix the authority to lease, sell, mortgage, convey, or retain any and all personal property which I may own at the time of my death in such manner and at such time as he/she shall deem in the best interest of my estate. My Executor/Executrix is hereby given the authority to decide which items of personal property he/she will distribute to the Trustee for the benefit of each trust hereunder. The decision of my Executor/Executrix as to which trust will receive which items of tangible personal property will be final and not subject to judicial review. In the event that my Executor/Executrix shall predecease me or for any reason be disabled, unwilling, or unable to act either at the time of my death or during the administration of my estate, in any such events, I nominate, constitute and appoint my sister **Michele Jones** as Alternate Executor/Executrix of this my Last Will and Testament, with the full power herein stated.

SEVENTH: I authorize and empower my fiduciary, as he/she shall deem appropriate, in his/her discretion, to make, or refrain from making, elections permitted under any applicable income, estate or inheritance tax law without regard to the effect of any such election on the interest of any beneficiary of my estate. No beneficiary under this Will shall be entitled to a compensating adjustment, even though the exercise of these powers affects the size or composition of my estate or of any disposition under this Will.

EIGHTH: I direct that all estate, inheritance, legacy, succession, or other death taxes and duties of any nature that may be assessed or imposed by the United States of America, or by the State of New York, or by any other jurisdiction, be paid from my residuary estate. All such taxes with respect to property not passing under the provisions of this Will but upon which property such taxes are assessed or imposed, including all such taxes assessed or imposed upon the proceeds of any and all policies of insurance upon my life are also to be paid out of my residuary estate.

LASTLY: If pursuant to any provision of this Will all or any part of my estate shall vest in absolute ownership in a minor or minors (or if at the termination of any trust created by this Will or a portion of principal of such trust shall vest in absolute

ownership in a minor or minors), I authorize my Executor/Executrix (or Trustee) to hold the same without bond and in his/her absolute discretion and without authorization by any court:

A. To defer, in whole or part, payment or distribution of any or all property to which such minor may be entitled, holding the whole or the undistributed portion thereof as a separate share for such minor with all the powers and authority conferred by the provisions of this will including, without limitation, the power to retain, invest, and reinvest, principal without being limited to investments authorized by law for trust funds.

B. To pay, distribute, or apply the whole or any part of any net income or principal at any time held for any such minor, to or for the support, education, and general welfare of such minor, either directly or by making payment or distribution thereof to the guardian or other legal representative, wherever appointed, of such minor or to the person with whom such minor shall reside (without obligation to see to the proper application thereof) or to such minor personally, or by distributing the whole or part of such share to a Custodian under the New York Uniform Transfers to Minors Act, and to pay or distribute any balance thereof to such minor when such minor attains his or her majority or, in case such minor shall die before distribution of all the property held under this Article, to the Executor/Executrix or Administrator of the estate of such minor.

The receipt of the person or persons to whom any such payment or distribution is so made shall be a sufficient discharge therefore even though my Executor/Executrix may be such person.

My Executor/Executrix (and the Trustee) shall not be required to render and file annual accountings with respect to property so held under this Article of my Will.

My Executor/Executrix (and the Trustee) shall be entitled to receive compensation with respect to any property held for any minor pursuant to this Article at the same rate and in the manner payable to testamentary Trustees under the State of New York.

IN WITNESS WHEREOF, I have hereunto subscribed my name on _____, 20___.

_____L.S. **Mary C. Smith**

WE, whose names are hereto subscribed, Do Certify, that on _____, 20__, the Testator, **MARY C. SMITH**, subscribed her name to this instrument in our presence and in the presence of each of us, and at the same time in our presence and hearing, declared the same to be her Last Will and Testament and requested us and each of us, to sign our names thereto as witnesses to the execution thereof, which we hereby do in the presence of the Testator and each of us, on the day of the date of the said Will, and write opposite our names our respective places of residence.

_____ residing at _____

_____

_____ residing at _____

_____

WILL SUBSTITUTE :

Even if a will exists, not all the property a person owns will be probated. Some assets pass outside of a will as a matter of law. They are often called will substitutes. The most common example is jointly held property. Some will substitutes we will examine are:

- Gifts
- Jointly held property
- Trusts
- Life Insurance policies

Gifts: As part of estate planning, some people make gifts to people of their choice instead of waiting until the die to do so. Each year, a person may give away some of their money tax free. In 2018, the federal limit is $15,000 to any individual from any individual. Assets you give away during your lifetime will not be a part of your estate after you die.

Jointly Held Real Property: When real property is held either as a “tenancy by the entirety” or as “joint tenants,” the surviving owner takes title of the real property upon the death of the other owner. This transfer of the property interest takes place by operation of law. It takes place automatically, regardless of whether the other owner died with or without a will. It also does not

matter if the deceased owner states otherwise in the will by declaring their property interest will pass to someone other than the surviving owner. Jointly held real estate passes outside of the will.

Jointly Held Bank Accounts: When two individuals are named on a bank account as joint owners, the bank account passes automatically to the surviving owner upon the death of the deceased. The transfer happens as a matter of law much in the same way as jointly held real property.

Trusts: A trust is a formal legal document by which a person's assets are managed by a trustee for the benefit of another person called a beneficiary. Trusts can either be created by will called a testamentary trust, or during the lifetime of the grantor called an intervivos trust.

Life Insurance: Life insurance is a contract between an individual and a life insurance company whereby the company agrees to pay a stated sum upon the death of the individual. The person who buys the contract designates an individual or individuals who will receive the money upon their death. These individuals are known as beneficiaries. The two basic forms of life insurance are called term and whole life. Life insurance is often part of an employment benefits package with the amount of insurance to be paid upon one's death based on the salary of the employee.

Life insurance is often purchased as a safety net for families in the event the primary income provider dies unexpectedly. It is also used by partners in a business to help the remaining living partners financially in the event of the unexpected death of a partner would put the business in financial jeopardy.

> **Term Insurance:** This type of life insurance protects an individual over a stated term. If purchased while young and in good health, this can be very inexpensive life insurance. As a person's age increases or their health deteriorates, the risk of death increases and so do the insurance premiums. Term insurance is pure insurance and provides no investment value. An insurance company will only pay out the money contracted for through the death of the insured during the term period.
>
> **Whole Life Insurance:** This type of life insurance provides protection to an insured's beneficiaries in the same manner as term life insurance. However, it includes an element of investment. A portion of the premiums paid are set aside as an investment, much like a savings account, accumulating cash value. Cash value builds up over time. Upon termination of the life insurance portion of the policy, the cash value still remains and is payable to the insured or the insureds beneficiaries. Whole life insurance is more expensive and usually has higher premiums than term life insurance.

WHAT IS A POWER OF ATTORNEY ?

A Power of Attorney is a formal legal document that gives one person the permission to act on another's behalf. While the word attorney is part of the name of this legal document, it has nothing to do with being an attorney or requiring that the person with the power to sign documents on behalf of another has to be an attorney. A person with a power of attorney can buy a car, sell a house, sign checks, pay bills, and sign just about any legal document for another person. However, they cannot write a Will for the other person.

A Power of Attorney expires and terminates automatically upon the death of the principal. If a Power of Attorney is used to convey an interest in real property, it must be recorded in the County Clerk's Office. A Power of Attorney can be terminated at any time by the principal. The principal signing a Power of Attorney must be of sound mind and mentally capable so that they understand what they are signing.

New York State has what are called a "durable power of attorney" that remains valid even in the event of the subsequent disability of the principal who signed the Power of Attorney. This means that the person designated to sign on behalf of the principle, can still act even though the principle is incapacitated (NY General Obligations Law Section 5-1501).

WHAT IS A **GUARDIAN ?**

A guardian is a person appointed by a court to make decisions regarding the care for a minor or persons unable to make their own decisions. Guardians may be appointed by different courts depending on the circumstances. A guardian may be necessary for a minor child whose parents are not capable of taking care of them. A guardian may be appointed for an elderly person who cannot take care of themselves. The powers of a guardian will depend on the circumstances and needs of the person they are to care for.

WHAT IS A LIVING WILL ?

A living will is a formal legal document made by a person prior to his life-threatening disease or injury, outlining what medical treatment they want if they cannot express their own wishes. It usually includes whether they should be allowed to die without the intervention of life-sustaining procedures and equipment. When there is no living will, family of the injured person will have to demonstrate to a court that the person left “clear and convincing” evidence that they would not want to be kept alive by extraordinary measures.

WHAT IS A HEALTH CARE PROXY?

A health care proxy designates another individual to make critical medical and life support decisions on your behalf if you were to become unable to make such decisions.

A living will states a person’s intent and wishes regarding their medical treatment whereas a health care proxy provides for a “designated decision maker” to do so for a person when they are not capable of doing so themselves. These documents are usually signed together and in conjunction with each other. Both a living will and a health care proxy documents do not need to be signed with the assistance of an attorney.

SENIOR LIVING ARRANGEMENTS

With an ever-increasing elderly population that is living longer, the options of living arrangements for the seniors have grown. The following are three types of senior living facilities. The definitions are very general and not definitive. There are many variations on a theme with these types of facilities.

Independent Living Facility: Residents live in independent apartments but can eat one or two meals a day in a dining center. They typically have their laundry and apartment cleaning done for them. There may be a pool or recreation center, and common areas such as libraries and game rooms available. The apartments are designed for seniors, with wide doorways and grab bars in the showers. Many residents still drive their own autos and come and go as they please. 24-hour security and safety monitoring may be available. Generally, nursing care or nurses aids are ***not*** provided.

Assisted Living Facilities: In many ways, these facilities are like the independent living facilities except an on-site nurse is most likely available to assist with medications and monitor health care conditions. A staff doctor may visit the facility on a periodic basis. While some members may still drive, it is more likely that residents will go shopping and attend events in a facility sponsored bus. Generally, a resident in assisted living has to be able to dress, feed, bathe, and toilet themselves. They usually have to be able get themselves to the dining room for meals.

Nursing Home: These facilities are for the very old, the sick, and the frail. Usually the resident is there because they can no longer independently perform certain daily living activities such as bathing, toileting, dressing, and feeding. All meals are provided. There are 24-hour nurses available on the premises, with staff doctors on call. Many residents have been recently hospitalized but are sent to a nursing home when they no longer require the higher level of medical diagnosis and treatment provided in a hospital setting. The cost of nursing home care is very expensive and can cost as much as $10,000 and more per month.

Medicaid: Most elderly people who enter a nursing home, even those who saved during their lives, will eventually run out of money. When a person runs out of money, Medicaid coverage kicks in and the costs of the nursing home is paid by the government and ultimately the taxpayers.

The Medicaid rules are very complicated. Although there are many exceptions (your home, your car, some of the community spouse’s assets, etc.), a single person does not become eligible for Medicaid until he/she has spent all of his assets except $14,400. In addition, an individual may set up a special prepaid funeral account to cover burial expenses and still qualify. The nursing home resident must then pay each month to the nursing home his/her social security benefits and any other sources of income, except for $50/month to be used for personal care items.

Some people try to give away money to their children or other relatives in an attempt to protect their family assets. However, the government can look back at these gifts and transfers and require that they be returned. The look back rule as of 2018 is five years from the date of the Medicaid application.

The following document is an example of a Living Will and Health Care Proxy.

NEW YORK LIVING WILL AND HEALTH CARE PROXY

I, _____, being of sound mind, make this statement as a directive to be followed if I become permanently unable to participate in decisions regarding my Medical care. These instructions reflect my firm and settled commitment to decline medical treatment under the circumstances indicated below.

I direct my attending physician and other medical personnel to withhold or withdraw treatment that serves only to prolong the process of my dying, if I should be in an incurable or irreversible mental or physical condition with no reasonable expectation of recovery.

These instructions apply if I am: a) in a terminal condition; b) permanently unconscious; or c) if I am conscious but have irreversible brain damage and will never regain the ability to make decisions and express my wishes.

I direct that treatment be limited to measures to keep me comfortable and to relieve pain, including any pain that might occur by withholding or withdrawing treatment. While I understand that I am not legally required to be specific about future treatments, if I am in the condition(s) described above, I feel especially strong about the following forms of treatment.

I do not want cardiac resuscitation.

I do not want mechanical respiration.

I do not want tube feeding.

I do not want antibiotics.

I do want maximum pain relief.

Other instructions (insert personal instructions):

I HEREBY APPOINT

Name: _____

Address: _____

Phone Number: _____

as my health care proxy to make all health care decisions for me in conformity with the guidelines I have expressed in this document. I direct my proxy to make health care decisions in accordance with my wishes and instructions as stated above or as otherwise known to him or her. I also direct my agent to abide by any limitations on his or her authority as stated above or as otherwise known to him or her.

In the event my health care proxy is unable, unwilling, or unavailable to serve as such, then **I appoint as my substitute health care proxy** (with the same powers that I have heretofore enumerated).

Name: _ _____

Address: _____

Phone Number: _____

I understand that unless I revoke it, this living will and health care proxy will remain in effect indefinitely.

These directions express my legal right to refuse treatment, under the laws of New York. Unless I have revoked this instrument or otherwise clearly and explicitly indicated that I have changed my mind, it is my unequivocal intent that my instructions as set forth in this document be faithfully carried out.

Signature: _____

Address: _____

Dated: _____

Statement By Witnesses (Must Be 18 or Older)

I declare that the person who signed this document is personally known to me and appears to be of sound mind and acting of his or her own free will. He or she signed (or asked another to sign for him or her) this document in my presence.

Witness: _____

Address: _____

Dated: _____

Witness: _____

Address: _____

Dated: _____

KEEP THIS SIGNED ORIGINAL WITH YOUR PERSONAL PAPERS AT HOME. GIVE COPIES OF THE SIGNED ORIGINAL TO YOUR DOCTOR, FAMILY, LAWYER AND OTHERS WHO MIGHT BE INVOLVED IN YOUR CARE.

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10.3: References

New York Consolidated Laws, Estates, Powers and Trusts Law – EPT § 3-2.1. (n.d.). Retrieved July 27, 2018, from https://codes.findlaw.com/ny/estates-powers-and-trusts-law/ept-sect-3-2-1.html

New York State. (2014, November 13). When There Is No Will. Retrieved July 27, 2018, from https://www.nycourts.gov/courthelp/WhenSomeoneDies/intestacy.shtml

New York State. (2015, January 5). Last Will and Testament. Retrieved July 27, 2018, from https://www.nycourts.gov/courthelp/WhenSomeoneDies/will.shtml

New York State. (2016, March 17). Probate. Retrieved July 27, 2018, from https://www.nycourts.gov/courthelp/WhenSomeoneDies/probate.shtml

New York State Department of Health. (2017, November). Health Care Proxy Appointing Your Health Care Agent in New York State. Retrieved July 27, 2018, from https://www.health.ny.gov/publications/1430.pdf

New York State Office of the Attorney General. (n.d.). A Housing Guide for Senior Citizens. Retrieved July 27, 2018, from https://ag.ny.gov/sites/default/files/senior-housing-guide.pdf

Pogue, D. L., Clifford, E., & Schwartz, A. L. (2009). Understanding New York Law, 2013-14. Upstate Legal Publishers

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CHAPTER OVERVIEW

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11.1: TAXES

INTRODUCTION

“Our new Constitution is now established, and has an appearance that promises permanency; but in this world nothing can be said to be certain, except death and taxes.” ***Benjamin Franklin, 1789.*** Certainly, taxes are a part of our lives. Taxes are legally imposed and collected in a variety of ways by our local, state, and federal governments. Since we all have to pay taxes, having a better understanding about them makes sense.

We expect our government to provide us with certain services like law enforcement, courts, infrastructure, military protection, food safety, a clean environment, and a host of other services. These services are paid for by taxes. Where you live, how much you spend, and how much you earn affect how much you pay in taxes. There several types of taxes that we pay. This chapter will explain income taxes, FICA, sales taxes and property taxes.

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11.2: INCOME TAXES

THE HISTORY OF INCOME TAX LAW: The original founders of the U.S. Constitution authorized the newly formed federal government to collect taxes. Article I, Section 8, Clause 1 of the U.S. Constitution states:

The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States.

Article I, Section 9, Clause 4 of the U.S. Constitution states:

No Capitation, or other direct, Tax shall be laid, unless in proportion to the Census or Enumeration herein before directed to be taken.

However, this authorization to collect taxes in the original Constitution has several restrictions. It required taxes to be uniform throughout the country. The Constitution also states no “Capitation, or other tax” meaning a poll tax or head count tax, could be imposed unless it proportional to the population of the state. Income taxes would not fall into this category. In 1913, the Sixteenth Amendment to the U.S. Constitution was ratified which authorizes the collection of taxes based on income by the federal government.

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

In 1919, NYS also imposed a state income tax. In addition to the state income tax, Manhattan and Yonkers eventually passed a city income tax. There are a few states, like Texas and Florida that do not have a state income tax.

GRADUATED TAX BRACKET SYSTEM: NYS and the Federal government both calculate the amount of income taxes paid by taxpayers using what is called a graduated tax bracket system. (This is sometimes referred to as a progressive tax system.) This means taxpayers pay a certain percentage of their income in taxes based on the amount of income they earn each year. Various income tax brackets are created based on income ranges. The rate or percentage the taxpayers pay in taxes is different for each income tax bracket. This is in contrast to a flat tax system which has all taxpayers pay the same percentage in taxes regardless of their income. Generally, this means that taxpayers with higher taxable incomes pay their taxes at a higher percentage rate, and taxpayers with lower taxable incomes pay their taxes at a lower percentage rate. Below are the 2018 federal income tax brackets and rates associated with each.

Federal Income Tax Brackets and Rates for 2018*

Rate	For Unmarried Individuals, Taxable Income Over	For Married Individuals Filing Joint Returns, Taxable Income Over	For Heads of Households, Taxable Income Over
10%	$0	$0	$0
12%	$9,525	$19,050	$13,600
22%	$38,700	$77,400	$51,800
24%	$82,500	$165,000	$82,500
32%	$157,500	$315,000	$157,500
35%	$200,000	$400,000	$200,000
37%	$500,000	$600,000	$500,000

***Source Tax Foundation 2018 Tax Brackets by Amir El-Sibaie, January 2, 2018 (https://taxfoundation.org/2018-tax-brackets/)**

A review of the above chart demonstrates how the graduated tax bracket system works. There are seven tax brackets starting with incomes up to $9,525 for a single filer, up to $500,000 for a single filer. The tax rates or percentages start at 10% for the lowest tax bracket up to 37% for the highest tax bracket.

Graduated income tax brackets are deemed to be fairer than a flat tax system because lower income individuals and families typically need more of their income to sustain them. As income increases, less of that income is used for the basic necessities like food, clothing, and housing. Increased income also increases what is referred to as disposable income.

The Merriam-Webster dictionary defines disposable income as, “Income that is left after paying taxes and for things that are essential, such as food and housing.” (Merriam-Webster.com. 2018. https://www.merriam-webster.com (20 July 2018) The current tax code is designed to have those with more disposable income carry the higher burden of income taxes because they can afford to do so. Almost half of the tax payers pay no federal income tax, but they still do pay a significant amount in taxes nevertheless. An article published on April 18, 2018 by Market Watch titled “*46% of Americans pay no federal income tax-here’s why*” by Quentin Fottrell confirms the data pointing out that, “All but the top 20% of American families pay more in payroll taxes than in federal income taxes, according to Treasury Department data, cited by the Pew Research Center.”

(https://www.marketwatch.com/story/81-million-americans-wont-pay-any-federal-income-taxes-this-year-heres-why-2018-04-16)

INCOME TAX PAYMENT PROCESS: The general income tax payment process for a typical taxpayer that is an employee receiving a paycheck from their employer is as follows:

- Upon hire, employee fills out a W-4.
- Employee works for the employer and receives compensation in the form of a paycheck.
- Employer makes withholdings from the taxpayer’s paycheck for taxes and FICA based on the W-4 and sends those withholdings to the state and federal income tax agencies.
- After the end of the year, employer sends the taxpayer and the state and federal income tax agencies, the employee’s W-2.

- The employee determines their gross income from the W-2 form to fill out their state and federal income tax returns.
- The employee determines their filing status to fill out their state and federal income tax returns.
- The employee determines their withholdings using their W-2 and uses that information to fill out their state and federal tax returns.
- The employee determines their deductions and tax credits to calculate their taxable income and income tax liability.
- The employee signs and files their state and federal tax returns with the respective income tax agencies.

FILING STATUS: A review of the tax brackets chart above indicates three different tax filing statuses; unmarried individuals, married individuals filing joint returns, and heads of households. Not mentioned above is married filing separately. Filing status affects tax rates. Married couples have a choice on how to file, which is usually by their respective incomes. Below is a brief summary of 4 of the most common filing statuses.

1. An unmarried individual is a taxpayer who is single.
2. Married filing joint is for married taxpayers who are filing their taxes together.
3. Married filing separately is for married taxpayers who choose to file separate income tax returns.
4. Head of Household is for individuals who:
    1. file separately;
    2. are unmarried, or are considered to be unmarried by living apart from their spouse for at last six months of the tax year;
    3. provided more than 50% of household support for the main home in which the taxpayer lived during the tax year;
    4. supported at least one qualifying dependent child during the tax year.

STANDARD DEDUCTION, ITEMIZED DEDUCTIONS, TAX CREDITS, & TAXABLE INCOME: The amount one pays in income taxes is not totally based on a taxpayer's income alone. The standard deduction or itemized deductions play an important role in the income tax system. They are used to determine what a taxpayer's taxable income will be. That, in turn, determines what tax bracket a taxpayer will be in and that in turn determines what tax rate the taxpayer will pay. (Before the new Tax Cuts and Jobs Act of 2017 law was passed, there were also personal and dependent exemptions allowed. Those were eliminated in 2018.) Deductions are allowed under the tax code for certain expenses that taxpayers incur in that tax year.

The tax code is often used to encourage certain behaviors like buying a home or purchasing an electric automobile. To incentivize taxpayers to do certain things, deductions and tax credits are made available which lower the taxable income of taxpayers and thereby lower their income taxes.

Taxpayers have a choice of using the standard deduction which is the same for all taxpayers based on their filing status or itemizing their deductions. Whether a taxpayer itemizes or uses the standard deduction is a calculation the taxpayer has to make to determine which is more advantageous for them. Higher income earners tend to find that itemizing their deductions is more advantageous that using the standard deduction while the opposite tends to be turn for lower tax earners.

The 2018 standard deduction for taxpayers is as follows:

- Single or married filing separately: $12,000
- Married filing jointly: $24,000
- Head of household: $18,000

Deductions are different than tax credits. Deductions are used to determine what the taxable income. For example, if a single taxpayer earns $50,000 and takes the standard deduction of $12,000, that taxpayer's taxable income is $38,000. The tax rate for $38,000 is 12% versus the tax rate for $50,000 which is 22%. The very basic math calculation is the taxpayer will owe $4,560 in federal income taxes. Now, if a taxpayer also has a tax credit, that credit will be applied to the actual tax amount owned. Taking our above example, if this taxpayer also has a dependent child that the taxpayer cares for and supports, there is a $2,000 tax credit allowed. The taxpayer will now pay $2,560 in federal taxes after taking the tax credit.

Some of the deductions available are for mortgage interest, student loan interest, and medical insurance. Some of the tax credits available are for dependent children, college education, earned income credit, (for low income earners with dependent children) and child care.

W-4 FORM: The W-4 form is used by an employer to determine how much they will withhold from an employee's paycheck. Withholding refers to the amount of money an employer holds as prepayment of income taxes and FICA contributions from an

employee's paycheck and sends to the New York State Department of Taxation and Finance and the Internal Revenue Service on behalf of the employee. To make this determination, all employees fill out a W-4 form with their employers. The information the employee provides on the form provides the employer with the correct information to determine how much the employer should withhold from the employees paycheck for income tax purposes.

The W-4 form gives an employee the opportunity to choose how the number of allowances they want to claim. Allowances are the anticipated deductions and/or credits the employee anticipates they will claim on when they file their federal and state income tax forms. The more allowances a taxpayer claims, the less the employer will withhold for taxes from the employees paycheck. This can result in more or less money in the taxpayer's paycheck, but it can also determine how much of a refund or taxes the taxpayer may own when they file.



Form **W-4** Department of the Treasury Internal Revenue Service

Employee's Withholding Allowance Certificate

► Whether you're entitled to claim a certain number of allowances or exemption from withholding is subject to review by the IRS. Your employer may be required to send a copy of this form to the IRS.

OMB No. 1545-0074

2018

1 Your first name and middle initial | Last name | 2 Your social security number

Home address (number and street or rural route) | 3 ☐ Single ☐ Married ☐ Married, but withhold at higher Single rate. Note: If married filing separately, check "Married, but withhold at higher Single rate."

City or town, state, and ZIP code | 4 If your last name differs from that shown on your social security card, check here. You must call 800-772-1213 for a replacement card. ►☐

5 Total number of allowances you're claiming (from the applicable worksheet on the following pages) . . . | 5

6 Additional amount, if any, you want withheld from each paycheck | 6 $

7 I claim exemption from withholding for 2018, and I certify that I meet both of the following conditions for exemption.

- Last year I had a right to a refund of all federal income tax withheld because I had no tax liability, and
- This year I expect a refund of all federal income tax withheld because I expect to have no tax liability.

If you meet both conditions, write "Exempt" here . . . . . ► | 7

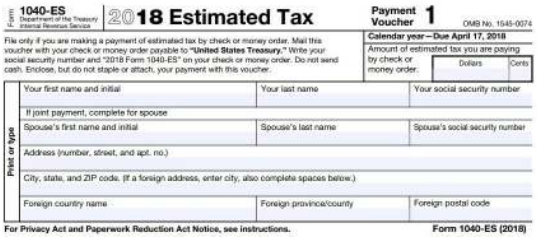
Under penalties of perjury, I declare that I have examined this certificate and, to the best of my knowledge and belief, it is true, correct, and complete.

Employee's signature (This form is not valid unless you sign it.) ► Date ►

8 Employer's name and address (Employer: Complete boxes 8 and 10 if sending to IRS and complete boxes 8, 9, and 10 if sending to State Directory of New Hires.) | 9 First date of employment | 10 Employer identification number (EIN)

For Privacy Act and Paperwork Reduction Act Notice, see page 4. | Cat. No. 10220Q | Form W-4 (2018)

1040-ES FORM: Taxpayers who are self-employed don't necessarily receive a paycheck with an employer withholding funds for prepayment of income taxes and FICA. Therefore, self-employed taxpayers make what are called estimated tax payments using form 1040-ES. The estimated payments are just that, an estimate of how much the self-employed taxpayer will owe in income taxes and FICA contributions based on the income of the taxpayer. The estimated tax payments are paid quarterly during the year starting in April, then again in June, September, and January of the following year. If estimated payments are more than the required tax liability, there is a refund of the difference. If the estimated payments are less than the tax liability, the taxpayer owes a balance due. If the estimates by the taxpayer are too low, the taxpayer can also be fined.



Form **1040-ES** Department of the Treasury Internal Revenue Service

2018 Estimated Tax

Payment Voucher 1

OMB No. 1545-0074

File only if you are making a payment of estimated tax by check or money order. Mail this voucher with your check or money order payable to "**United States Treasury.**" Write your social security number and "2018 Form 1040-ES" on your check or money order. Do not send cash. Enclose, but do not staple or attach, your payment with this voucher.

Calendar year—Due April 17, 2018

Amount of estimated tax you are paying by check or money order: Dollars | Cents

Print or type

Your first name and initial | Your last name | Your social security number

If joint payment, complete for spouse

Spouse's first name and initial | Spouse's last name | Spouse's social security number

Address (number, street, and apt. no.)

City, state, and ZIP code. (If a foreign address, enter city, also complete spaces below.)

Foreign country name | Foreign province/county | Foreign postal code

For Privacy Act and Paperwork Reduction Act Notice, see instructions. | Form 1040-ES (2018)

W-2 FORM: The W-2 form is formally called the Wage and Tax Statement form. It is the official record of how much a taxpayer earned from a particular employer in that tax year. It provides the taxpayer and the state and federal income tax agencies, along with the Social Security Administration, with the amount of gross income earned by the employee, the withholdings for state and federal taxes, as well as FICA. It also provides information regarding withholdings for health care benefits paid for and provided to the employee by the employer. It shows the amount of contributions made by and employee for retirement. The W-2 must be sent to the employee by the employer by the end of January following the tax year. Employees must use their W-2(s) to file their state and federal tax returns.



Form **W-2** Wage and Tax Statement 2017

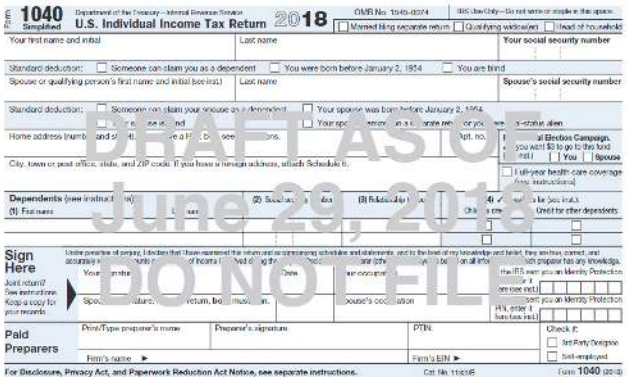
Copy B—To Be Filed With Employee's FEDERAL Tax Return.

This information is being furnished to the Internal Revenue Service.

FEDERAL INSURANCE CONRIBUTIONS ACT (FICA): While already discussed in Chapter 9 in regards to determining income for the purposes of spousal and child support obligations, FICA is worth discussing here again. FICA is the acronym for the Federal Insurance Contributions Act. This is the law passed in 1935 that created Social Security. FICA is a contribution, (not technically a tax) that all employees and employers pay for Social Security and Medicare benefits. It is withheld from an employee's paycheck and paid to the federal government. Employers also match these payments. If a person is self-employed, they pay both the employee and employer amount. The percentage of an employee's income that is used to determine FICA is 6.2% for Social Security plus 1.45% for Medicare. There is a cap on income at which point the 6.2% for Social Security is no longer deducted from an employee's paycheck. That amount in 2018 is $128,700 and can change each year pursuant the tax code.

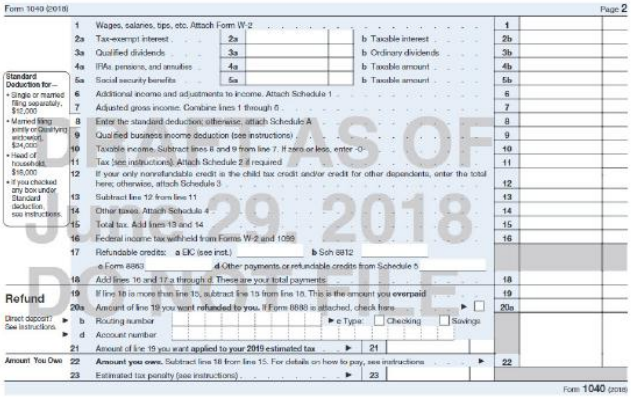
As mentioned earlier in this chapter, approximately 46% of taxpayers do not pay federal income taxes. However, all taxpayers pay FICA. While FICA is technically not called a tax, it is a significant withholding from all taxpayers incomes. It is based on the taxpayer's gross income, not taxable income.

INCOME TAX FORMS: While in the past there where three federal personal income tax return forms that taxpayer's could choose from, the 1040EZ, 1040A, and 1040, under the Tax Cuts and Jobs Act of 2017, there is only one federal personal income tax return form that all taxpayers will use, the 1040.



Form **1040** Simplified U.S. Individual Income Tax Return 2018

DRAFT AS OF June 29, 2018 DO NOT FILE



Form 1040 (2018) Page 2

DRAFT AS OF JUNE 29 2018 DO NOT FILE

The basic NYS personal income tax form is the IT-201-Resident Income Tax Return. Below is page one of four pages of the 2017 version of this return.

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11.3: OTHER TAXES

While the main focus of this chapter is on income taxes, the tax burden of citizens goes well beyond just income taxes. NYS typically ranks as one of, if not the highest tax burden state in the country. In 2012, NYS was ranked first in terms of the highest overall tax burden for its residents. (Source: Tax Foundation 2018, https://taxfoundation.org/state/new-york/, July 22, 2018.) According to that study, NYS residents pay 12.7% of their income in state and local taxes. This would be in addition to their federal tax liability.

So, what are some of these other taxes? NYS has sales taxes, property taxes, hotel occupancy taxes, cellphone surcharges, taxes on utility use, taxes on automobile insurance policies, and even criminal conviction and traffic violations surcharges just to name a few. Some taxes go by other names like fees or surcharges, but regardless of what you call them, they all have the same affect, less money in a taxpayer's pocket.

SALES TAXES: According to the NYS Department of Taxation and Finance, Sales and use tax (sales tax) is applied to:

- tangible personal property (unless specifically exempt);
- gas, electricity, refrigeration and steam, and telephone service;
- selected services;
- food and beverages sold by restaurants, taverns, and caterers;
- hotel occupancy; and
- certain admission charges and dues.

The overall sales tax rate in NYS varies depending on where you make your purchase within the state. The NYS rate itself is 4%. Each county or city in the state then adds its own sales tax. There is also a transit tax that some counties add to their sales tax. As of 2018, the NYS sales tax rate is between 7% and 8.875% across the state.

HOTEL OCCUPANCY TAX: Besides sales tax charges for a hotel room, many local municipalities charge an occupancy tax. For example, the hotel occupancy tax in NYC over and above the 4% sales tax charged by NYS is 10.375% plus an additional $3.50 per room per night fee. (Source: YourMileageMayVary.net article "*Understanding Hotel Taxes, Resort Fees & Deposits For Incidentals*" by Sharon Kurheg, January 2, 2018.

(https://yourmileagemayvary.net/2018/01/02/understanding-hotel-prices-hotel-taxes-resort-fees-deposits-for-incidentals/ July 22, 2018.)

CELLPHONE TAX: According to the New York Post article "*New Yorkers pay the third-highest cellphone taxes in the country*" by Kirstan Conley, October 14, 2016, cellphone taxes in NYS when combined with the federal surcharge of 6.64% total 24.68%. (https://nypost.com/2016/10/14/new-yorkers-pay-the-third-highest-cell-phone-taxes-in-the-country/ July 22, 2018)

CRIMINAL CONVICTIONS AND TRAFFIC VIOLATION SURCHARGES: Surcharges are extra fees or taxes imposed over and above the fine. Penal Law § 60.35 requires, (except for convictions covered by Vehicle and Traffic Law § 1809 and Parks, Recreation and Historic Preservation Law § 27.12) in addition to any sentence required or permitted by law the following surcharges:

- $300.00 for a felony conviction;
- $175.00 for a misdemeanor conviction;
- $95.00 for a conviction of a violation.

Additionally, Section 60.35 also requires a crime victim assistance fee of $25.00 on a person convicted of a felony, misdemeanor, or violation. Traffic violation surcharges range from $30 to $520 depending on the traffic violation conviction. Surcharges are not the only fees that are imposed by traffic courts and the DMV. For example, there is a driver responsibility assessment fee that is imposed on drivers:

- convicted of an alcohol or drugged driving-related traffic offense while driving a motor vehicle, boat, or snowmobile in NYS;
- refuse to take a chemical test for blood alcohol content in NYS;
- received six or more points on their NYS driver record within an 18-month period for convictions of traffic offenses committed in New York, Quebec, or Ontario.

The driver responsibility assessment fee is imposed whether the driver's license is issued by New York State, another jurisdiction, or if the driver does not have a driver license. The fee ranges from $300 to $750, and is payable in equal installments over a three-year period.

PROPERTY TAXES: School districts, municipalities, counties, and special districts use property taxes to raise the necessary revenue to fund their respective financial responsibilities. Property taxes are calculated by multiplying a property's taxable assessment (the assessment minus any exemptions) by the tax rates for school districts, municipalities, counties, and special districts. Tax owed = taxable assessment x tax rate.

Tax rates are calculated by the local jurisdictions. The steps involved in determining tax rates are as follows:

- Taxing jurisdiction (school district, municipality, county, special district) develops and adopts a budget.
- Taxing jurisdiction determines revenue from all sources other than the property tax (state aid, sales tax revenue, user fees, etc.).
- Revenues are subtracted from the budget and the remainder becomes the tax levy. The tax levy is the amount of the tax levy that is raised through the property tax.

Tax levy = budget – revenues.

- To determine the tax rate, the taxing jurisdiction divides the tax levy by the total taxable assessed value of all property in the jurisdiction.
- Because tax rates are generally expressed as "per $1,000 of taxable assessed value," the product is multiplied by 1,000.

Tax rate per thousand (tax levy ÷ total of all taxable assessments in jurisdiction) x 1,000

Example

Town A's tax levy = $2,000,000

Town's total taxable assessed value = $40,000,000

Tax rate = $50 per $1,000 of taxable assessed value

Tax bill for property with a taxable assessment of $150,000 = $7,500

(Source: NYS Department of Taxation and Finance, "*How property taxes are calculated*" https://www.tax.ny.gov/pit/property/learn/proptaxcalc.htm July 22, 2018)

The following is from the NYS's *An Electronic Town Hall* website, Cap NY Property Taxes-A Citizens Guide (https://reforminggovernment.ny.gov/reforminggovernment/propertytaxmap/ July 22, 2018)

How High is Your Community's Property Taxes?

New York property taxes are out of control. The median U.S. property tax paid is $1,917 and in New York it is $3,755—96 percent higher than the national median. Moreover, New York has the highest local taxes in America as a percentage of personal income—79 percent above the national average.

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11.4: References

Berger, R. (2018, March 07). The New 2018 Federal Income Tax Brackets & Rates. Retrieved July 27, 2018, from https://www.forbes.com/sites/robertberger/2017/12/17/the-new-2018-federal-income-tax-brackets-rates/#bdbfe0f292a3

Department of Taxation and Finance. (n.d.). Retrieved July 27, 2018, from https://www.tax.ny.gov/pit/default.htm

El-Sibaie, A. (2018, July 25). 2018 Tax Brackets | Center for Federal Tax Policy. Retrieved July 27, 2018, from https://taxfoundation.org/2018-tax-brackets/

Forms & Instructions. (n.d.). Retrieved July 27, 2018, from https://www.irs.gov/forms-instructions

Pogue, D. L., Clifford, E., & Schwartz, A. L. (2009). Understanding New York Law, 2013-14. Upstate Legal Publishers

Steps to Take Now to Get a Jump on Next Year's Taxes. (n.d.). Retrieved July 27, 2018, from https://www.irs.gov/individuals/steps-to-take-now-to-get-a-jump-on-next-years-taxes

Steps to Take Now to Get a Jump on Next Year's Taxes. (2018, May 22). Retrieved July 27, 2018, from https://www.irs.gov/individuals/steps-to-take-now-to-get-a-jump-on-next-years-taxes

Tax Reform. (n.d.). Retrieved July 27, 2018, from https://www.irs.gov/tax-reform

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CHAPTER OVERVIEW

12: REAL ESTATE TRANSFERS

12.1: REAL ESTATE TRANSFERS
12.2: Appendix A- Instrument Survey Map
12.3: References

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12.1: REAL ESTATE TRANSFERS

INTRODUCTION

For most people, the purchase of their home is the largest investment they will make in their lifetime. This chapter will discuss, in general terms, the usual steps in purchasing a home. The process of purchasing residential real estate can be very local in nature. How attorneys, real estate agents, title companies, and lenders work together can vary across the state and from city to city. However, while the process may be slightly different in NYC versus Buffalo, the legal concerns and requirements are the same.

DEFINITIONS AND TERMS:

It is helpful to understand the language and terminology used in real estate transfers. The following are common terms and language, in alphabetical order, used in real estate transfers.

Abstract of Title

The Abstract of Title is a summary of all the previous and current owners of a property. It may go back as far as the original owner to the present owner. It is a history of the development and subdivision of your property from the deeds, mortgages, and other documents filed in the County Clerk's Office where the property is located. An up-to-date abstract is almost always provided by a seller to a buyer at the seller's expense. Abstracts are updated by abstract companies that certify the accuracy of the information contained in the abstract. A buyer will use the abstract to help them determine whether the seller has good and clean title to their property. Most attorneys and lenders require abstracts to go back between forty to fifty years of a property's title history.

Condominium

A condominium or condo is a building, or group of buildings, where units are individually owned rather than by a landlord. The individual owners of the units will share certain parts of the property and expenses of maintenance. These individual owners will pay a fee to an association that all owners participate in to manage and pay for agreed upon maintenance and management of the condominiums. Condos often resemble an apartment building.

Contingency

Most purchase offers will have contingencies associated with the contract. For example, a buyer may have a contingency that they will purchase the property, but only if they can borrow the necessary funds for a certain interest rate. A seller may have a contingency that the closing date for their sale aligns with the purchase of the new home they are purchasing.

Counter-Offer

When a seller receives a purchase offer, they may want to accept the offer but under different terms like a higher purchase price. They will then make a counter-offer to the buyer. This process of counter-offers may go back and forth between a buyer and seller several times before a final agreement is reached.

Deed

A deed is the legal document that transfers legal title of real estate from one person or entity to another.

Deposit

When a buyer and seller agree to a purchase offer, the seller will usually require the buyer to place a deposit with the real estate broker listing the property to show good faith in the purchase. The deposit is usually non-refundable if the buyer breaches the purchase offer contract. This deposit will be used toward the down payment on the property.

Down Payment

A down payment is the amount of funds the buyer is paying in conjunction with his/her loan. The amount of down payment a buyer must make is determined by the lender, which is usually determined by the credit of the buyer. Better credit usually means a lower down payment.

Easements

An easement gives a property right to someone who does not own the property. Examples are with utility companies and their right to enter a property they do not own to repair and maintain the utility services. Another example is when a property is landlocked, so the owners cannot reach the street or sidewalks without crossing another property. An easement would give them the right to do so.

Escrow

Typically, a lender will require a buyer/mortgagor to set up an escrow through the lender. The escrow will have funds paid by a mortgagor in advance and placed in the escrow account to pay the real estate taxes and homeowner's property insurance associated with the property.

Fixtures

Fixtures are personal property items that are attached to a property. Fixtures can become part of the real estate. For example, a chandelier attached to the ceiling of a home is a fixture and upon sale and purchase is expected to remain with the property. However, a room air conditioner that is placed in and out of a window is not a fixture.

Foreclosure

A foreclosure is a legal action by the mortgagee to take legal possession and title of real estate owned by a mortgagor when the mortgagor breaches the note and mortgage.

House Inspection

A buyer often will hire a third party to inspect the property as a contingency of the purchase. The property inspector will look for defects or damage to property. Radon, mold, pests, water damage, and leaking roofs are often things that inspectors will look and test for.

Homeowner's Property Insurance

Homeowner's property insurance is a type of insurance that the owner of real estate purchases to protect them in the event the property is damaged by fire or other unforeseen events. It often protects them from theft of their personal property and from lawsuits from third parties against them based on their property ownership. Lenders almost always will require mortgagors to purchase property insurance and have the lender listed on the insurance, so the lender's collateral is protected. This is an expense of the buyer/owner of the property and has nothing to do with title insurance.

Instrument Survey

An instrument survey is a map drafted by a licensed surveyor showing lot lines, sewer easements, fences, and the location of any structures such as houses, garages, sheds, and swimming pools located on a particular piece of property. A survey is almost always provided by a seller to a buyer at the seller's expense. It is used by a buyer to help determine if the seller has good and clean title of their property.

Listing a Home

A real estate broker "lists" your house when you put your house up for sale and you sign a written sales agreement with that broker agreeing to have them represent you in said sale.

Mortgagee

A mortgagee is the lender that loans the money to a mortgagor.

Mortgagor

A mortgagor is the buyer who borrows the money and signs a mortgage with a lender.

Multiple Family

A multiple family is a home built for two or more people or families to live in. A two-family home is often called a double.

Multiple Listing Service or MLS

The MLS is an internet tool of the National Association of REALTORS® that assists listing brokers find cooperative brokers working with buyers to help sell their clients' homes.

Note and Mortgage

Typically, because of the amount of money required to purchase real estate, a buyer will borrow the necessary funds to do so from a lender. The lender can be a bank, credit union, or individual who lends the money to a buyer. The note sets out the terms of the contract between the lender and the buyer. It will state how much interest the buyer will pay for the loan, along with the timeframe and method of repayment. The mortgage is the contract between the lender and the buyer that uses the real estate as collateral for the loan. It sets out the responsibilities of the buyer regarding insurance coverage, paying of taxes, and of the note. It also sets out what will happen if the buyer breaches the terms of the note and mortgage, which will lead to foreclosure.

Real Estate

Real estate is land that includes any buildings or structures on said land. It is often called real property.

Real Estate Commission

Almost all real estate brokers and agents work on commission. The commission for the sale and purchase of real residential real estate is most typically paid by the seller. The typical commission for residential real estate is in the range of four to six percent of the sale price. The commission is paid to the listing broker, who then shares the commission with the other brokers and agents involved in the transaction.

REALTOR®, Broker, Agent, Salesperson

A real estate agent is anyone who earns a real estate license. There is a test that real estate agents must pass to get licensed. A real estate agent helps clients rent, buy, or sell real estate. A real estate agent is an independent contractor who must work under the umbrella of a real estate broker. A real estate broker is an agent who has a higher license than an agent by passing an additional test. Brokers can work alone or hire agents to work for them. Real estate brokers can start their own companies or own a franchise with a real estate company like Century 21 or Coldwell Banker. There are a number of different local and national real estate companies. A REALTOR® is a real estate broker or agent who is a member of the National Association of REALTORS®. A real estate salesperson is another name for a real estate agent.

Purchase Offer

All contracts for the sale and purchase of real estate must be in writing. A purchase offer is a written contract between a buyer and seller for the purchase of real estate. Putting real estate up for sale is not an offer. It is an invitation to accept offers for purchase. A seller is not under any obligation to accept an offer for purchase. The buyer is the one making the offer that a seller must accept for a valid real estate purchase offer.

Purchaser

A purchaser and buyer are one in the same.

Property Description

A deed will set out the property description. It is a written version of the lot lines of the property. The property description in a deed and what an instrument survey shows as lot lines should match exactly.

Property Lots

Real estate is divided into various lots that people or entities own. Lot lines are also referred to as property lines.

Title

If you have title to real estate, it means you own it. When a buyer purchases property, their attorney should make sure they are receiving good and clean title. There should be no unknown problems with the title. These title problems are sometimes referred to as a cloud on title. An example of a cloud on title would be an unresolved foreclosure action or a judgment filed against an owner of real property.

Title Insurance

Title insurance is purchased by a buyer to protect them against future title problems that are missed at a closing. A title company is guaranteeing the title to your land is good and clean and will reimburse you if there is a future title problem. Title insurance is typically an expense of a buyer. Lenders almost always require a buyer to purchase title insurance in an amount to cover the note and mortgage. This protects the lender's collateral and interest in the property. Buyers can also purchase their own title insurance. This is not the same as property insurance.

Real Estate Attorneys

Most sellers, buyers, and lenders in NYS real estate transfers have their own attorneys representing them. The buyer and seller are typically responsible for the cost of their own attorneys. The buyer typically pays for the cost of the lender's attorney. In most instances, the buyer's and seller's attorneys will review and approve the purchase offer between the parties.

The seller's attorney is responsible for providing to the buyer's attorney all the legal documents that show the seller has good and clean title. The buyer's attorney is responsible for reviewing these documents. If the buyer finds problems with the title, the buyer's attorney will notify the seller's attorney, who is then responsible for trying to resolve the title issues. The lender's attorney is responsible for providing the legal documents required by the lender to protect their interest, like the note and mortgage. They will also be concerned with the title of the property and review all the title documents provided by the seller's attorney to determine whether they are satisfied that the title is good and clean.

Real Estate Closing

A real estate closing is the final step in a real estate transaction. This is where signed deeds, notes, mortgages, and other legal documents, along with the funds for purchase are exchanged between the parties.

Real Estate Taxes

Real estate taxes are a type of tax used to fund schools and essential services provided by your local governments.

Recording Fees

Most legal documents in a real estate transfer are recorded in the local county clerk's office. The county clerks charge various fees for recording these documents. Some recording fees are paid by the seller, and some by the buyer, as determined by the purchase offer contract.

Restrictive Covenants

Properties sometimes have restrictive covenants placed on them that do not allow current and future owners from doing certain things with the property. Restrictive covenants are enforceable as long as they do not violate the law.

General Obligations Law (GOB) § 5-331 states, "Any promise, covenant or restriction in a contract, mortgage, lease, deed or conveyance or in any other agreement affecting real property, heretofore or hereafter made or entered into, which limits, restrains, prohibits or otherwise provides against the sale, grant, gift, transfer, assignment, conveyance, ownership, lease, rental, use or occupancy of real property to or by any person because of race, creed, color, national origin, or ancestry, is hereby declared to be void as against public policy, wholly unenforceable, and shall not constitute a defense in any action, suit or proceeding."

However, a restrictive covenant that would prohibit a property from having a clothes line outside or from being painted a certain color would be enforceable.

Single Family

A single family is a home built for one person or family to live in.

Townhouse

Townhouses are very much like condominiums, except they are individual houses attached to each other.

Zoning

Zoning is the government's way of controlling how a property can be used by the owner. The government has an interest in making certain neighborhoods residential while having other parts of its territory zoned for commercial and industrial use.

MUST I USE A REAL ESTATE AGENT TO SELL OR PURCHASE A HOME?

There is no requirement to use a real estate agent in the sale or purchase of real estate. Many sellers will put their real estate on the market for sale without the help of a real estate broker or agent. However, most people do use the services of real estate brokers and agents.

THE TYPICAL STEPS IN SELLING A HOME USING A REAL ESTATE BROKER

- Sign a written contract with your broker to list the property on the MLS for an agreed upon price.
- Place a sign on the property indicating it is for sale with the broker's contact information.
- Hold open houses so potential buyers can walk through and see the property.
- Hire an attorney to represent you and prepare the closing documents.
- Review, counter, and accept a purchase offer.
- Through their attorney, provide all the title documents like an updated abstract and instrument survey to the buyer's attorney, along with a proposed deed.
- Make arrangements with their current lender, if there is one, to pay off their loan and get a mortgage release on the property.
- Make arrangements to move out of the property pursuant to the date set in the purchase contract. Sometimes, sellers remain in the home after the closing and pay rent to the buyer until they can move out.
- Sign all the legal documents including the deed to the property.

THE TYPICAL STEPS IN BUYING A HOME WITH A REAL ESTATE BROKER

- Work with a broker who will represent you in the purchase of your home.
- Decide what type home, where you wish to live in, and how much you want to spend in purchasing your home.
- Get pre-qualified for a mortgage.
- Review prospective homes on the internet and in person with your broker.
- Make a purchase offer with the help of your real estate broker.
- Hire an attorney to represent you in the purchase and review all the title and closing documents.
- Hire an inspector to inspect the property.
- After the purchase offer is signed and approved by your attorney, work with your lender to obtain your mortgage.
- Purchase homeowners insurance.
- Make arrangements to move into the property pursuant to the purchase offer.
- Attend the closing and sign all legal and closing documents.

TYPICAL SELLER'S CLOSING COSTS

- Updating the Abstract of Title
- Broker's commission
- Instrument Survey
- Transfer Taxes
- Seller's mortgage payoff
- Attorney Fees

TYPICAL BUYER'S CLOSING COSTS

- Bank Fees
- Down Payment
- Personal Attorney Fees
- Lender's Attorney Fees
- Escrow
- Mortgage Tax
- Recording Fees

QUALIFYING FOR MORTGAGE

As with all loans, lenders for the purchase of real estate are looking for borrowers that they believe are good risks. Most lenders look for the following in making this determination:

- The borrower's credit history
- The borrower's income
- The borrower's length of employment
- The value of the property

CLOSING DOCUMENTS FILED WITH AT THE COUNTY CLERKS OFFICE

Real estate transfer documents are part of the public record. All real estate transfer documents can be found at the county clerk's office where the property is located. Deeds, mortgages, and other documents are recorded so the public has notice as to ownership and liens that are placed on real estate.

Deeds, mortgages, and other documents relating to real property are recorded (filed) in the county clerk's office in the county where the real estate is located. This is done so potential buyers can research the tile and make sure the seller really owns the property and that all mortgages have been paid off or otherwise provided for prior to closing. Attorneys and title companies generally assist you with this task. This is why an abstract of title is prepared.

DIFFERENT WAYS TO RECEIVE TITLE ON A DEED

Sole Ownership: If a buyer is taking sole ownership of a property, all they need is the signature on a deed from the seller(s). If they die while in ownership of the property, it will become part of their estate and be passed on pursuant to their will or by law if they have no will.

Tenants by the Entirety: Spouses can take title as tenants by the entirety. This means that if one of the spouses dies while they are in ownership of the property, the living spouse has the right of survivorship. The deceased spouse's property rights in said property automatically pass to the surviving spouse regardless of what the deceased spouse's will dictates. If, during their lifetimes, both spouses wish to sell the property, both of them must sign the deed to convey title to a third party. This is because each spouse owns 100% of the property. NY EPTL § 6-2.2(b) provides that, "a disposition of real property to a husband and wife creates in them a tenancy by the entirety, unless expressly declared to be a joint tenancy or a tenancy in common". This means that if spouses purchase property while they are married, they automatically do so as tenants by the entirety, even if the deed does not state so.

Joint Tenants with Right of Survivorship: This form of title is exactly the same as tenants by the entirety except the two owners are not married. Both owners have equal rights and ownership of the property while alive. Upon the death of one of the joint tenants, all the property rights and title of the property will vest in the surviving joint tenant. If, during their lifetimes, both owners wish to sell the property, both of them must sign the deed to convey title to a third party. This is because each owner owns 100% of the property.

Tenants in Common: When two or more owners take ownership of a property, they can do so as tenants in common and set forth in the deed. The ownership of the property is divided by percentages as agreed upon by the owners. There is no right of survivorship. Upon an owner's death, that owner's share in the property will pass on as dictated by the owner's estate, with or without a will. Each owner can sell their share of the property without the permission or signing of a deed by other owner(s). If the deed is silent as to form of ownership and just lists the names of the owners, then it is presumed that the parties own the property as tenants in common.

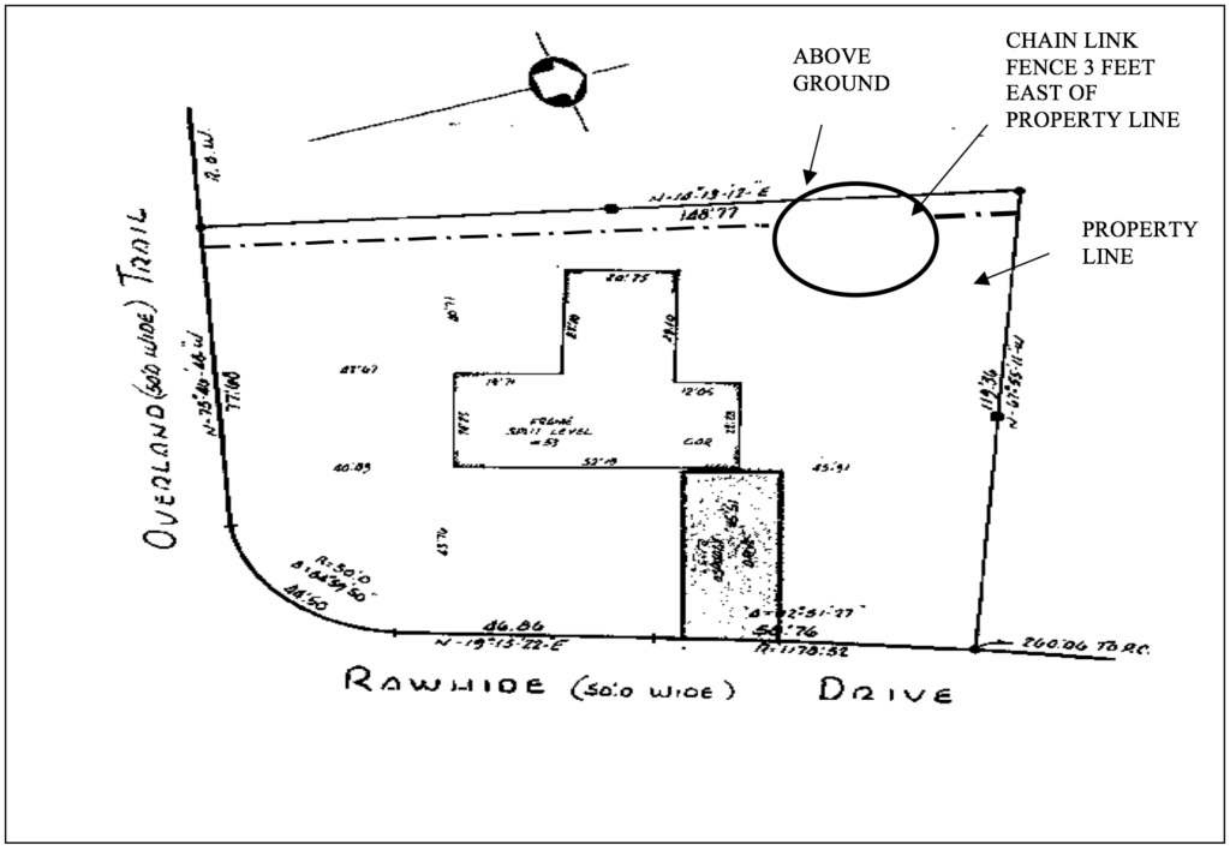
Life Estate: A person can transfer property to another while retaining right of possession of the said property while they are still alive. This is called a life estate. Life estates are common between family members where elderly parents wish to convey their real property to their children while still retaining the right to live in the home until they die.

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Pogue, D. L., Clifford, E., & Schwartz, A. L. (2009). Understanding New York Law, 2013-14. Upstate Legal Publishers

Real Estate Topics. (n.d.). Retrieved July 27, 2018, from https://www.nar.realtor/topics

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CHAPTER OVERVIEW

13: RESIDENTIAL LEASE TRANSACTIONS

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13.1: RESIDENTIAL LEASE TRANSACTIONS

INTRODUCTION

This chapter will explain the basics in residential lease transactions. It should be noted that this chapter will discuss the law as it pertains generally across the New York State. The law regarding rent control, rent stabilization, and boarding house leases will not be discussed in much detail.

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13.2: RESIDENTIAL LEASES

Leases are contracts between landlords and tenants, (also referred to as lessors and lessees) which can be in writing or verbal, allowing the tenant to take possession of the landlord's property for a specific term and for a specified rent. All leases can be in writing, but do not have to be. However, all leases that are for a term of one year or more must be in writing. An oral lease for more than one year cannot be legally enforced. (General Obligations Law § 5-701) Leases that are that not in writing are called month-to-month leases.

Written leases that are for a term of one year or more can become month-to-month leases. For example, take a tenant who has a written lease for a term of one year. After one year, the written lease now expires, but the landlord allows the tenant to remain in the rental unit without signing a lease renewal or new lease. All the terms of the written lease will remain intact except that the lease is now a month-to-month lease, meaning the term is one month. If the tenant wants to move out, or the landlord wants to raise the rent, the law regarding month-to-month leases applies.

The law regarding month-to-month leases allows tenants to terminate their lease with one month's notice. (30 days in NYC.) However, the one month's notice must be given before the first of the month of termination. For example, if a tenant wants to move out at the end of June, the one-month notice would have to be given to the landlord no later than May 31st. If the notice was given to the landlord on June 1st, the tenant would be responsible for both the June and July rent. The lease would not terminate until the end of July.

The law for landlords of month-to-month leases is very much the same. If a landlord wants to terminate the tenancy of a tenant, the same rules regarding one month's notice apply. The same one month's notice applies if the landlord wants to raise the rent.

Terminating a month-to-month lease is much easier as no cause needs to be established, only proof of proper notice. Not so if a tenant or landlord attempts to terminate a longer term lease before the end of the term. In those situations, cause must be alleged and proven.

Plain English: The law in New York requires that all leases must be in plain English. The language in residential leases must be clear, simple, and understandable. (General Obligations Law § 5-702; NY CPLR § 4544)

At a minimum, a lease should identify the premises to be leased, specify the names and addresses of the parties, the amount and due dates of the rent, the term or duration of the lease, conditions of occupancy, and the rights and obligations of both parties.

Rent: As long as an apartment is not subject to Rent Control or Rent Stabilization, a landlord can charge any amount of rent agreed upon by the parties. Rent is usually paid monthly and usually is due the first of the month. Some leases give a grace period that the rent can be paid before a late fee applies.

Rent Control: Rent control limits the rent a landlord may charge for an apartment. It also restricts the right of the landlord to evict tenants. Rent control is still in effect in New York City and parts of Albany, Erie, Nassau, Rensselaer, Schenectady, and Westchester counties.

Rent Stabilization: Rent stabilization generally covers buildings built after 1947 and before 1974, along with some buildings built with tax incentives. Rent stabilization limits the ability of landlords to raise rent. It also entitles tenants to have their leases renewed, and tenants may not be evicted except on legal grounds. You will find rent stabilization laws in NYC and in certain localities located in Nassau, Westchester, and Rockland counties.

Security Deposit: This is money paid by a tenant that is held in escrow by a landlord as collateral in the event the tenant damages the property they are leasing, or fails to pay all the rent that is due. The amount of a security deposit is whatever the parties agree to. Generally, it is an amount that equals between one and two months' rent. Non-refundable security deposits are unlawful.

Landlords of buildings with six or more apartments must put all security deposits in a New York bank accounts earning interest at the prevailing rate. Each tenant must be informed in writing of the bank's name and address and the amount of the deposit. Landlords are entitled to collect annual administrative expenses of one percent of the deposit. All other interest earned on the deposits belongs to the tenants. (General Obligations Law § 7-103)

New York State law requires that security deposits must be returned in a reasonable amount of time. There is no specific time frame set by statute. Generally speaking, courts have interpreted 30 days to be a reasonable amount of time.

A landlord can use a security deposit to make repairs caused by the tenant. A landlord can also use the security deposit for any rent or fees that are unpaid. If a landlord does keep any amount of a security deposit, they must inform the tenant in writing on why and how they calculated their expenditures.

While a landlord can deduct from the deposit actual cost of damages including labor costs, they cannot deduct for repairs that are considered normal wear and tear. However, if a tenant leaves the apartment unclean, the costs of cleaning can be deducted from the security deposit.

Renewal Clauses: Leases may contain automatic renewal clauses. However, to be enforceable, the landlord must give the tenant advance notice of the existence of this clause between 15 and 30 days before the tenant is required to notify the landlord of an intention not to renew the lease. (General Obligations Law § 5-905)

Senior Citizen Rights: Senior citizens have the right to terminate their leases with thirty days' notice to their landlord if they are at least 62-year- old, and accepted into: 1) an adult care facility; 2) a residential health care facility; 3) subsidized low income housing; 4) other senior housing; or 5) move into the residence of a relative or family member if certified by a physician as no longer able to live independently. (Real Property Law § 227-a)

Active Duty Military: Tenants that are on active duty with the military and transferred out of the area, may terminate their lease with a thirty-day notice corresponding to the rent due date. (NY Military Law § 310)

Victims of Domestic Violence: Tenants that are victims of domestic violence and are shielded by a court order of protection are permitted, with ten days' notice to their landlord, to seek a court order terminating their lease. If the lease is terminated by court order, the tenant will be released from any further rental payments. (Real Property Law § 227-c)

Sharing Occupancy: A landlord cannot restrict the occupancy of an apartment strictly to the named tenant or tenants in a lease. Tenants may share the rental unit with immediate family, one additional occupant, and the occupant's dependent children, provided that the tenant or the tenant's spouse occupies the premises as their primary residence.

When a lease names more than one tenant, and one of the tenants named in the lease moves out, that tenant may be replaced with another occupant and the dependent children of the occupant.

Tenants have the obligation to give the landlord notice of the additional occupants within 30 days. If the tenant moves out, the occupants have no right of occupancy.

Landlords may limit the total number of people living in rental based on state and local occupancy laws.

Heat Bills: The law in New York requires that a landlord or heat supplier must furnish, upon request by a prospective tenant, the cost of heating and cooling for the past two years. (Energy Law § 17-103)

Providing Heat: A landlord must provide heating, plumbing, and electrical apparatus in good and safe working order, even if the tenant pays the utility bills. State law requires that landlords who supply heat to tenants must do so between October 1 and May 31. Multiple Dwelling Law § 79 links the outside temperature to the required indoor temperature as follows:

Time	Outside	Inside
6 a.m. to 10 p.m.	55 degrees or less	68 degrees
10 p.m. to 6 a.m.	40 degrees or less	55 degrees

Municipalities may require higher, but not lower, indoor temperatures.

Hot Water: Landlords must provide both hot and cold water. (Multiple Dwelling Law § 75) Hot water should have a constant temperature of 120 degrees or greater at the tap.

Safety: Landlords are required to follow all Certificate of Occupancy requirements. They must install and maintain the proper number of smoke detectors and carbon monoxide detectors. They must abide by all state and local lead paint laws. The apartment must be secured with functioning window and door locks. Some buildings require functioning intercom systems and access to fire escapes. Landlords are required to take reasonable measures to keep their property safe from crime.

Assignment of Lease: "Unless a greater right to assign is conferred by the lease, a tenant renting a residence may not assign his lease without the written consent of the owner, which consent may be unconditionally withheld without cause provided that the owner shall release the tenant from the lease upon request of the tenant upon thirty days' notice if the owner unreasonably withholds consent which release shall be the sole remedy of the tenant. If the owner reasonably withholds consent, there shall be no assignment and the tenant shall not be released from the lease." (Real Property Law § 226-b(1)).

Sublet: "A tenant renting a residence pursuant to an existing lease in a dwelling having four or more residential units shall have the right to sublease his premises subject to the written consent of the landlord in advance of the subletting. Such consent shall not be unreasonably withheld."

(Real Property Law § 226-b(2)(a))

"If the landlord consents, the premises may be sublet in accordance with the request, but the tenant thereunder, shall nevertheless remain liable for the performance of tenant's obligations under said lease. If the landlord reasonably withholds consent, there shall be no subletting and the tenant shall not be released from the lease. If the landlord unreasonably withholds consent, the tenant may sublet in accordance with the request and may recover the costs of the proceeding and attorney's fees if it is found that the owner acted in bad faith by withholding consent."

(Real Property Law § 226-b(2)(c))

Pets: Whether a landlord will allow a tenant to have pets is a lease term that is negotiated between the parties. Landlord are allowed to charge more rent and fees, including higher security deposits with tenants that want to have pets.

Snow Removal and Lawn Cutting: Tenants of single family and two-family dwellings are responsible for cutting the grass and shoveling the snow unless the landlord and tenant(s) agree otherwise. Some local laws even require that the first-floor tenant is responsible for snow removal on the public sidewalk in front of the rented premises.

Warranty of Habitability: "In every written or oral lease or rental agreement for residential premises the landlord or lessor shall be deemed to covenant and warrant that the premises so leased or rented and all areas used in connection therewith in common with other tenants or residents are fit for human habitation and for the uses reasonably intended by the parties and that the occupants of such premises shall not be subjected to any conditions which would be dangerous, hazardous or detrimental to their life, health or safety. When any such condition has been caused by the misconduct of the tenant or lessee or persons under his direction or control, it shall not constitute a breach of such covenants and warranties." (Real Property Law § 235-b(1))

"Any agreement by a lessee or tenant of a dwelling waiving or modifying his rights as set forth in this section shall be void as contrary to public policy." (Real Property Law § 235-b(2))

The warrant of habitability does not have to be stated in the lease. It applies to all residential leases by law.

Tenant Repair and Deduct Law: When a tenant has repeatedly requested repairs in writing over an extended period of time, the tenant may, under common law, make the repairs and deduct the costs of said repairs from the rent. There is no written law that allows this remedy in NYS. Therefore, there is no guaranteed protection given a tenant who decides to take the course of action.

Appliances: Landlords are not required to provide appliances in an apartment. However, if they do not provide a stove or refrigerator with the apartment, they must notify the tenant before finalizing the lease. If the landlord does supply appliances, they must keep them in good working order.

Privacy Rights of a Tenant: Tenants are entitled to what is referred to as quiet enjoyment of their leased premises. This doctrine limits a landlord's access to a tenant's apartment so as to protect the privacy of a tenant. If a landlord wants to enter the tenant's apartment, they must give reasonable notice (24 hours) before doing so. However, a landlord may enter without notice for emergencies. Fire, gas or water leaks, and burglary are considered emergencies. A lease often details how the tenant's right to privacy will be protected.

Unlawful Lease Terms: Certain terms in a lease are void by law. A term that exempt the landlord from liability for injuries to persons or property caused by the landlord's negligence, or that of the landlord's employees or agents would be void pursuant to General Obligations Law § 5-321. Waiving the tenant's right to a jury trial in any lawsuit brought by either of the parties against the other for personal injury or property damage would be void pursuant to Real Property Law § 259-c. Requiring tenants to pledge their household furniture as security for rent is void pursuant to Real Property Law § 231.

Renters Insurance: Tenants often purchase renter's insurance to cover their risk of loss if their personal property in their apartment is damaged. Landlord's carry insurance that covers the risks to the landlord's property, not to damage or losses incurred to a tenant's personal property in a rental unit. When damage results to a tenant's personal property from something like water damage due to a broken water supply line, or burglary, the landlord will not be responsible for said damages. That is when renters insurance would help a tenant recover from their loss. If the landlord were in some way legally responsible, a tenant may be able to sue the landlord for said damages but that is often not easy to prove, can be expensive, and is time consuming.

Evictions: Evictions are legal proceedings where a landlord is asking a civil court to issue an order for removal of the tenant from an apartment. Typically, when a tenant has not paid the rent (is in arrears), or violated terms of the lease (like having a pet in an apartment where the lease specifically prohibits such), or is a hold over tenant (when a tenant remains in possession of a property without the landlords consent after their lease has expired), a landlord must first give three days' written notice of the violations, then serve a tenant with a Notice of Petition and Petition to appear in court for a Summary Proceeding for eviction. The Petition sets out the grounds for the eviction, while the Notice of Petition sets out the date, location of the court, and time of appearance for the Summary Proceeding. A Summary Proceeding is an expedited court proceeding.

At the Summary Proceeding, if a judge finds there that no triable issues exist, there is no hearing. The landlord then obtains an order for eviction and judgment for rent due. If the judge finds there is a triable issue of fact (like a warrant of habitability violation claim), then the judge can set a hearing date to get testimony from both parties before rendering an order of eviction or dismissing the case.

Landlords may not use self-help to evict a tenant. A landlord cannot do things like change the locks, remove a tenant's possessions, or shut off the utilities to force a tenant out. These actions are criminal acts under New York State Real Property Law § 235.

If a judge issues a judgment of eviction known as a Warrant of Eviction, the tenant will have 72 hours to vacate the premises. If the tenant fails to abide by the Warrant of Eviction, only a marshal of the court can enforce the Warrant. The landlord would hire the marshal to enforce the Warrant and remove the tenant.

If the tenant leaves their personal belongings behind in an apartment, whether the tenant is evicted or not, unless the tenant has given notice to the landlord that they do not want said personal property, the landlord must place those items in a secure storage area for 30 days before disposing of them. The tenant has the right retrieve said items of personal property within the 30-day period of time as long as they pay the landlord for the reasonable cost of the storage. After the 30-day period expires, the landlord can sell any remaining personal property in storage and apply those funds to any monies owed to the landlord by the tenant.

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13.3: SELECTING TENANTS

A person's ability to pay rent and willingness to preserve an apartment are the two major considerations of a landlord in selecting a tenant.

Landlords usually use an application form which requests the following information:

- Name, social security number, and current residence address
- Number and names of people who will occupy rental unit
- Residence and work telephone numbers
- Annual income and source
- Employer's name, address, and length of time on the job
- Bank accounts – name of bank and account number(s)
- Past residence addresses over several years
- Motor vehicle make, model, year, and plate numbers
- Credit and character references
- Whom to contact in the event of an emergency
- Written permission from the applicant to run a credit report on them

Discrimination: In selecting a tenant, a landlord is prohibited under New York's Human Rights Act and the federal government's Fair Housing Amendments Act of 1988 from illegally refusing to rent or refuse to renew a lease based on race, color, religion, national origin, age, sex, marital status, disabilities, sexual orientation, military status, and children. These are what are called under the laws "protected categories" that prohibit discrimination in residential lease transactions.

However, landlords in owner-occupied rental units of four units or less, and in renting a room in a home in which the owner resides, are exempt from both these state and federal discrimination laws.

Sexual Harassment in Housing: Sexual harassment in housing is a form of sex discrimination prohibited by the Fair Housing Act and other federal and state laws. There are two main types of sexual harassment: (1) quid pro quo sexual harassment; and (2) hostile environment sexual harassment.

Quid pro quo harassment is when a landlord, property manager, or maintenance person requires a person to submit to an unwelcome request to engage in sexual conduct as a condition of obtaining or maintaining housing or housing-related services.

Hostile environment harassment is when a landlord, property manager, or maintenance person subjects a person to severe or pervasive unwelcome sexual conduct that interferes with the rental, the availability of a rental, or the terms, conditions, or privileges of housing or housing-related services.

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13.4: Appendix 1- Sample Lease

LEASE AGREEMENT made by and between the Tenant, _____, currently residing at _____, and the Landlord, _____, with a current mailing address of _____.

The parties hereby agree to the following terms and conditions of this lease agreement:

1. **Apartment Location:** _____, Apt. No._____.

2. **Term of Lease:**_____Months, beginning _____ and ending _____.

3. **Rent:** Monthly: $ _____.

4. **Rent Due Date:**Rent will be due the _____ day of the month starting _____.

5. **Late Charge:** Tenant will pay a charge of $_____if rent is more than five (5) days late.

6. **Maintenance of the Apartment:**The tenant agrees to pay for any damage to the apartment occurring during his term only. Tenant may, within ten (10) days of moving in, notify the owner in writing of any items which are damaged, broken, or soiled. The tenant will not be held responsible for any damage, breakage, or soil occurring before the tenant moved in. Broken glass of windows shall be replaced by tenant. The tenant agrees not to paint or make any alterations to the apartment without discussing his plans with the owner. The tenant is responsible for, and shall take care of, the apartment during his occupancy and agrees to keep the apartment clean.

7. **Security Deposit:** A Security Deposit in the amount of $ _____, which represents one-month's rent, is required, and will be held in trust by the owner until termination of tenancy. The security deposit is not to be considered as rent for the last month of lease. The Security Deposit will be refunded in full, with interest minus a 1% account maintenance fee within thirty (30) days of termination of this tenancy, less any damages over and above regular wear and tear, and less cleaning charges, if any.

8. **Cleaning Charges:** Tenant is expected to leave apartment clean at end of tenancy, and to place all unwanted items in boxes, and remove same from the apartment, and place at curb, ready for refuse collector. If the tenant fails to leave the apartment in clean condition, the following cleaning charges may be applied against the Security Deposit: Range: $25.00; Refrigerator: $25.00; Kitchen (including cabinets), Bathroom (including all fixtures and tile), and all other rooms: $15.00 each.

9. **Utilities:** The tenant shall be responsible and pay for electric, cable, telephone, and internet service to the apartment. The landlord is responsible for, and will pay, the utilities for the gas appliances that provide heat and hot water service to the apartment and for the water supply service.

10. **Early Termination:** Tenant agrees to occupy the apartment and to pay rent during the full term of lease. Owner will release tenant from tenant's obligation to complete the full term of this lease provided:

(a) Tenant gives at least one-month's written notice of his intention to leave. Notice should be mailed to Owner at address as stated at the top of this lease, and

(b) Tenant pays the regular rent for one month after date of written notice, and

(c) Tenant will let owner keep the security deposit to cover such rental expenses as advertising, traveling, and showing apartment caused by the earlier termination.

11. **Use of Premises:** The tenant shall use the apartment as private living quarters for no more than _____ occupants. Tenant agrees not to use the apartment for business purposes. The tenant shall not violate any regulation of the Board of Health, Fire Underwriters, City Ordinance, or State or Federal laws of any nature, and shall not use the apartment for any unlawful or immoral purpose.

12. **Assignment or Subletting:** The tenant agrees that he will not assign this lease or sublet the apartment, or any part of it, without the written consent of the owner. Said consent shall not be unreasonably withheld and the landlord will only refuse to consent for a good reason.

13. **Repairs:** Plumbing leaks, failure of heating or hot water systems, and electrical malfunctions will be repaired by the landlord within a reasonable time after the tenant notifies the owner. To avoid more damage to the apartment, the tenant agrees to give notice of the need of said repairs to the landlord as soon as possible. Landlord is not required to give notice of entry of the apartment to evaluate and/or make emergency repairs.

14. **Insurance:** The owner's insurance policy covers damage or loss by fire, theft, or otherwise, to the building and owner's furnishings only. It is the responsibility of the tenant to protect with renters insurance tenant's own personal property. Tenant agrees to make no claims against owner for any such damage or loss.

15. **Pets:** No pets of any kind are allowed in the apartment.

16. **Snow Removal and Lawn Maintenance:** The landlord is responsible for all snow removal at the premises, as well as lawn maintenance.

17. **Tenant Privacy:** Tenant will have quiet enjoyment of said apartment. Landlord will give 24-hour notice of intent to enter said apartment unless emergency repairs are required.

18. **Signatures:** The person signing this lease as the tenant states that she/he has the authority to sign for all other persons who will occupy the apartment.

_____, Tenant

Dated: _____

_____, Landlord

Dated: _____

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13.5: References

About Rent Stabilization. (n.d.). Retrieved July 27, 2018, from http://metcouncilonhousing.org/help_and_answers/about_rent_stabilization

Frequently Asked Questions (FAQs). (n.d.). Retrieved July 27, 2018, from https://www1.nyc.gov/site/rentguidelinesboard/resources/rent-stabilization.page

N.Y. State Codes & Statutes, (2015, October 23) Retrieved July 27, 2918 from https://www.nycourts.gov/lawlibraries/nycodesstatutes.shtml

New York Rental Laws. (2017, April 24). Retrieved July 27, 2018, from https://www.landlordology.com/new-york-landlord-tenant-laws/

New York State Division of Human Rights. (n.d.). Fair Housing Guide. Retrieved July 27, 2018, from https://dhr.ny.gov/sites/default/files/pdf/nysdhr-fair-housing-guide.pdf

Office of the New York StateAttorney General. (n.d.). Tenants' Rights Guide. Retrieved July 27, 2018, from https://ag.ny.gov/sites/default/files/tenants_rights.pdf

Pogue, D. L., Clifford, E., & Schwartz, A. L. (2009). Understanding New York Law, 2013-14. Upstate Legal Publishers

Sexual Harassment in Housing Initiative. (2018, July 23). Retrieved July 27, 2018, from https://www.justice.gov/crt/sexual-harassment-housing-initiative

The Housing Council. (2007, November 12). Tenant Rights & Responsibilities. Retrieved July 27, 2018, from https://www.rochester.edu/reslife/assets/pdf/non/Tenants-Rights-Responsibilities.pdf

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CHAPTER OVERVIEW

14: ELEMENTS OF A CONTRACT, CONSUMER PROTECTIONS, AND BANKRUPTCY

14.1: ELEMENTS OF A CONTRACT, CONSUMER PROTECTIONS, AND BANKRUPTCY

14.2: ELEMENTS OF A CONTRACT

14.3: CONSUMER PROTECTIONS

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14.1: ELEMENTS OF A CONTRACT, CONSUMER PROTECTIONS, AND BANKRUPTCY

INTRODUCTION

In law school, the contracts course is one, if not the most, important courses taught. It typically is a two-semester course which demonstrates the depth and complexity of the subject matter. This chapter will explain the very basic elements of contract law and how it affects private citizens and consumers every day. To that end, some basic consumer protections provided under the law will be touched upon. The chapter will end with a basic explanation of the ultimate consumer protection law, bankruptcy.

Some contracts have already been discussed in previous chapters. Purchase offers for real property, leases, separation agreements, and prenuptial agreements are all contracts. Most simply stated, a contract is a legally enforceable promise.

Most contracts are not overly formal and not in writing. Every time you buy a pizza or put gas in your car, you are entering into a contract. Some contracts must be in writing and many contracts are. Because contracts are a part of everyday life a basic understanding of them is important.

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14.2: ELEMENTS OF A CONTRACT

To be valid, a contract must generally contain all of the following elements:

- Offer
- Acceptance
- Consideration
- Legality

OFFER:

Contracts always start with an offer. An offer is an expression of a willingness to enter into a contract on certain terms. It is important to establish what is and is not an offer. Offers must be firm, not ambiguous, or vague. A person who is making the offer is called the offeror.

Invitation to Treat: Offers are different than an invitation to treat. An invitation to treat is not an offer. When you list your home for sale, you are not making an offer; you are making an offer to treat. You are inviting potential buyers to make an offer to you to buy your home. The same is true with most advertising. The stores are making an offer to treat. They are expressing their willingness to sell you something if you offer them their asking price. However, they are not bound to accept your offer. For example, you place an ad online to sell your automobile for a certain price. Someone makes an offer to buy the automobile from you at full price. Do you have to accept their offer? No. You are making an offer to treat, and you are not bound to accept their actual offer to buy your automobile.

Puffery: Advertisers often use puffery to promote their products. So, was the advertising slogan "Red Bull Gives You Wings" meant to be a true statement or puffery? In a class action lawsuit filed on Jan. 16, 2013 in the U.S. District Court of the Southern District of New York by Benjamin Careathers, Mr. Careathers claimed he had been drinking Red Bull since 2002. His lawsuit argued that Red Bull mislead consumers about the superiority of its products starting with its slogan "Red Bull gives you wings" and its claims of increased performance, concentration, and reaction speed. Red Bull eventually settled the lawsuit and emailed a statement to BevNET.com, Inc., a beverage oriented media company stating, "Red Bull settled the lawsuit to avoid the cost and distraction of litigation. However, Red Bull maintains that its marketing and labeling have always been truthful and accurate, and denies any and all wrongdoing or liability."

(See https://www.bevnet.com/news/2014/red-bull-to-pay-13-million-for-false-advertising-settlement/ for more information.)

Courts will determine whether a statement in advertising is false versus puffery by using the "reasonable person" standard. In other words, would a reasonable person believe the exaggerated statement in an advertisement is meant to be true? It is hard to imagine a jury would find that the Red Bull advertisement that by drinking their product one would grow wings was anything but puffery.

Counter-Offers: A counter-offer negates the original offer. It alters the original offer, and by doing, so releases the person making the original offer from any obligation. For example, A makes an offer to treat regarding the sale of A's automobile for $10,000.00. B offers A $9,000.00. If A accepts this offer, B is bound to purchase the vehicle for that price. A does not have to accept B's offer and is not bound to. However, A then makes a counter-offer to B that A will sell the vehicle for $9,500.00. B is not bound to buy the vehicle for that price, but A is now bound to sell the vehicle to B for that price if B accepts the counter-offer.

ACCEPTANCE:

Acceptance by the offeree (the person accepting an offer) is the unconditional agreement to all the terms of the offer. There must be what is called a "meeting of the minds" between the parties of the contract. This means both parties to the contract understand what offer is being accepted. The acceptance must be absolute without any deviation, in other words, an acceptance in the "mirror image" of the offer. The acceptance must be communicated to the person making the offer. Silence does not equal acceptance.

CONSIDERATION:

Consideration is the act of each party exchanging something of value to their detriment. A sells A's automobile to B. A is exchanging and giving up A's automobile while B is exchanging and giving up B's cash. Both parties must provide consideration.

Past Consideration: Voluntarily doing something for someone is not consideration. A see's B's lawn needs to be cut so A voluntarily does so. B comes home from work and is so pleased that B gives A $30 for cutting the lawn. The following week A cuts B's lawn again without B asking A to do so. A now asks B for $30 for cutting the lawn and B refuses to do so. A claims they have a contract since A has provided consideration by mowing B's lawn, even though it was voluntary. A is incorrect. B is not obligated to provide consideration to A. There is no contract. However, if B had asked A to mow the lawn, but did not set the price, A would probably be able to enforce the contract after mowing the lawn because B requested he do so.

Performance of an Existing Duty: If a person has a duty to do something, such as a public servant, the performance of the duty is not consideration.

Promissory Estoppel: In some instances, one party is not providing consideration but is relying on a reasonable promise made by another. A party that that is induced to action based on the reasonable promise may be able to enforce the promise under the legal theory of promissory estoppel.

This is explained in the Restatement (Second) of Contracts[1] § 90. Promise Reasonably Inducing Action Or Forbearance:

(1) A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.

(2) A charitable subscription or a marriage settlement is binding under Subsection (1) without proof that the promise induced action or forbearance.

For example, A works for B who has promised to provide A retirement benefits if A works for B for 25 years. After A is employed with B for 15 years, B tells A that the retirement benefits will now be half the amount originally promised. A can enforce the original promise under the theory of promissory estoppel even though A has provided no consideration. A can make the case that A was induced and acted on this promise.

LEGALITY:

The fourth required element of a valid contract is legality. The basic rule is that courts will not enforce an illegal bargain. Contracts are only enforceable when they are made with the intention that they legal, and that the parties intend to legally bind themselves to their agreement. An agreement between family members to go out to dinner with one member covering the check is legal but is not likely made with the intent to be a legally binding agreement. Just as a contract to buy illegal drugs from a drug dealer is made with all the parties knowing that what they are doing is against the law and therefore not a contract that is enforceable in court.

Lack of Mental Capacity: The capacity to enter into a contract may be compromised by mental illness or intellectual deficiency. Issues of dementia and Alzheimer's can blur the lines of competency to sign a contract. Competency to enter into a contract requires more than a transient surge of lucidity. It requires the ability to understand not only the nature and quality of the transaction, but an understanding of its significance and consequences. If a person is found to lack the mental capacity to enter into a contract, then the contract is not automatically void but it is voidable.

Minors and Contracts: Minors under the age of 18-years-old are allowed to sign contracts, but they are voidable at the minor's election. The exception to this rule is that contracts for necessities are not voidable. Necessities are general goods or services necessary for subsistence, health, comfort, or education. The burden to prove a contract is for necessities for a minor is on the plaintiff. Minors can affirm their contract made while a minor formally or by actions upon reaching the age of 18.

Contracts That Must Be In Writing: As already mentioned above, not all contracts have to be in a written format. However, some absolutely do, or they are voidable. Under the common law doctrine of the "Statute of Frauds," which has been codified in the General Obligations Law (GOB), contracts for the purchase of real property (GOB § 5-703), contracts that cannot be performed in less than 1 year, and contracts that guarantee the debt of another (co-signers) (GOB § 5-701) must all be in writing. It is important to understand that just about any form of writing is acceptable. A handwritten contract to purchase real property on a napkin is acceptable if all the elements of a contract are met. The use of email and text message may also acceptable under GOB § 5-701(4).

UNILATERAL VERSUS BILATERAL CONTRACTS: Most contracts are bilateral, meaning both parties are in agreement and the four basic elements of a contract exist. For example, B offers to buy A's automobile for a specific price and A accepts the offer

and agrees to give B the automobile upon receipt of those specific funds. Both parties are agreeing to the contractual arrangement. It is bilateral. In a unilateral contract, one party is making an offer and promise if someone does something in return. There is no agreement necessarily between two individuals as there is in a bilateral contract. However, an offer is made and if another individual accepts the offer and performs, an enforceable contract exists. An example would be if A offers a reward of $100 to the person who finds and returns A's missing cat. If B finds and returns the cat to A, A would be bound to pay B the $100 reward. This is a unilateral contract.

GIFT VERSUS CONTRACT:

Gifts are very similar to contracts, but they are different. Gifts do require an offer, acceptance, and delivery of the gift, but are generally not enforceable. If A promises to give B a birthday gift but fails to do so, B cannot enforce the promise. There is no consideration provided by B. However, B is also in no worse position than before the promise was made. From a legal standpoint, if a party does not follow through with the promise of a gift, the parties are in no worse position because of it, and therefore there is no cause of action.

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1. (The Restatement (Second) of the Law of Contracts is a legal treatise often cited by judges and lawyers regarding the general principles of contract common law. It is one of the most recognized and cited legal treatises in American law.) ↵

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14.3: CONSUMER PROTECTIONS

CONSUMER CONTRACTS:

The General Obligations Law (GOB) § 5-327 defines a consumer contract as:

"Consumer contract" means a written agreement entered into between a creditor, seller or lessor as one party with a natural person who is the debtor, buyer or lessee as the second party, and the money, other personal property or services which are the subject of the transaction are primarily for personal, family or household purposes;"

There are numerous consumer protection laws under federal and NYS statutes. The following are just a few.

New York Deceptive Trade Practice: NY Gen Bus L §§ 349-350 prohibits deceptive trade practices, such as false advertising, and Vehicle and Traffic Law (VAT) § 417-b and Gen. Bus. §392-addresses the tampering with a car's odometer.

New York Interest Rates: GOB § 5-501(1) and Banking § 14-a address interest rates and usury regulations. The maximum interest rate a lender can charge for a loan is 16%.

New York Identity Theft:

It is a crime to use someone else's personally identifying information to secure credit or purchase goods.

- New York Penal Law Section 190.77 (identity theft offenses)
- New York Penal Law Section 190.78 (third degree identity theft)
- New York Penal Law Section 190.79 (second degree identity theft)
- New York Penal Law Section 190.80 (first degree identity theft)
- New York Penal Law Section 190.80-a (aggravated identity theft)

New York Lemon Law: General Business Law § 198-a protects consumers who purchase or lease new automobiles while General Business Law § 198-b protects consumers who purchase used automobiles from a dealer. Private sales are not covered under NYS's Lemon Law.

> **New Automobiles:** For new automobiles, the law places a duty on the manufacturer to correct a problem during the first 18,000 miles or two years, whichever comes first, free of charge to the buyer. If the manufacturer or dealer is unable to repair the problem after a reasonable number of attempts, and if the problem substantially impairs the value of the car to the consumer, then the manufacturer, at the consumer's option, must either

- refund the full purchase (or lease) price, or
- offer a comparable replacement car.

> There additional restrictions placed on this law once a vehicle reaches 12,000 miles or more in terms of the amount of a refund the consumer will get.
>
> **Used Automobiles:** For used automobiles purchased from a dealer (which is defined as a person selling 3 or more vehicles over a 12-month period of time), you are entitled to the following warranty:

Automobiles with 36,000 miles or less	90 days or 4,000 miles, whichever comes first
Automobiles with over 36,000 up to 80,000 miles	60 days or 3,000 miles, whichever comes first
Automobiles with more than 80,000 miles	No warranty

Consumer Contracts Cooling Off Period: There is a three day "cooling off period" that applies to door-to-door solicitations, dating services, health clubs, and home improvement contracts. Contracts for those types of services must clearly stipulate your right to cancel the agreement within 72 hours.

Fair Debt Collection Practices Act (FDCPA): This is a federal statute that is enforced by the Consumer Financial Protection Bureau. The general purpose of the law is to eliminate abusive practices in the collection of consumer debts and promote fair debt collection. A few of the prohibited actions of debt collectors are:

- Contacting consumers by telephone outside of the hours of 8:00 a.m. to 9:00 p.m. local time.
- Communicating with consumers after receiving written notice that said consumer wishes no further communication with the debt collector.
- Causing a telephone to ring or engaging any person in telephone conversation repeatedly or continuously: with intent to annoy, abuse, or harass a person.
- Communicating with consumers at their place of employment after having been advised that this is unacceptable.
- Contacting consumer known to be represented by an attorney.
- Threatening arrest or legal action that is either not permitted or not actually contemplated.
- The use of abusive or profane language by the debt collector.
- Reporting false information on a consumer's credit report or threatening to do so in the process of collection.

Credit Card Accountability Responsibility and Disclosure Act of 2009, (CARD Act): This federal consumer protection law was passed to reform the credit card business by mandating more transparency, and requiring easier-to-understand credit card terms. Some of the protections the law provides credit card users are:

- retroactive interest rate increases on existing card balances is prohibited
- increased the time to pay monthly bills
- requires greater advance notice of changes in credit card terms
- provides consumers the right to opt out of significant changes in terms on accounts.
- provides consumers with more time, 45 days instead of 15, to shop around for better deals if they don't like the new terms
- bans the issuance of credit cards to anyone under 21, unless they have adult co-signers on the accounts or can show proof they have enough income to repay the card debt
- requires that credit card companies stay at least 1,000 feet from college campuses if they are offering free food or gifts to entice students to apply for credit cards

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14.4: BANKRUPTCY

There are occasions were individuals (and companies) find themselves in so much debt, they can no longer pay their bills and function financially. This is where bankruptcy can assist a person by relieving them of their debt burden and give them a fresh start. The first thing to understand about bankruptcy is that is a federal legal action. There is no New York State law allowing for bankruptcy. Our Founders realized that too much debt can become a problem and set forth in the U.S. Constitution a remedy.

"The Congress shall have Power To…establish…uniform Laws on the subject of Bankruptcies throughout the United States…." ARTICLE I, SECTION 8, CLAUSE 4

Personal bankruptcies are covered primarily under two parts of the U.S. Bankruptcy Code, Chapter 7's and Chapter 13's.

Chapter 7 Bankruptcy: Chapter 7 liquidation, commonly referred to as straight bankruptcy, is often what people mean or thinks of when they use or hear the term generically. In its simplest form, Chapter 7 wipes out most, but not all of your debts and, in return, you may have to surrender some of your property. Chapter 7 doesn't include a repayment plan. Your debts are simply eliminated forever.

To qualify for a Chapter 7 bankruptcy, you must first pass the means test. If you have too many means, i.e. income or money, you can't declare Chapter 7 bankruptcy. Second, you must receive required credit counseling. At some point during the six months before you file for bankruptcy, you have to receive counseling and get a certificate from a court-approved nonprofit credit counselor.

Some debts cannot be discharged and will still be owed by the debtor even after the bankruptcy. Some assets are allowed to be kept by the debtor (exemptions) like a home allowance, a motor vehicle, and personal property up to certain amounts.

Some of the non-dischargeable debts are:

- Most taxes
- Debts owed to spouse (maintenance, child support, divorce property settlements)
- Student loans with rare exceptions
- Government fines, penalties, restitution
- Personal Injury judgments arising out of a DWI accident
- Debts not listed in the Bankruptcy filing

When you file a Chapter 7 bankruptcy, almost all of your assets and property become property of the bankruptcy estate. A bankruptcy trustee is appointed and given the authority to sell your assets to pay your creditors. However, under the bankruptcy law, there are asset exemptions. The law allows a person to retain some of their assets. Exemptions allow you to keep a certain amount of your property so that you can make a fresh start after the bankruptcy. How much property a debtor can keep in a Chapter 7 bankruptcy depends on the value of the assets and where the debtor lives.

The 2019 NYS Homestead Exemption for a debtor's residence is: $170,825 for the counties of Kings, New York, Queens, Bronx, Richmond, Nassau, Suffolk, Rockland, Westchester, and Putnam; $142.350 for the counties of Dutchess, Albany, Columbia, Orange, Saratoga, and Ulster; $85,400 for the remaining counties in the state.

There are also personal property exemptions. In 2019, a debtor may keep a motor vehicle in value up to $4,550, or $11,375 if the vehicle is equipped for a disabled person. This is doubled if a married couple both file.

As of 2019, debtors can keep most household goods and clothing, and their tools that are necessary for their employment or trade up to a total of $11,375.

For the most part, debtors keep their retirement assets like their IRA, 401(k), Keogh, or other qualified retirement plans. Social Security, unemployment, disability, public assistance, workers' compensation, or veteran's benefits are also exempt from bankruptcy garnishment.

Chapter 13 Bankruptcy: The primary difference with a Chapter 7 and Chapter 13 is that Chapter 13 is a repayment plan. Plans can include a partial payment of debt. It freezes debt and accumulating interest but requires a plan to repay creditors that must be approved by the bankruptcy court.

There are other special kinds of bankruptcy. Chapter 11 bankruptcy is available to individuals, but primarily is used for large business reorganizations. Chapter 12 bankruptcy is similar to a Chapter 13 bankruptcy, but for family farmers and family fishermen.

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14.5: References

Bankruptcy. (n.d.). Retrieved July 28, 2018, from http://www.uscourts.gov/services-forms/bankruptcy

CreditCards.com. (2016, January 28). 12 consumer protections in the Credit CARD Act. Retrieved July 28, 2018, from https://www.creditcards.com/credit-card-news/help/card-act-12-consumer-protections-6000.php

Duggan, O. (2014, October 11). $13m lawsuit proves Red Bull doesn't give you wings. Retrieved July 28, 2018, from https://www.telegraph.co.uk/news/worldnews/northamerica/usa/11155731/13m-lawsuit-proves-Red-Bull-doesnt-give-you-wings.html

Fair Debt Collection Practices Act. (2016, March 23). Retrieved July 28, 2018, from https://www.ftc.gov/enforcement/rules/rulemaking-regulatory-reform-proceedings/fair-debt-collection-practices-act-text

Institute, T. A. (n.d.). Shop ALI Publications. Retrieved July 27, 2018, from https://www.ali.org/publications/show/contracts/

New Car Lemon Law Fact Sheet. (n.d.). Retrieved July 28, 2018, from https://ag.ny.gov/consumer-frauds/new-car-lemon-law-fact-sheet

New York Bankruptcy Exemption Laws. (n.d.). Retrieved July 28, 2018, from https://www.legalconsumer.com/bankruptcy/bankruptcy-law.php?ST=NY

New York Homestead Laws. (n.d.). Retrieved July 28, 2018, from https://statelaws.findlaw.com/new-york-law/new-york-homestead-laws.html

New York Lemon Laws. (n.d.). Retrieved July 28, 2018, from https://statelaws.findlaw.com/new-york-law/new-york-lemon-laws.html

New York State. (n.d.). N.Y. State Codes & Statutes. Retrieved July 28, 2018, from https://www.nycourts.gov/lawlibraries/nycodesstatutes.shtml

Pogue, D. L., Clifford, E., & Schwartz, A. L. (2009). Understanding New York Law, 2013-14. Upstate Legal Publishers

Red Bull to Pay $13 Million for False Advertising Settlement. (2015, September 10). Retrieved July 28, 2018, from https://www.bevnet.com/news/2014/red-bull-to-pay-13-million-for-false-advertising-settlement/

US Legal, Inc. (n.d.). USLegal. Retrieved July 28, 2018, from https://definitions.uslegal.com/i/invitation-to-treat/

US Legal, Inc. (n.d.). USLegal. Retrieved July 28, 2018, from https://definitions.uslegal.com/p/puffery/

US Legal, Inc. (n.d.). USLegal. Retrieved July 28, 2018, from https://definitions.uslegal.com/p/promissory-estoppel/

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CHAPTER OVERVIEW

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15.1: PRIVACY

INTRODUCTION

The word privacy does not appear in the United States Constitution. Yet, privacy is a fundamental right of Americans. This chapter will explain how despite the fact that the word privacy is not specifically mentioned in the United States Constitution, it is still a constitutionally protected right. With the advent of heightened concerns of terrorism, cyber-attacks, security, and the use of social media, a basic understanding of privacy law is becoming increasingly important.

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15.2: THE HISTORICAL DEVELOPMENT OF PRIVACY LAW

In 1890, the Harvard Law Review published an article which addressed the "right to be let alone." It was co-authored by two legal scholars, Samuel Warren and Louis Brandies. Louis Brandies was a law professor at the time, but went on to later become one of the more respected U.S. Supreme Court justices. Perhaps in some ways, what they mention as "Recent inventions and business methods…" is as pertinent today regarding social media and smartphones as it was to cameras and newspapers in 1890.

"Recent inventions and business methods call attention to the next step which must be taken for the protection of the person, and for securing to the individual what Judge Cooley calls the right "to be let alone" Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that "what is whispered in the closet shall be proclaimed from the house-tops." For years there has been a feeling that the law must afford some remedy for the unauthorized circulation of portraits of private persons; and the evil of invasion of privacy by the newspapers, long keenly felt, has been but recently discussed by an able writer. The alleged facts of a somewhat notorious case brought before an inferior tribunal in New York a few months ago, directly involved the consideration of the right of circulating portraits; and the question whether our law will recognize and protect the right to privacy in this and in other respects must soon come before our courts for consideration."

In 1960, the California Law Review published an article entitled "Privacy." It was written by widely recognized legal scholar William Prosser. In this law review article, Prosser discusses the Warren and Brandies law review article mentioned above in some detail. He also compiled and reviewed the various privacy cases from the various courts and jurisdictions. Prosser concluded that there are four distinct but related actions that violate a person's right to privacy.

- Intrusion: The intrusion, whether physically or otherwise, upon the solitude of another in a highly offensive manner is a violation of one's privacy.
- Private Facts: The publication of private information about a person who is not a public figure is a violation of one's privacy.
- False Light: The publication of a highly offensive and false impression of another is a violation of one's privacy.
- Appropriation: Taking and using a person's name or likeness for financial or other advantage without that person's consent is a violation of one's privacy.

Prosser argued these various privacy violations in terms of tort actions and the right to sue. While Americans most likely would overwhelming agree that all four actions, intrusion, private facts, false light, and appropriation are violations of one's privacy, with the everyday use of social media, are those lines being blurred voluntarily?

***GRISWOLD v CONNECTICUT*, 381 U.S. 479 (1965):** As already mentioned, the U.S. Constitution does not include the word privacy in it. However, 1965, the US Supreme Court held in *Griswold v. Connecticut* that the right to privacy does exist. The case involved a Connecticut doctor who had been arrested and fined $100 by a Connecticut trial court for counseling married couples about birth control devices. Such advice violated a Connecticut statute making birth control counseling a misdemeanor.

The U.S. Supreme court overruled the conviction and declared the Connecticut statute to be unconstitutional. The Court found that the spirit, structure, and specific provisions of the Bill of Rights created 'zones of privacy' which are broad enough to protect aspects of personal and family life, in this case, marital privacy. The Court declared "…that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance."

***ROE v. WADE*, 410 U.S. 113 (1973):** One could argue the *Roe v. Wade* is the most politically and socially controversial landmark U.S. Supreme Court cases of our time. The 1973 decision authored by Justice Harry Blackmun enunciated a woman's right to privacy.

The question before the court was whether a Texas statute that criminalized all abortions except those necessary to save the mother's life was constitutional. The Court declared, in a 7-2 majority opinion, that the Texas statute was unconstitutional as it violated a woman's right to privacy stating, "This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."

The Court also acknowledged the legal tension between a woman's privacy right and the State's interest in the life of the unborn child. In addressing this legal issue, the Court constructed the following trimester framework.

1. A state criminal abortion statute of the current Texas type, that excepts from criminality only a lifesaving procedure on behalf of the mother, without regard to pregnancy stage and without recognition of the other interests involved, is violative of the Due Process Clause of the Fourteenth Amendment.

(a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.

(b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.

(c) For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.

A syllabus version of this case can be found in Chapter 4.

***PLANNED PARENTHOOD v CASEY*, 505 U.S. 833 (1992):** In 1992, the U.S. Supreme Court again took up the issue of abortion in the *Planned Parenthood v. Casey* case. The state of Pennsylvania had passed legislation regulating abortions requiring the following:

- Informed consent with a 24-hour waiting period prior to the procedure.
- Minor's seeking an abortion need the consent of one parent or a judge's order.
- A married woman must sign off that she notified her husband.

In a 5-4 decision, Court reaffirmed the core principle of *Roe v Wade*, but replaced the trimester framework with the "undue burden" test." This new standard is that any law that places an "undue burden" on a woman's right to obtain an abortion before viability is unconstitutional. Under this new standard, the only section of Pennsylvania's statute found to place and undue burden on a woman's right to have an abortion before viability of a child was the requirement that a married woman must inform her husband of her intent to have an abortion.

"The spousal notification requirement is thus likely to prevent a significant number of women from obtaining an abortion. It does not merely make abortions a little more difficult or expensive to obtain; for many women, it will impose a substantial obstacle. We must not blind ourselves to the fact that the significant number of women who fear for their safety and the safety of their children are likely to be deterred from procuring an abortion as surely as if the Commonwealth had outlawed abortion in all cases."

A syllabus version of this case can be found in Chapter 4.

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15.3: HIPAA

The Health Insurance Portability & Accountability Act, (HIPPA) is the federal statute passed by the US Congress in 1996 to protect the privacy of medical information. The Department of Health and Human Services summarizes patients' rights on their website by publishing HIPAA General Fact Sheets. The following information can be found in their General Fact Sheet entitled ***Your Health Information Privacy Rights***

Most of us feel that our health information is private and should be protected. That is why there is a federal law that sets rules for health care providers and health insurance companies about who can look at and receive our health information. This law, called the Health Insurance Portability and Accountability Act of 1996 (HIPAA), gives you rights over your health information, including the right to get a copy of your information, make sure it is correct, and know who has seen it.

Get It.

You can ask to see or get a copy of your medical record and other health information. If you want a copy, you may have to put your request in writing and pay for the cost of copying and mailing. In most cases, your copies must be given to you within 30 days.

Check It.

You can ask to change any wrong information in your file or add information to your file if you think something is missing or incomplete. For example, if you and your hospital agree that your file has the wrong result for a test, the hospital must change it. Even if the hospital believes the test result is correct, you still have the right to have your disagreement noted in your file. In most cases, the file should be updated within 60 days.

Know Who Has Seen It.

By law, your health information can be used and shared for specific reasons not directly related to your care, like making sure doctors give good care, making sure nursing homes are clean and safe, reporting when the flu is in your area, or reporting as required by state or federal law. In many of these cases, you can find out who has seen your health information. You can:

- **Learn how your health information is used and shared by your doctor or health insurer**. Generally, your health information cannot be used for purposes not directly related to your care without your permission. For example, your doctor cannot give it to your employer, or share it for things like marketing and advertising, without your written authorization. You probably received a notice telling you how your health information may be used on your first visit to a new health care provider or when you got new health insurance, but you can ask for another copy anytime.
- **Let your providers or health insurance companies know if there is information you do not want to share.** You can ask that your health information not be shared with certain people, groups, or companies. If you go to a clinic, for example, you can ask the doctor not to share your medical records with other doctors or nurses at the clinic. You can ask for other kinds of restrictions, but they do not always have to agree to do what you ask, particularly if it could affect your care. Finally, you can also ask your health care provider or pharmacy not to tell your health insurance company about care you receive or drugs you take, if you pay for the care or drugs in full and the provider or pharmacy does not need to get paid by your insurance company.
- **Ask to be reached somewhere other than home.** You can make reasonable requests to be contacted at different places or in a different way. For example, you can ask to have a nurse call you at your office instead of your home or to send mail to you in an envelope instead of on a postcard.

If you think your rights are being denied or your health information is not being protected, you have the right to file a complaint with your provider, health insurer, or the U.S. Department of Health and Human Services.

To learn more, visit www.hhs.gov/ocr/privacy/.

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15.4: FOIL

FOIL is an acronym for the Freedom of Information Law. (Public Officers Law §§ 87-90.) Passed in 1974 by the NYS Legislature, FOIL provides public access to NYS government documents, statistics, and records. In other words, while citizens have a right to privacy, the government generally does not. The purpose of the law is set out in the statute. (Public Officers Law § 84)

Legislative declaration.

The legislature hereby finds that a free society is maintained when government is responsive and responsible to the public, and when the public is aware of governmental actions. The more open a government is with its citizenry, the greater the understanding and participation of the public in government.

As state and local government services increase and public problems become more sophisticated and complex and therefore harder to solve, and with the resultant increase in revenues and expenditures, it is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible.

The people's right to know the process of governmental decision-making and to review the documents and statistics leading to determinations is basic to our society. Access to such information should not be thwarted by shrouding it with the cloak of secrecy or confidentiality. The legislature therefore declares that government is the public's business and that the public, individually and collectively and represented by a free press, should have access to the records of government in accordance with the provisions of this article.

The law requires all NYS agencies to keep FOIL request for six months, and to make them available to the public, unless doing so would violate the privacy of the FOIL requester. NYS agencies subject to a FOIL request are not allowed to ask why the information is being requested.

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15.5: FERPA

FERPA is an acronym for the Family Educational Rights and Privacy Act. The U.S. Department of Education provides information regarding FERPA on its website. The general purpose of the law to provide privacy rights to students and parents regarding student educational records. The following is from the Department of Education's website regarding FERPA. (https://www2.ed.gov/policy/gen/guid/fpco/ferpa/index.html)

> The Family Educational Rights and Privacy Act (FERPA) (20 U.S.C. § 1232g; 34 CFR Part 99) is a Federal law that protects the privacy of student education records. The law applies to all schools that receive funds under an applicable program of the U.S. Department of Education.
>
> FERPA gives parents certain rights with respect to their children's education records. These rights transfer to the student when he or she reaches the age of 18 or attends a school beyond the high school level. Students to whom the rights have transferred are "eligible students."
>
> Parents or eligible students have the right to inspect and review the student's education records maintained by the school. Schools are not required to provide copies of records unless, for reasons such as great distance, it is impossible for parents or eligible students to review the records. Schools may charge a fee for copies.
>
> Parents or eligible students have the right to request that a school correct records which parent or eligible student then has the right to a formal hearing. After the hearing, if the school still decides not to amend the record, the parent or eligible student has the right to place a statement with the record setting forth his or her view about the contested information.
>
> Generally, schools must have written permission from the parent or eligible student in order to release any information from a student's education record. However, FERPA allows schools to disclose those records, without consent, to the following parties or under the following conditions (34 CFR § 99.31):

- School officials with legitimate educational interest;
- Other schools to which a student is transferring;
- Specified officials for audit or evaluation purposes;
- Appropriate parties in connection with financial aid to a student;
- Organizations conducting certain studies for or on behalf of the school;
- Accrediting organizations;
- To comply with a judicial order or lawfully issued subpoena;
- Appropriate officials in cases of health and safety emergencies; and
- State and local authorities, within a juvenile justice system, pursuant to specific State law.

> Schools may disclose, without consent, "directory" information such as a student's name, address, telephone number, date and place of birth, honors and awards, and dates of attendance. However, schools must tell parents and eligible students about directory information and allow parents and eligible students a reasonable amount of time to request that the school not disclose directory information about them. Schools must notify parents and eligible students annually of their rights under FERPA. The actual means of notification (special letter, inclusion in a PTA bulletin, student handbook, or newspaper article) is left to the discretion of each school.
>
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15.6: THE USA PATRIOT ACT

After the 9/11 terrorist attack in 2001, Congress passed the USA Patriot Act. The U.S. Department of Justice's website has a page entitled Preserving Life & Liberty. (https://www.justice.gov/archive/ll/highlights.htm) The top of that page states the following regarding the Patriot Act.

The Department of Justice's first priority is to prevent future terrorist attacks. Since its passage following the September 11, 2001 attacks, the Patriot Act has played a key part – and often the leading role – in a number of successful operations to protect innocent Americans from the deadly plans of terrorists dedicated to destroying America and our way of life. While the results have been important, in passing the Patriot Act, Congress provided for only modest, incremental changes in the law. Congress simply took existing legal principles and retrofitted them to preserve the lives and liberty of the American people from the challenges posed by a global terrorist network.

The remainder of this webpage summarizes the USA Patriot Act as follows:

The USA PATRIOT Act: Preserving Life and Liberty

(Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism)

Congress enacted the Patriot Act by overwhelming, bipartisan margins, arming law enforcement with new tools to detect and prevent terrorism: The USA Patriot Act was passed nearly unanimously by the Senate 98-1, and 357-66 in the House, with the support of members from across the political spectrum.

The Act Improves Our Counter-Terrorism Efforts in Several Significant Ways:

1. The Patriot Act allows investigators to use the tools that were already available to investigate organized crime and drug trafficking. Many of the tools the Act provides to law enforcement to fight terrorism have been used for decades to fight organized crime and drug dealers, and have been reviewed and approved by the courts. As Sen. Joe Biden (D-DE) explained during the floor debate about the Act, "the FBI could get a wiretap to investigate the mafia, but they could not get one to investigate terrorists. To put it bluntly, that was crazy! What's good for the mob should be good for terrorists." (Cong. Rec., 10/25/01)

Allows law enforcement to use surveillance against more crimes of terror. Before the Patriot Act, courts could permit law enforcement to conduct electronic surveillance to investigate many ordinary, non-terrorism crimes, such as drug crimes, mail fraud, and passport fraud. Agents also could obtain wiretaps to investigate some, but not all, of the crimes that terrorists often commit. The Act enabled investigators to gather information when looking into the full range of terrorism-related crimes, including: chemical-weapons offenses, the use of weapons of mass destruction, killing Americans abroad, and terrorism financing.

Allows federal agents to follow sophisticated terrorists trained to evade detection. For years, law enforcement has been able to use "roving wiretaps" to investigate ordinary crimes, including drug offenses and racketeering. A roving wiretap can be authorized by a federal judge to apply to a particular suspect, rather than a particular phone or communications device. Because international terrorists are sophisticated and trained to thwart surveillance by rapidly changing locations and communication devices such as cell phones, the Act authorized agents to seek court permission to use the same techniques in national security investigations to track terrorists.

Allows law enforcement to conduct investigations without tipping off terrorists. In some cases, if criminals are tipped off too early to an investigation, they might flee, destroy evidence, intimidate or kill witnesses, cut off contact with associates, or take other action to evade arrest. Therefore, federal courts in narrow circumstances long have allowed law enforcement to delay for a limited time when the subject is told that a judicially-approved search warrant has been executed. Notice is always provided, but the reasonable delay gives law enforcement time to identify the criminal's associates, eliminate immediate threats to our communities, and coordinate the arrests of multiple individuals without tipping them off beforehand. These delayed notification

search warrants have been used for decades, have proven crucial in drug and organized crime cases, and have been upheld by courts as fully constitutional.

Allows federal agents to ask a court for an order to obtain business records in national security terrorism cases. Examining business records often provides the key that investigators are looking for to solve a wide range of crimes. Investigators might seek select records from hardware stores or chemical plants, for example, to find out who bought materials to make a bomb, or bank records to see who's sending money to terrorists. Law enforcement authorities have always been able to obtain business records in criminal cases through grand jury subpoenas and continue to do so in national security cases where appropriate. These records were sought in criminal cases such as the investigation of the Zodiac gunman, where police suspected the gunman was inspired by a Scottish occult poet and wanted to learn who had checked the poet's books out of the library. In national security cases where use of the grand jury process was not appropriate, investigators previously had limited tools at their disposal to obtain certain business records. Under the Patriot Act, the government can now ask a federal court (the Foreign Intelligence Surveillance Court), if needed to aid an investigation, to order production of the same type of records available through grand jury subpoenas. This federal court, however, can issue these orders only after the government demonstrates the records concerned are sought for an authorized investigation to obtain foreign intelligence information not concerning a U.S. person or to protect against international terrorism or clandestine intelligence activities, provided that such investigation of a U.S. person is not conducted solely on the basis of activities protected by the First Amendment.

2. The Patriot Act facilitated information sharing and cooperation among government agencies so that they can better "connect the dots." The Act removed the major legal barriers that prevented the law enforcement, intelligence, and national defense communities from talking and coordinating their work to protect the American people and our national security. The government's prevention efforts should not be restricted by boxes on an organizational chart. Now police officers, FBI agents, federal prosecutors and intelligence officials can protect our communities by "connecting the dots" to uncover terrorist plots before they are completed. As Sen. John Edwards (D-N.C.) said about the Patriot Act, "we simply cannot prevail in the battle against terrorism if the right hand of our government has no idea what the left hand is doing" (Press release, 10/26/01)

Prosecutors and investigators used information shared pursuant to section 218 in investigating the defendants in the so-called "Virginia Jihad" case. This prosecution involved members of the Dar al-Arqam Islamic Center, who trained for jihad in Northern Virginia by participating in paintball and paramilitary training, including eight individuals who traveled to terrorist training camps in Pakistan or Afghanistan between 1999 and 2001. These individuals are associates of a violent Islamic extremist group known as Lashkar-e-Taiba (LET), which operates in Pakistan and Kashmir, and that has ties to the al Qaeda terrorist network. As the result of an investigation that included the use of information obtained through FISA, prosecutors were able to bring charges against these individuals. Six of the defendants have pleaded guilty, and three were convicted in March 2004 of charges including conspiracy to levy war against the United States and conspiracy to provide material support to the Taliban. These nine defendants received sentences ranging from a prison term of four years to life imprisonment.

3. The Patriot Act updated the law to reflect new technologies and new threats. The Act brought the law up to date with current technology, so we no longer have to fight a digital-age battle with antique weapons-legal authorities leftover from the era of rotary telephones. When investigating the murder of Wall Street Journal reporter Daniel Pearl, for example, law enforcement used one of the Act's new authorities to use high-tech means to identify and locate some of the killers.

Allows law enforcement officials to obtain a search warrant anywhere a terrorist-related activity occurred. Before the Patriot Act, law enforcement personnel were required to obtain a search warrant in the district where they intended to conduct a search. However, modern terrorism investigations often span a number of districts, and officers therefore had to obtain multiple warrants in multiple jurisdictions, creating unnecessary delays. The Act provides that warrants can be obtained in any district in which terrorism-related activities occurred,

regardless of where they will be executed. This provision does not change the standards governing the availability of a search warrant, but streamlines the search-warrant process.

Allows victims of computer hacking to request law enforcement assistance in monitoring the "trespassers" on their computers. This change made the law technology-neutral; it placed electronic trespassers on the same footing as physical trespassers. Now, hacking victims can seek law enforcement assistance to combat hackers, just as burglary victims have been able to invite officers into their homes to catch burglars.

4. The Patriot Act increased the penalties for those who commit terrorist crimes. Americans are threatened as much by the terrorist who pays for a bomb as by the one who pushes the button. That's why the Patriot Act imposed tough new penalties on those who commit and support terrorist operations, both at home and abroad. The Act:

Prohibits the harboring of terrorists. The Act created a new offense that prohibits knowingly harboring persons who have committed or are about to commit a variety of terrorist offenses, such as: destruction of aircraft; use of nuclear, chemical, or biological weapons; use of weapons of mass destruction; bombing of government property; sabotage of nuclear facilities; and aircraft piracy.

Enhanced the inadequate maximum penalties for various crimes likely to be committed by terrorists: including arson, destruction of energy facilities, material support to terrorists and terrorist organizations, and destruction of national-defense materials.

Enhanced a number of conspiracy penalties, including for arson, killings in federal facilities, attacking communications systems, material support to terrorists, sabotage of nuclear facilities, and interference with flight crew members. Under previous law, many terrorism statutes did not specifically prohibit engaging in conspiracies to commit the underlying offenses. In such cases, the government could only bring prosecutions under the general federal conspiracy provision, which carries a maximum penalty of only five years in prison.

Punishes terrorist attacks on mass transit systems.

Punishes bioterrorists.

Eliminates the statutes of limitations for certain terrorism crimes and lengthens them for other terrorist crimes.

The government's success in preventing another catastrophic attack on the American homeland since September 11, 2001, would have been much more difficult, if not impossible, without the USA Patriot Act. The authorities Congress provided have substantially enhanced our ability to prevent, investigate, and prosecute acts of terror.

USA FREEDOM ACT

On June 2, 2015, President Obama signed into law the USA Freedom Act. The Bill passed with bi-partisan support. The vote in the House was 338-88 and in the Senate 67-32. This law was passed partly in response to bulk collection of Americans' phone records under Section 215 of the Patriot Act. The law was crafted to help prevent the Patriot Act from infringing on the civil liberties of U.S. citizens. The House of Representatives Judiciary Committee published a summary of the law which states in part:

PROTECTS CIVIL LIBERTIES

Ends bulk collection: Prohibits bulk collection of ALL records under Section 215 of the PATRIOT Act, the FISA pen register authority, and national security letter statutes.

Prevents government overreach: The bulk collection prohibition is strengthened by prohibiting large-scale, indiscriminate collection, such as all records from an entire state, city, or zip code.

Allows challenges of national security letter gag orders: NSL nondisclosure orders must be based upon a danger to national security or interference with an investigation. Codifies procedures for individual companies to challenge nondisclosure orders. Requires periodic review of nondisclosure orders to determine necessity.

(https://judiciary.house.gov/issue/usa-freedom-act/)

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15.7: DRONES AND PRIVACY

There are drones, and then there are drones. The military use of drones for both surveillance and as weapons has been around for some time now. According to the Council on Foreign Relations blog post by Micah Zenko on January 20, 2017 entitled ***Obama's Final Drone Strike Data***, it is estimated that President Obama during his presidency as part of his counterterrorism efforts abroad, authorized 542 drone strikes that killed an estimated 3,797 people, including 324 civilians.

However, drones are now being used domestically and their use is expanding. One can find drones being sold online and at the mall. Farmers use them to survey their land. Various industries use them to inspect their facilities and equipment that is hard to reach. Amazon is considering using them to deliver packages. Hobbyists fly them for recreational purposes. The Federal Aviation Administration has rules for the flying model aircraft.

Fly under the Special Rule for Model Aircraft

To fly under the Special Rule for Model Aircraft you must:

- Fly for hobby or recreation ONLY
- Register your model aircraft
- Fly within visual line-of-sight
- Follow community-based safety guidelines and fly within the programming of a nationwide community-based organization
- Fly a drone under 55 lbs. unless certified by a community-based organization
- Never fly near other aircraft
- Notify the airport and air traffic control tower prior to flying within five miles of an airport[1]
- Never fly near emergency response efforts

The law in NYS regarding the regulation of drones is mixed. NYC, Syracuse, and Orchard Park all have restrictions on the flying of drones within their municipality limits. With concerns regarding weaponized drones, their size, and use to violate the privacy rights of others, there is legislation being considered in NYS to address the use of drones.

In January 2018, the NYS Troopers deployed four unmanned drones in various locations throughout the state with plans to deploy another 14 by the end of the year. Official spokesman for the troopers stated that the drones will be used for emergency response, traffic safety, and other law enforcement missions. (Daily News, *New York State Police launching drones to aid in disaster response, traffic safety*, by Glenn Blain, January 11, 2018.)

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1. The person flying the model aircraft is responsible for contacting the airport directly. ↵

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15.8: INTERNET PRIVACY

The statement internet privacy is an oxymoron. It can be argued that privacy on the internet does not exist. What is most interesting is how willingly many people give it up. The use of social media, smartphones and unsecured Wi-Fi are everyday occurrences.

The following excerpts are from The Harvard Gazette article, *On internet privacy, be very afraid* by Liz Mineo, Harvard Staff Writer dated August 24, 2017. She interviewed cybersecurity expert Bruce Schneier, a fellow with the Berkman Klein Center for Internet & Society and the Belfer Center for Science and International Affairs at Harvard Kennedy School. The interview illustrates how the use of the internet subjects all of us to our loss of privacy. The article makes the point that while we may have legitimate concerns about the government violating our constitutionally protected privacy rights, perhaps our bigger concerns should be with big business. (https://news.harvard.edu/gazette/story/2017/08/when-it-comes-to-internet-privacy-be-very-afraid-analyst-suggests/)

> In the internet era, consumers seem increasingly resigned to giving up fundamental aspects of their privacy for convenience in using their phones and computers, and have grudgingly accepted that being monitored by corporations and even governments is just a fact of modern life.
>
> In fact, internet users in the United States have fewer privacy protections than those in other countries.
>
> GAZETTE: After whistleblower Edward Snowden's revelations concerning the National Security Agency's (NSA) mass surveillance operation in 2013, how much has the government landscape in this field changed?
>
> SCHNEIER: Snowden's revelations made people aware of what was happening, but little changed as a result. The USA Freedom Act resulted in some minor changes in one particular government data-collection program. The NSA's data collection hasn't changed; the laws limiting what the NSA can do haven't changed; the technology that permits them to do it hasn't changed. It's pretty much the same.
>
> GAZETTE: What about corporate surveillance? How pervasive is it?
>
> SCHNEIER: Surveillance is the business model of the internet. Everyone is under constant surveillance by many companies, ranging from social networks like Facebook to cellphone providers. This data is collected, compiled, analyzed, and used to try to sell us stuff. Personalized advertising is how these companies make money, and is why so much of the internet is free to users. We're the product, not the customer.
>
> GAZETTE: It seems that U.S. customers are resigned to the idea of giving up their privacy in exchange for using Google and Facebook for free. What's your view on this?
>
> SCHNEIER: The survey data is mixed. Consumers are concerned about their privacy and don't like companies knowing their intimate secrets. But they feel powerless and are often resigned to the privacy invasions because they don't have any real choice. People need to own credit cards, carry cellphones, and have email addresses and social media accounts. That's what it takes to be a fully functioning human being in the early 21st century. This is why we need the government to step in.
>
> GAZETTE: You're one of the most well-known cybersecurity experts in the world. What do you do to protect your privacy online?
>
> SCHNEIER: I don't have any secret techniques. I do the same things everyone else does, and I make the same tradeoffs that everybody else does. I bank online. I shop online. I carry a cellphone, and it's always turned on. I use credit cards and have airline frequent flier accounts. Perhaps the weirdest thing about my internet behavior is that I'm not on any social media platforms. That might make me a freak, but honestly, it's good for my productivity. In general, security experts aren't paranoid; we just have a better understanding of the trade-offs we're doing. Like everybody else, we regularly give up privacy for convenience. We just do it knowingly and consciously.
>
> GAZETTE: What else do you do to protect your privacy online? Do you use encryption for your email?
>
> SCHNEIER: I have come to the conclusion that email is fundamentally insecurable. If I want to have a secure online conversation, I use an encrypted chat application like Signal. By and large, email security is out of our

control. For example, I don’t use Gmail because I don’t want Google having all my email. But last time I checked, Google has half of my email because you all use Gmail.

GAZETTE: Is Google the “Big Brother?”

SCHNEIER: “Big Brother” in the Orwellian sense meant big government. That’s not Google, and that’s not even the NSA. What we have is many “Little Brothers”: Google, Facebook, Verizon, etc. They have enormous amounts of data on everybody, and they want to monetize it. They don’t want to respect your privacy.

(This is not the entire interview which has been edited for length by the Author.)

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Committee on Open Government. (n.d.). Retrieved July 28, 2018, from https://www.dos.ny.gov/coog/freedomfaq.html

FindLaw's United States Supreme Court case and opinions. (n.d.). Retrieved July 28, 2018, from https://caselaw.findlaw.com/us-supreme-court/410/113.html

Griswold v. Connecticut. (n.d.). Retrieved July 28, 2018, from https://www.law.cornell.edu/supremecourt/text/381/479

Mineo, L. (2017, August 24). When it comes to internet privacy, be very afraid, analyst suggests. Retrieved July 28, 2018, from https://news.harvard.edu/gazette/story/2017/08/when-it-comes-to-internet-privacy-be-very-afraid-analyst-suggests/

Office for Civil Rights. (n.d.). Your Health Information Privacy Rights. Retrieved July 28, 2018, from https://www.hhs.gov/sites/default/files/ocr/privacy/hipaa/understanding/consumers/consumer_rights.pdf

Planned Parenthood of Southeastern Pennsylvania v. Casey. (n.d.). Retrieved July 28, 2018, from https://www.law.cornell.edu/supremecourt/text/505/833

Pogue, D. L., Clifford, E., & Schwartz, A. L. (2009). Understanding New York Law, 2013-14. Upstate Legal Publishers

Prosser, W. J. (1960). Privacy. California Law Review, 48(3), 1-42. Retrieved July 28, 2018, from https://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=3157&context=californialawreview.

USA Freedom Act Archives. (n.d.). Retrieved July 28, 2018, from https://judiciary.house.gov/issue/usa-freedom-act/

Warren, S. D., & Brandeis, L. D. (1890). The Right to Privacy. Harvard Law Review, 4(5), 193-220. Retrieved July 27, 2018, from https://www.jstor.org/stable/pdf/1321160.pdf?refreqid=excelsior:c94503ca104f06654246d39c944f72f1.

What is the USA Patriot Web. (n.d.). Retrieved July 28, 2018, from https://www.justice.gov/archive/ll/highlights.htm

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