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**APOSTLE OF FUNDAMENTAL FAIRNESS:  
NEW YORK COURT OF APPEALS  
JUDGE STEWART F. HANCOCK, JR.'S STATE  
CONSTITUTIONAL DECISION-MAKING**

**By Thompson Gould Page\***

INTRODUCTION

As a member of the New York Court of Appeals since 1986,<sup>1</sup> Judge Stewart F. Hancock, Jr., who will leave the court this year due to mandatory retirement,<sup>2</sup> has approached cases implicating constitutional rights and liberties with an overriding commitment to establishing a rule of law that is most sensible and equitable.<sup>3</sup> Whether in a majority opinion or in one of his numerous and substantive dissents, perhaps the most recurring underpinning of Judge Hancock's jurisprudence in fundamental rights and liberties cases is his emphasis on fairness.<sup>4</sup>

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\* The author received his J.D. from Albany Law School in 1992 and is a solo practitioner admitted to practice in New York and Connecticut. He would like to express his appreciation to Judge Hancock for granting an extensive four hour interview on December 6, 1991. The author would also like to thank his wife Karen and Professor Vincent M. Bonaventure for their encouragement and support.

1. Judge Stewart F. Hancock, Jr. spent fourteen years as a state Supreme Court justice, nine of those years on the Appellate Division, Fourth Department, before being appointed to the New York Court of Appeals by Governor Mario M. Cuomo in 1986.

2. N.Y. CONST. art. VI, § 25(b). This provision provides in pertinent part: "Each judge of the court of appeals . . . shall retire on the last day of December in the year in which he reaches the age of seventy." *Id.*

3. See generally Stewart F. Hancock, *Bill of Particulars, Upon Due Deliberation: Appeals in the Court of Appeals*, N.Y. ST. TRIAL LAW. INST., Nov./Dec. 1989, at 7 [hereinafter Hancock, *Upon Due Deliberation*]; Stewart F. Hancock, *A Century of Law: Continuity in Change*, N.Y. ST. B.J., Jan. 1991, at 29.

4. See *infra* subsection I and the cases cited therein, discussing how the notion of fairness is crucial.

The purpose of this article is to discuss the dominant theme of fundamental fairness in Judge Hancock's constitutional rights and liberties jurisprudence.<sup>5</sup> In addition, the importance that Judge Hancock places on notions of criminal responsibility,<sup>6</sup> expressional freedoms<sup>7</sup> and expectations of privacy,<sup>8</sup> areas often evok-

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5. The aim of this article is to discuss overarching philosophies of Judge Hancock's jurisprudence in rights and liberties cases, and not to predict how he might vote on free speech, privacy, search and seizure or other "topical" issues. Judge Hancock's underlying motivations and approaches to adjudication are more often pronounced in his forceful and meaningful dissents. Accordingly, such dissents are a primary source for this analysis.

6. *See* *People v. Gensler*, 72 N.Y.2d 239, 527 N.E.2d 1209, 532 N.Y.S.2d 72 (1988) (mental competency); *People v. Kohl*, 72 N.Y.2d 191, 527 N.E.2d 1182, 532 N.Y.S.2d 45 (1988) (insanity defense); *People v. Marrero*, 69 N.Y.2d 382, 507 N.E.2d 1068, 515 N.Y.S.2d 212 (1987) (mistake of law); *see also* *People v. Outley*, No. 93-24, 1993 WL 36141 (N.Y. Feb. 16, 1993) (Judge Hancock, writing for the court, held that when a defendant has agreed to a plea-bargain containing a no-arrest condition and the defendant is arrested prior to sentencing, the court has the power to impose sentences substantially greater than stipulated in the conditional plea-bargain despite the fact that an evidentiary hearing was not held.).

7. *See* *People v. Dietze*, 75 N.Y.2d 47, 549 N.E.2d 1166, 550 N.Y.S.2d 595 (1989) (Judge Hancock, writing for the court, invalidated the abusive language section of a harassment statute proclaiming it barred a substantial amount of state and federal constitutionally protected speech and was overbroad.); *see also* *Golden v. Clark*, 76 N.Y.2d 618, 564 N.E.2d 611, 563 N.Y.S.2d 1 (1990) (Hancock, J., dissenting) (Judge Hancock expressed strong disapproval of restrictions on certain New York City government officials from also holding high political party positions, stating that it was a curtailment of associational and expressional freedoms which implicated fundamental rights under the New York State Constitution.).

8. *See* *People v. Reynolds*, 71 N.Y.2d 552, 559, 523 N.E.2d 291, 294, 528 N.Y.S.2d 15, 18 (1988) (Hancock, J., dissenting) (Judge Hancock disagreed with the majority that the warrantless aerial surveillance and ground search of defendant's property was justified because defendant had not established a reasonable expectation of privacy by taking precautions to exclude public entry); *see also* *People v. Scott*, 79 N.Y.2d 474, 593 N.E.2d 1328, 583 N.Y.S.2d 920 (1992) (Judge Hancock, writing for the court, explained that by posting no trespassing signs and erecting fences, defendant had expressed a reasonable expectation of privacy on his property under the state constitution.); *Johnson Newspaper Corp. v. Melino*, 77 N.Y.2d 1, 10, 564 N.E.2d 1046, 1051, 563 N.Y.S.2d 380, 385 (1990) ("keeping

ing constitutional interpretations, are also examined. These jurisprudential themes arise throughout the case law surveyed, regardless of the substantive context of a particular case.<sup>9</sup> Finally, this article will explore Judge Hancock's view of independent state constitutional adjudication and its relationship to corresponding federal constitutional law as articulated by the Supreme Court.

### I. FUNDAMENTAL FAIRNESS

Though often espousing the importance of societal interests,<sup>10</sup> Judge Hancock's concern herein is not a pretext for supporting government and criminal enforcement. His concern for society and for fairness to the individual are not necessarily diametric positions, and should not be confused with the oft-used comparisons of jurists as being either pro-prosecution or pro-defense, and

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disciplinary hearings involving licensed professionals confidential until they are finally determined").

9. *See, e.g.*, *People v. Gensler*, 72 N.Y.2d 239, 527 N.E.2d 1209, 532 N.Y.S.2d 72 (1988) (mental competency); *People v. Kohl*, 72 N.Y.2d 191, 527 N.E.2d 1182, 532 N.Y.S.2d 45 (1988) (insanity defense); *People v. Marrero*, 69 N.Y.2d 382, 507 N.E.2d 1068, 515 N.Y.S.2d 212 (1987) (mistake of law); *Briggins v. McGuire*, 67 N.Y.2d 965, 494 N.E.2d 90, 502 N.Y.S.2d 985 (1986) (administrative due process).

10. *See People v. Green*, 75 N.Y.2d 902, 907, 553 N.E.2d 1331, 1333, 554 N.Y.S.2d 821, 823 (1990) (Hancock, J., dissenting) (racial discrimination "is a fundamental flaw that implicates . . . society's interests in the integrity of the criminal process itself"); *O'Neill v. Oakgrove Constr., Inc.*, 71 N.Y.2d 521, 525, 523 N.E.2d 277, 281, 528 N.Y.S.2d 1, 5 (1988) (Judge Hancock, writing for the court, stated that a reporter's privilege will allow more time for reporting news, thus maintaining the vitality of a free press for society).

Judge Hancock recently stated at a lecture at Albany Law School that he believed the only legitimate purpose of law was the betterment of society; that law should serve society and try to improve it. He explained that his thinking was most parallel with the likes of "Rousseau who believes that mankind is not inherently evil and with Kant, Lon Fuller, Rawls, Aristotle and Dworkin, who believe that there is some moral component in law — some quality of what is right and just." Judge Stewart F. Hancock, Jr., Lecture at Albany Law School, (April 27, 1992).

“conservative” or “liberal.”<sup>11</sup> Rather, Judge Hancock believes social policy objectives are served by fairness,<sup>12</sup> and this notion resounds in a number of his opinions, whether or not he is advocating the defendant’s claim, and whether or not societal interests are implicated.<sup>13</sup>

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11. For extensive discussions and statistical analyses of voting records of current members of the New York Court of Appeals, see Vincent M. Bonventre, *Court of Appeals-State Constitutional Law Review, 1990*, 12 PACE L. REV. 1 (1992) [hereinafter Bonventre, *State Constitutional Law*]; Vincent M. Bonventre, *State Constitutional Adjudication at The Court of Appeals, 1990 and 1991: Retrenchment is the Rule*, 56 ALB. L. REV. 119 (1992) [hereinafter Bonventre, *Retrenchment is the Rule*]; Daniel Wise, *Wachtler Court at 5*, N.Y. L.J., Oct. 15, 1991, at S-3 (annual supplement on N.Y. Court of Appeals).

12. *People v. Wesley*, 73 N.Y.2d 351, 362, 538 N.E.2d 76, 87, 540 N.Y.S.2d 757, 768 (1989) (Hancock, J., dissenting) (in refuting majority’s claim that precedent mandated its decision, Judge Hancock noted occasions “when the social interests of symmetry and certainty to be served by adherence to precedent must give way to the social interests served by equity and fairness”).

13. Compare *People v. Carter*, 77 N.Y.2d 95, 566 N.E.2d 119, 564 N.Y.S.2d 992 (1990) (defendant received fair trial even though prosecutor was an unlicensed attorney) with *People v. Marrero*, 69 N.Y.2d 382, 405, 507 N.E.2d 1068, 1081, 515 N.Y.S.2d 212, 225 (1987) (Hancock, J., dissenting) (voting to overturn a correction officer’s conviction for weapons possession because the defendant believed he had a right to carry a gun and thus he correctly claimed the mistake of law defense). See also *People v. Castillo*, 80 N.Y.2d 578, 607 N.E.2d 1050, 592 N.Y.S.2d 945 (1992) (Hancock, J., dissenting). *Castillo* involved a claimant’s right to a hearing when challenging a search warrant. Judge Hancock wrote a strong dissent stating that “[d]epriving a defendant of any participation in or knowledge of a suppression hearing where the issues involve both probable cause and invalidity because of police misconduct is without precedent.” *Id.* at 588, 607 N.E.2d at 1055, 592 N.Y.S.2d at 950 (Hancock, J., dissenting). Moreover, Judge Hancock maintained that “conflicts with fundamental tenets of fairness and due process of law [are] inherent in our Federal and State Constitutions.” *Id.* He concluded: “Secret proceedings of this nature . . . are repugnant to the concepts of ‘fair play which have evolved through centuries of Anglo-American constitutional history,’ particularly as applied to the relationship ‘between the individual and the government.’” *Id.* (Hancock, J., dissenting) (quoting *Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 162 (1951) (Frankfurter, J., concurring)).

During calendar years 1990 and 1991 (which are coterminous with the official court years) the New York Court of Appeals rendered twenty-eight divided decisions involving a material state constitutional right or liberty issue.<sup>14</sup> Of these decisions, Judge Hancock supported the individual rights claimants of 54% of the time while voting to uphold the government or prosecution claim in 46% of these cases.<sup>15</sup> Not surprisingly, rather than being labeled a "conservative" based upon his prior Republican political affiliations and upstate New York origins, Judge Hancock has been referred to as a "centrist,"<sup>16</sup> and as a potential swing vote amongst the members of the court of appeals.<sup>17</sup>

The cases which particularly illustrate Judge Hancock's emphasis on the notion of fundamental fairness reflect a broad spectrum of legal contexts.<sup>18</sup> In *People v. Green*,<sup>19</sup> Judge Hancock

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14. Bonventre, *Retrenchment Is The Rule*, *supra* note 11, at 145 app.

15. *Id.* Additionally, in forty-three criminal cases decided by the court from August, 1990 to August, 1991, Judge Hancock voted for the prosecution's claim in twenty-one of these cases and for the defendant in twenty-two of them. In twelve of these cases where the court was divided, he voted to uphold the defendant's claim in seven of them. *See also* Wise, *supra* note 11, at S-3.

16. Bonventre, *Retrenchment is the Rule*, *supra* note 11, at 143 app.

17. *See* Wise, *supra* note 11, at S-3; *see also* Bonventre, *State Constitutional Law*, *supra* note 11, at 1.

18. *See, e.g.*, *Wieder v. Skala*, 61 U.S.L.W. 2393 (N.Y. Dec. 22, 1992) (No. 256) (Hancock, J., writing for the court) (attorney who alleged that law firm wrongfully discharged him in retaliation for insisting that firm report ethics violations of a colleague may, despite employee at-will status, maintain breach-of-contract claim under New York law against firm based on implied obligation that both attorney and firm would conduct practice in accordance with ethical standards of legal profession); *Ingle v. Glamore Motors*, 73 N.Y.2d 183, 190, 535 N.E.2d 1311, 1315, 538 N.Y.S.2d 771, 775 (1989) (Hancock, J., dissenting) (while majority refused to apply principles of fiduciary duty, Judge Hancock asserted that alleged bad faith discharge of long-term employee/minority stockholder, upheld under employee-at-will doctrine, was "egregiously unfair"); *see also* *Cohen v. Lord, Day, & Lord* 75 N.Y.2d 95, 550 N.E.2d 410, 551 N.Y.S.2d 157 (1989) (Hancock, J., dissenting). In *Cohen*, a former law partner brought suit to invalidate a partnership termination agreement. Judge Hancock stated that "[p]laintiff . . . does not and surely cannot in good conscience claim that the agreement is unfair." *Id.* at 103-04, 550 N.E.2d at 415, 551 N.Y.S.2d at 162.

wrote a compelling dissent in response to an unsigned memorandum decision which held that the right to challenge errors in jury selection, in this case alleged race-based peremptory challenges by the prosecution, is a trial right, and that a guilty plea waived those rights.<sup>20</sup> He asserted that racially motivated peremptory challenges implicated not only a defendant's trial rights, but his rights to equal protection as well.<sup>21</sup> Judge Hancock, joined by Judge Alexander, vigorously responded to what he viewed as a constricted interpretation of a defendant's criminal rights encompassing notions of fundamental fairness inherent to equal protection to buttress those rights.<sup>22</sup>

While conceding that a guilty plea necessarily relinquishes the defendant's right to a jury trial, Judge Hancock asserted that such a plea by the defendant "[wa]s certainly not a decision to relinquish the right to equal racial protection in the conduct of the criminal proceeding regardless of the stage in the process."<sup>23</sup> Nor can the denial of a racially neutral trial be deemed a "technical

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Indeed, during plaintiff's time with the firm other partners had withdrawn, and as a remaining partner, Judge Hancock reasoned that he accepted the benefits of the very withdrawal provision he now attacked. *Id.* at 103-04, 550 N.E.2d at 415, 551 N.Y.S.2d at 162.

19. 75 N.Y.2d 902, 553 N.E.2d 1331, 554 N.Y.S.2d 821 (1990).

20. *Id.* at 904, 553 N.E.2d at 1332, 554 N.Y.S.2d at 822. The decision, void of any discussion of the constitutional implications, stated that the assertion of a *Batson* violation based upon the prosecution's exercise of peremptory challenges could not be raised after the defendant pleaded guilty following his motion for a mistrial. *Id.* Thus, "[b]y pleading guilty instead of going to trial, the defendant waived all of his trial rights and thus necessarily surrendered his right to challenge on appeal any alleged trial errors." *Id.* at 904-05, 553 N.E.2d at 1332, 554 N.Y.S.2d at 822. The court held that "[t]he claimed *Batson* violation is a trial matter which is part of the jury trial right itself. Inasmuch as we have held that the whole jury trial right may be waived[,] . . . there is no basis in law or logic for permitting one component of the plenary right to survive a guilty plea." *Id.* at 905, 553 N.E.2d at 1332, 554 N.Y.S.2d at 822.

21. *Id.* at 905, 553 N.E.2d at 1332, 554 N.Y.S.2d at 822 (Hancock, J., dissenting).

22. *Id.* (Hancock, J., dissenting).

23. *Id.* at 906, 553 N.E.2d at 1333, 554 N.Y.S.2d at 823 (Hancock, J., dissenting).

defect" which is waivable by a guilty plea.<sup>24</sup> Instead, Judge Hancock labeled racial discrimination in the jury selection process as "a fundamental flaw that implicates both the individual defendant's entitlement to basic fairness and society's interests in the integrity of the criminal process itself."<sup>25</sup>

For Judge Hancock, the test for whether or not the claimed trial defect implicates fundamental fairness or societal interests determines whether such claims can be raised on appeal.<sup>26</sup> In drawing that line, Judge Hancock noted that the critical distinction is between "jurisdictional or constitutional defects which implicate the integrity of the process and other less fundamental flaws [such as] evidentiary or technical matters."<sup>27</sup> Judge Hancock drew upon past court of appeals' decisions in determining whether the defendant had forfeited his claim by entering a guilty plea. He noted that a defendant's claims have survived a guilty plea when they implicated jurisdictional defects, speedy trial violations, double jeopardy, incompetency to stand trial, illegality of sentence, and the prosecutor's knowing use of false evidence in an accusatory instrument.<sup>28</sup> Judge Hancock maintained that these claims survived the guilty plea because they invoked societal interests that "recognized [these rights] as a matter of fairness

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24. *Id.* (Hancock, J., dissenting).

25. *Id.* at 907, 553 N.E.2d at 1333, 554 N.Y.S.2d at 823 (Hancock, J., dissenting).

26. *Id.* at 907, 553 N.E.2d at 1334, 554 N.Y.S.2d at 824 (Hancock, J., dissenting).

27. *Id.* (Hancock, J., dissenting).

28. *Id.* (Hancock, J., dissenting) (citing *People v. Prescott*, 66 N.Y.2d 216, 486 N.E.2d 813, 495 N.Y.S.2d 955 (1985) (double jeopardy); *People v. Pelchat*, 62 N.Y.2d 97, 464 N.E.2d 447, 476 N.Y.S.2d 79 (1984) (use of illegal evidence in an accusatory instrument); *People v. Case*, 42 N.Y.2d 98, 365 N.E.2d 872, 396 N.Y.S.2d 841 (1977) (jurisdictional defects in accusatory instrument); *People v. Armlin*, 37 N.Y.2d 167, 332 N.E.2d 870, 371 N.Y.S.2d 691 (1975) (incompetency); *People v. Blakely*, 34 N.Y.2d 311, 313 N.E.2d 763, 357 N.Y.S.2d 459 (1974) (speedy trial violation); *People v. Francabandera*, 33 N.Y.2d 429, 310 N.E.2d 292, 354 N.Y.S.2d 609 (1974) (illegal sentencing)).



to the accused but *they also embrace the reality of fairness in the process itself* and, therefore, a defendant may not waive them."<sup>29</sup>

In turning to racial discrimination in jury selection, Judge Hancock found this practice to be an "anathema to the mandate of fundamental fairness in our criminal process," and concluded that any "conviction infected by it — whether that conviction be by verdict or guilty plea — should [not] be permitted to stand."<sup>30</sup> He concluded that because racial discrimination in the criminal process may force a defendant to plead guilty rather than face a fundamentally unfair trial, "[a] choice between a guilty plea and an inherently unfair trial is no choice at all."<sup>31</sup>

While Judge Hancock refused to find race-based peremptory challenges a technical defect which can be waived, since it was contrary to fundamental fairness, this did not preclude him from overlooking technicalities if the parties received fair treatment under the law.<sup>32</sup> In *People v. Carter*,<sup>33</sup> Judge Hancock addressed

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29. *Id.* at 908-09, 553 N.E.2d at 1335, 554 N.Y.S.2d at 825 (Hancock, J., dissenting) (emphasis added) (citing *People v. Seaberg*, 74 N.Y.2d 1, 9, 541 N.E.2d 1022, 1025, 543 N.Y.S.2d 968, 971 (1989)).

30. *Id.* at 911, 553 N.E.2d at 1336, 554 N.Y.S.2d at 826 (Hancock, J., dissenting).

31. *Id.* at 911-12, 553 N.E.2d at 1337, 554 N.Y.S.2d at 827 (Hancock, J., dissenting).

32. *See People v. Edmonson*, 75 N.Y.2d 672, 554 N.E.2d 1254, 555 N.Y.S.2d 666 (1990) (Judge Hancock, writing for the court, upheld the use of videotape surveillance of a defendant for a victim's extra-judicial identification of her assailant as fair to the defendant, as long as the tape was presented to the victim in an unbiased manner.). *But see People v. Cintron*, 75 N.Y.2d 249, 551 N.E.2d 561, 552 N.Y.S.2d 68 (1990). Despite a two hour examination and positive conclusion by the court of a child's propensity to be harmed by testifying in a sex crime trial, Judge Hancock, writing for the majority, rejected this procedure and ruled instead that a separate hearing on the matter must be held in order to safeguard the defendant's right to fair treatment. *Id.* at 258, 551 N.E.2d at 567, 552 N.Y.S.2d at 74. In declaring that neither state nor federal law granted an absolute right to confrontation, Judge Hancock nonetheless said that only a procedure deemed fair to the defendant justified compromising his due process rights to confrontation and an impartial jury. *Id.* at 259, 551 N.E.2d at 567, 552 N.Y.S.2d at 74. Though the dissent claimed the trial court's own analysis of the child had been sufficient, Judge Hancock stated this did not keep "the infringement on the defendant's confrontation rights . . . to a minimum." *Id.* at 258, 551 N.E.2d at 567, 552 N.Y.S.2d at

the fairness of a criminal defendant being prosecuted by an unlicensed attorney.<sup>34</sup> Judge Hancock argued that unless there were aspects of the trial where the prosecuting attorney's unlicensed status deprived the defendant of fair treatment or resulted in prejudice, the conviction would stand.<sup>35</sup> Despite rules prohibiting the unauthorized practice of law,<sup>36</sup> Judge Hancock held that it was the defendant's fair treatment that was determinative of whether to overturn his conviction.<sup>37</sup> The dissent rather predictably contended that the court was, in effect, sanctioning state prosecutions by "an unadmitted layperson masquerading as an attorney."<sup>38</sup>

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74. For Judge Hancock, the seeming technicality of a hearing versus the court's own examination rose to the level of constitutional infringement. *Id.*

33. 77 N.Y.2d 95, 566 N.E.2d 119, 564 N.Y.S.2d 992 (1990), *cert. denied*, 111 S. Ct. 1599 (1991).

34. *Id.* at 102, 566 N.E.2d at 121, 564 N.Y.S.2d at 994. Judge Hancock, writing for the court, dismissed the defendant's primary claim that because the prosecutor could not properly serve as an Assistant District Attorney his presence at a Grand Jury was unauthorized by statute, noting that his unauthorized presence was only recognized when the prosecution lacked jurisdiction. *Id.* at 104, 566 N.E.2d at 122, 564 N.Y.S.2d at 995 (citing N.Y. CRIM. PROC. LAW § 190.25(3)(a) (McKinney 1990)).

35. *Id.* at 106, 566 N.E.2d at 123, 564 N.Y.S.2d at 996. Judge Hancock noted the proceeding's continued secrecy, the sixteen year tenure of the prosecutor and the lack of authority, under either state or federal constitutional analysis, for a right to be prosecuted by a duly admitted attorney as factors suggesting the defendant received a fair trial. *Id.* at 105, 566 N.E.2d at 122, 564 N.Y.S.2d at 995.

36. *See* N.Y. JUD. APP. CODE OF PROFESSIONAL RESPONSIBILITY DR 3-101 (McKinney 1990).

37. *Carter*, 77 N.Y.2d at 106, 566 N.E.2d at 123, 564 N.Y.S.2d at 996. Judge Hancock rejected the claim that no prejudice need be shown since prosecution by a licensed attorney was a fundamental right in felony cases. *Id.* He stated that "[defendant] point[s] to no aspect of the case where [the prosecutor's] not being a lawyer assertedly deprived [him] of a fair trial or resulted in prejudice." *Id.*

38. *Id.* at 108, 566 N.E.2d at 124, 564 N.Y.S.2d at 997 (Titone, J., dissenting). Judge Hancock conceded the defendant *should* have been prosecuted by a duly admitted attorney, however, he concluded the determinative factor was "whether . . . defendant's prosecution by a nonlawyer, standing alone, has deprived [him] of protections guaranteed by the Federal and State Constitutions." *Id.*

Judge Hancock will frequently depart from the majority when he believes common sense and justice demand it.<sup>39</sup> For example, in *People v. Wesley*,<sup>40</sup> Judge Hancock's powerful dissent, joined by Judge Titone, laid bare the incongruity of allowing the State to charge a defendant with possession of contraband based solely on his control over the place where contraband was found, and then denying him standing to challenge the search of that place.<sup>41</sup> Judge Hancock pointedly reminded the majority of the court's conclusion in *People v. Millan*,<sup>42</sup> "that the overriding concern was the unfairness of permitting the People to assert squarely contradictory positions."<sup>43</sup> According to Judge Hancock, the majority's opinion in *Wesley* enabled the State to have it both ways<sup>44</sup> while offering "no purposive, policy, or societal rea-

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39. See, e.g., *People v. Wesley*, 73 N.Y.2d 351, 364, 538 N.E.2d 76, 84, 540 N.Y.S.2d 757, 765 (1989) (Hancock, J., dissenting). Judge Hancock agreed that this was perhaps one of his most fervent and emphatic dissenting opinions since joining the court in 1986. Interview with the Hon. Stewart F. Hancock, Jr., Judge of the New York Court of Appeals, in Albany, N.Y. (Dec. 6, 1991). See also *People v. Green*, 75 N.Y.2d 902, 905, 553 N.E.2d 1331, 1332, 554 N.Y.S.2d 821, 822 (1990) (Hancock, J., dissenting); *Golden v. Clark*, 76 N.Y.2d 618, 631, 564 N.E.2d 611, 618, 563 N.Y.S.2d 1, 8 (1990) (Hancock, J., dissenting); *People v. Kohl*, 72 N.Y.2d 191, 200, 527 N.E.2d 1182, 1187, 532 N.Y.S.2d 45, 50 (1988) (Hancock, J., dissenting); *People v. Marrero*, 69 N.Y.2d 382, 392, 507 N.E.2d 1068, 1073, 515 N.Y.S.2d 212, 217 (1987) (Hancock, J., dissenting).

40. 73 N.Y.2d 351, 538 N.E.2d 76, 540 N.Y.S.2d 757 (1989).

41. *Id.* at 364-65, 538 N.E.2d at 84, 540 N.Y.S.2d at 765 (Hancock, J., dissenting). Regarding events in *Wesley*, Judge Hancock stated:

Here defendant's guilt is predicated solely on the People's claim that he had possessory control over the apartment where the drugs and gun were found . . . . [To then] deny that defendant had such dominion and control in order to bar his challenge to the concededly illegal search of the apartment [is an] assertion of such squarely contradictory positions.

*Id.* at 365, 538 N.E.2d at 85, 540 N.Y.S.2d at 766 (Hancock, J., dissenting).

42. 69 N.Y.2d 514, 508 N.E.2d 903, 516 N.Y.S.2d 168 (1987).

43. *Wesley*, 73 N.Y.2d at 365, 538 N.E.2d at 91, 540 N.Y.S.2d at 772 (Hancock, J., dissenting).

44. *Id.* at 368, 538 N.E.2d at 86, 540 N.Y.S.2d at 767 (Hancock, J., dissenting) (Judge Hancock's comment was made in reference to the doctrine laid down in *Millan*, one that embodies the principle of judicial estoppel.).

son . . . to all but jettison . . . the sound and just principle of *Millan* . . . ."<sup>45</sup>

Two years earlier, in *People v. Millan*, Judge Hancock, writing for the court, held that a defendant's state<sup>46</sup> and federal<sup>47</sup> constitutional rights were violated by a statute<sup>48</sup> which denied standing to a defendant who was charged with constructive possession of a weapon simply by being a passenger in the cab where a gun was found<sup>49</sup> from challenging the search at a suppression hearing.<sup>50</sup> Judge Hancock asserted that "to deny a defendant a hearing under th[ose] circumstances would be repugnant to the requirements of fair play which have 'evolved through centuries of Anglo-American constitutional history,' particularly as applied to the relationship 'between the individual and the government.'"<sup>51</sup> According to Judge Hancock, granting this power to the State would erect a

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45. *Id.* at 369, 538 N.E.2d at 87, 540 N.Y.S.2d at 768 (Hancock, J., dissenting).

46. N.Y. CONST. art. I, § 12. Section 12 states in pertinent part: "The right of the people to be secure . . . against unreasonable searches and seizures, shall not be violated . . ." *Id.*

47. U.S. CONST. amend. IV. The Fourth Amendment states in pertinent part: "The right of the people to be secure . . . against unreasonable searches and seizures, shall not be violated . . ." *Id.*

48. N.Y. PENAL LAW § 265.15(3) (McKinney 1980). The statute reads in pertinent part: "The presence in an automobile . . . of any firearm . . . is presumptive evidence of its possession by all persons occupying such automobile at the time such weapon . . . is found . . ." *Id.*

49. *Millan*, 69 N.Y.2d at 516, 508 N.E.2d at 904, 516 N.Y.S.2d at 168. Referring to the jury trial, Judge Hancock stated that "the only basis for guilt was the statutory rule that the presence of a gun in an automobile 'is presumptive evidence of its possession by all persons occupying such automobile at the time [it] is found.'" *Id.* (quoting N.Y. PENAL LAW § 265.15(3) (McKinney (1980))).

50. *Id.* at 518, 508 N.E.2d at 905, 516 N.Y.S.2d at 170. The court concluded that the defendant's rights as a passenger in a taxicab were no greater than the rights of the passenger in the private automobile involved in *Rakas v. Illinois*, 439 U.S. 128 (1978), and reasoned that defendant could, therefore, claim no right of privacy in the area searched. *Id.* at 520, 508 N.E.2d at 907, 516 N.Y.S.2d at 172.

51. *Id.* at 519-20, 508 N.E.2d at 906, 516 N.Y.S.2d at 171 (quoting *Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 162 (1951) (Frankfurter, J., concurring)).

rule which "offends fundamental tenets of fairness inherent in New York criminal jurisprudence . . . ."52

In *Wesley*, Judge Hancock viewed the majority's denial of standing to a similarly situated defendant as an abrupt reversal of the "logic and simple justice" of *Millan*.<sup>53</sup> Similarly to *Millan*, the defendant's conviction in *Wesley* for constructive possession of drugs and a gun was based solely on his dominion and control over an apartment where the contraband was seized.<sup>54</sup> Judge Hancock could not accept that under the *Millan* rationale, the defendant had not established a legitimate expectation of privacy sufficient for standing.<sup>55</sup> He therefore labeled the majority's decision "an unarticulated policy choice to retreat from [the] *Millan-Mosley* [rule]."<sup>56</sup> Although Judge Hancock respects the practical limitations on authoring a dissenting opinion, he will freely do so when he believes the majority has reached an unfair result.<sup>57</sup>

Judge Hancock's decisions, however, whether in dissent or for the court, reflect his preference for the rule, either federal and/or state, which seems most sensible and treats the parties most equitably. This was clearly illustrated in *Deas v. Levitt*<sup>58</sup> which concerned a civil service employee's promotion eligibility follow-

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52. *Id.* at 520, 508 N.E.2d 906, 516 N.Y.S.2d 171 (1987) (citations omitted).

53. *Wesley*, 73 N.Y.2d at 364, 538 N.E.2d at 84, 540 N.Y.S.2d at 765 (Hancock, J., dissenting).

54. *Id.* at 352, 538 N.E.2d at 76, 540 N.Y.S.2d at 757 (Hancock, J., dissenting).

55. *Id.* at 365-66, 538 N.E.2d at 85, 540 N.Y.S.2d at 766 (Hancock, J., dissenting).

56. *Id.* at 376, 538 N.E.2d at 91, 540 N.Y.S.2d at 772 (Hancock, J., dissenting). The requirement that a defendant establish a personal privacy interest in the searched premises to acquire standing parallels recent United States Supreme Court interpretations of Fourth Amendment rights, abrogating the automatic standing rule for defendants charged with possessory crimes. *See, e.g., Rakas v. Illinois*, 439 U.S. 128 (1978).

57. However, Judge Hancock acknowledged the desirability of group cohesiveness on the court. Interview with the Hon. Stewart F. Hancock, Jr., Judge of the New York Court of Appeals, in Albany, N.Y. (Dec. 6, 1991).

58. 73 N.Y.2d 525, 539 N.E.2d 1086, 541 N.Y.S.2d 958 (1989), *cert. denied*, 493 U.S. 933 (1989).

ing the nullification of his rejection for being mentally unfit.<sup>59</sup> The majority held petitioner was not entitled to placement on a special eligibility list<sup>60</sup> because he had not concurrently addressed the validity of the original list and commenced a proceeding before that list was expired.<sup>61</sup> Judge Hancock, joined by Judge Titone, dissented and characterized this as "a highly restrictive interpretation of the principle in *Mena*,"<sup>62</sup> which, in Judge Hancock's view, "reflect[ed] both a principle of fairness to the applicant and the state's interest in the integrity of the merit and fitness system . . . ." <sup>63</sup>

Judge Hancock claimed that the "unfair, arbitrary and unequal result" of the majority's "strict" rule wrongfully denied petitioner of his property interest in his position.<sup>64</sup> In support of his posi-

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59. *Id.* at 527, 539 N.E.2d at 1087, 541 N.Y.S.2d at 959.

60. *Id.* at 532, 539 N.E.2d at 1091, 541 N.Y.S.2d at 963 (Hancock, J., dissenting). In short, petitioner was erroneously removed from an eligibility list, and before the appeal process could rectify this error, the list had expired, leaving petitioner with no remedy under the majority rule. *Id.* at 527-28, 539 N.E.2d at 1087, 541 N.Y.S.2d at 959 (Hancock, J., dissenting). According to Judge Hancock, "[b]y any standard of fairness and common sense," *id.* at 536, 539 N.E.2d at 1093, 541 N.Y.S.2d at 965 (Hancock, J., dissenting), petitioner had a "right to be fairly considered [for promotion] solely on the basis of his relative [now rectified] qualifications." *Id.* at 540, 539 N.E.2d at 1096, 541 N.Y.S.2d at 968 (Hancock, J., dissenting).

61. *Id.* at 538, 539 N.E.2d at 1094, 541 N.Y.S.2d at 966 (Hancock, J., dissenting). The majority relied on the court's decision in *Mena v. D'Ambrose*, 44 N.Y.2d 428, 377 N.E.2d 466, 406 N.Y.S.2d 22 (1978), where petitioners attacked a list prior to its expiration that contained an erroneously placed employee. *Id.* at 429, 377 N.E.2d at 467, 406 N.Y.S.2d at 23. The *Mena* court held that since petitioners brought a timely action, their rights to promotion would be preserved by placing their names on a special extended eligibility list. *Id.* at 432-33, 377 N.E.2d at 468, 406 N.Y.S.2d at 24.

62. *Deas*, 73 N.Y.2d at 536, 539 N.E.2d at 1093, 541 N.Y.S.2d at 965 (Hancock, J., dissenting); *Mena*, 44 N.Y.2d at 432-33, 377 N.E.2d at 468, 406 N.Y.S.2d at 24.

63. *Deas*, 73 N.Y.2d at 538, 539 N.E.2d at 1094, 541 N.Y.S.2d at 966 (Hancock, J., dissenting). See also N.Y. CONST. art. V, § 6.

64. *Deas*, 73 N.Y.2d at 536 n.1, 539 N.E.2d at 1093 n.1, 541 N.Y.S.2d at 965 n.1 (Hancock, J., dissenting).

tion, Judge Hancock cited to *Logan v. Zimmerman Brush Co.*,<sup>65</sup> and declared this procedural limitation on petitioner, when not based on his own delay nor furthering any state interest, violated due process standards of fundamental fairness.<sup>66</sup>

## II. CRIMINAL RESPONSIBILITY UNDER THE LAW

Judge Hancock has a strong conviction that a culpable mental state and mental capacity are crucial elements for finding a defendant criminally responsible for his acts. To illustrate the importance of criminal responsibility in Judge Hancock's jurisprudence, a discussion of Judge Hancock's dissent in *People v. Marrero*<sup>67</sup> is important, in part because it demonstrates both the philosophical and historical legal foundations which he frequently utilizes.<sup>68</sup> In *Marrero*, a federal corrections officer was arrested

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65. 455 U.S. 422 (1982). In *Logan*, appellant, a former employee of appellee, claimed he had been wrongfully discharged because of his physical handicap. *Id.* at 426. Appellant timely filed a charge with the Illinois Fair Employment Practices Commission. *Id.* However, the Commission failed to schedule a hearing within the statutorily proscribed time period. *Id.* As a result, appellant's complaint was dismissed. *Id.* at 427. The Supreme Court concluded that such a dismissal violated appellant's due process rights because it deprived him of his property interest to use the Commission's adjudicatory procedures. *Id.* at 434-35.

66. *Deas*, 73 N.Y.2d at 542-43, 539 N.E.2d at 1096-97, 541 N.Y.S.2d at 968-69. In an analogous case, *Briggins v. McGuire*, 67 N.Y.2d 965, 494 N.E.2d 90, 502 N.Y.S.2d 985 (1986), *cert. denied*, 479 U.S. 930 (1989), a discharged police officer sought reinstatement following the reversal of a felony conviction. *Id.* at 966, 494 N.E.2d at 91, 502 N.Y.S.2d at 986. Although the officer's activity was later found not to be criminal, the majority held that the conviction terminated his property interest in his position, thus negating a reinstatement hearing. *Id.* at 968, 494 N.E.2d at 91, 502 N.Y.S.2d at 986. In his dissent, Judge Hancock, joined by Judge Meyer, proclaimed: "It is fundamentally unfair that a tenured civil service officeholder should be totally divested of all rights in his position for conduct which was not criminal." *Id.* at 972, 494 N.E.2d at 94, 502 N.Y.S.2d at 989 (Hancock, J., dissenting).

67. 69 N.Y.2d 383, 507 N.E.2d 1068, 515 N.Y.S.2d 212 (1987).

68. See also *People v. Castillo*, 80 N.Y.2d 578, 607 N.E.2d 1050, 592 N.Y.S.2d 945 (1992); *People v. Scott*, 79 N.Y.2d 474, 593 N.E.2d 1328, 583

for possession of a weapon without a permit, and claimed he mistakenly believed a state statute exempting "peace officer[s]" applied to him.<sup>69</sup>

In tracing the origins of the rigid common law maxim "*ignorantia legis neminen excusat*"<sup>70</sup> (ignorance of the law is no excuse), and recognizing that it is incompatible with society's present view of criminal responsibility,<sup>71</sup> Judge Hancock asserted: "[I]n modern times . . . with the profusion of legislation making otherwise lawful conduct criminal . . . 'the common law fiction that every man is presumed to know the law has become indefensible in fact or logic.'"<sup>72</sup> Judge Hancock stressed the absence of any criminal intent on the part of Marrero, and argued that "[s]ince [the defendant] has not knowingly committed a wrong there can be no reason for society to exact retribution."<sup>73</sup> Judge Hancock pointed out that this was exactly the sort of case for which the penal law provided the defense of mistake of law.<sup>74</sup>

Judge Hancock argued that New York Penal Law section 15.20<sup>75</sup> was applicable because it permits a mistaken belief defense when the belief is founded upon an official statement of

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N.Y.S.2d 920 (1992); *People v. Millan*, 69 N.Y.2d 514, 508 N.E.2d 903, 516 N.Y.S.2d 168 (1987).

69. *Marrero*, 69 N.Y.2d at 385, 507 N.E.2d at 1069, 515 N.Y.S.2d at 213 (Hancock, J., dissenting); see N.Y. PENAL LAW § 15.20 (McKinney 1987).

70. *Id.* at 392-94 nn.1-2 & 4-5, 507 N.E.2d at 1073-74 nn.1-2 & 4-5, 515 N.Y.S.2d at 217-18 nn.1-2 & 4-5 (Hancock, J., dissenting) (citing such authorities as Pound, Kant, Bentham, Holdsworth, Holmes and Austin to buttress his contention that an intent requirement is a prerequisite to a criminal conviction, and that the old common law rule that ignorance of the law is no excuse is no longer applicable in the modern day, sophisticated, legal system).

71. *Id.* (Hancock, J., dissenting).

72. *Id.* at 395, 507 N.E.2d at 1075, 515 N.Y.S.2d at 219 (Hancock, J., dissenting) (quoting Thomas W. White, *Reliance on Apparent Authority as a Defense to Criminal Prosecution*, 77 COLUM. L. REV. 775, 784 (1977)).

73. *Id.* at 393, 507 N.E.2d at 1073, 515 N.Y.S.2d at 217 (Hancock, J., dissenting).

74. *Id.* at 396, 507 N.E.2d at 1075-76, 515 N.Y.S.2d at 220 (Hancock, J., dissenting).

75. See N.Y. PENAL LAW § 15.20 (McKinney 1987).



the law.<sup>76</sup> He claimed that the defendant's plain reading of the statutes<sup>77</sup> defining "peace officers" which expressly exempted them from the permit requirement further underscored his lack of criminal intent and thus, criminal responsibility.<sup>78</sup> For Judge Hancock, "this was the only rational and fair reading of the law which the officer could have made."<sup>79</sup>

The issue regarding whether a defendant's mental disease is an element of the crime provable by the prosecution or an affirmative defense arose in *People v. Kohl*.<sup>80</sup> In a formidable dissent, Judge Hancock chastised the affirmance of a statute requiring defendants to establish insanity by a preponderance of the evidence.<sup>81</sup> He labeled it an apparent emulation of recent United

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76. *Marrero*, 69 N.Y.2d at 396, 507 N.E.2d at 1075, 515 N.Y.S.2d at 219-20 (Hancock, J., dissenting); see also N.Y. PENAL LAW § 15.20 (McKinney 1987).

77. See N.Y. CRIM. PROC. LAW § 2.10(25) (McKinney 1982) (defining peace officer); N.Y. PENAL LAW § 265.20 (McKinney 1982) (exempting peace officers from permit regulations).

78. *Marrero*, 69 N.Y.2d at 396-97, 507 N.E.2d at 1075-76, 515 N.Y.S.2d at 219-20 (Hancock, J., dissenting) (arguing that mistake of law defense was retained for exactly the predicament presented here: a defendant, with no criminal intent, who acted on a good faith interpretation of the law but was later found to be mistaken).

79. Interview with the Hon. Stewart F. Hancock, Jr., Judge of the New York Court of Appeals, in Albany, N.Y. (Dec. 6, 1991). Judge Hancock also argued that the majority's interpretation of Penal Law section 15.20, requiring a later determination that there was a mistake in the law itself for the defense to be invoked, created the anomaly that "only a defendant who is *not mistaken* about the law when he acts has a mistake of law defense." *Marrero*, 69 N.Y.2d at 398, 507 N.E.2d at 1077, 515 N.Y.S.2d at 221 (Hancock, J., dissenting).

80. 72 N.Y.2d 191, 527 N.E.2d 1182, 532 N.Y.S.2d 45 (1988).

81. N.Y. PENAL LAW § 40.15 (McKinney 1982).

States Supreme Court decisions,<sup>82</sup> which nonetheless violated due process rights under the New York State Constitution.<sup>83</sup>

Referring to the history of Anglo-American law,<sup>84</sup> Judge Hancock declared that New York has also treated insanity "as the absence of one of the two fundamental elements of criminal responsibility: the mental state which renders the act culpable."<sup>85</sup> The majority, according to Judge Hancock, by placing both the burden of production and persuasion as to insanity on the defendant, implicated a "fundamental due process infirmity."<sup>86</sup>

Judge Hancock disagreed with the majority's analysis that the New York Constitution did not call for broader protection than that provided by the Federal Constitution.<sup>87</sup> Judge Hancock viewed the statute as transgressing "inviolable principles of due

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82. *Kohl*, 72 N.Y.2d at 211, 527 N.E.2d at 1193, 532 N.Y.S.2d at 56 (Hancock, J., dissenting). See *Martin v. Ohio*, 480 U.S. 228 (1987); *Patterson v. New York*, 432 U.S. 197 (1977); *Mullaney v. Wilbur*, 421 U.S. 684 (1975). In each of these cases, the Supreme Court concluded that shifting the burden of proving any essential element to the defendant violates due process.

83. *Kohl*, 72 N.Y.2d at 207, 527 N.E.2d at 1190-91, 532 N.Y.S.2d at 53-54 (Hancock, J., dissenting); see also N.Y. CONST. amend. XIV, § 1.

84. *Kohl*, 72 N.Y.2d 201-02, 527 N.E.2d at 1187-88, 532 N.Y.S.2d at 50-51 (Hancock, J., dissenting). Judge Hancock cited Blackstone's premise that "an unwarrantable act without a vicious will is no crime at all," and Roscoe Pound for the theory of punishing only "free agent[s] confronted with a choice between doing right and doing wrong and choosing freely to do wrong." *Id.* at 202, 527 N.E.2d at 1188, 532 N.Y.S.2d at 51 (Hancock, J., dissenting).

85. *Id.* at 204, 527 N.E.2d at 1189, 532 N.Y.S.2d at 52 (Hancock, J., dissenting) (citations omitted).

86. *Id.* at 206 n.2, 527 N.E.2d at 1191 n.2, 532 N.Y.S.2d at 54 n.2 (Hancock, J., dissenting). Judge Hancock declared that the majority "abandoned" the established New York rule as to insanity, and that to satisfy due process, the state and not the defendant, must prove defendant's ability "not merely to know what he was doing, but to appreciate that what he was doing was wrong." *Id.* at 211, 527 N.E.2d at 1193, 532 N.Y.S.2d at 56 (Hancock, J., dissenting).

87. In rebuking this analysis, Hancock stated the court "need not excuse its differences with the Supreme Court's interpretation of corresponding Federal law . . . [nor] depend on textual distinctions or peculiarities of history or original legislative intention . . ." *Id.* at 210, 527 N.E.2d at 1193, 532 N.Y.S.2d at 56 (Hancock, J., dissenting).

process" which would nonetheless be upheld under recent Supreme Court decisions.<sup>88</sup> He argued the court must "honor [their] independent duty to render a sound analysis of [their] own law . . ." so that the burden of proving a defendant's criminal intent would remain with the prosecution.<sup>89</sup>

In *People v. Genler*,<sup>90</sup> which raised the issue of a defendant's right to a competency hearing before trial, Judge Hancock employed both a state and federal constitutional analysis. In his dissent, Judge Hancock cited case law from both high courts to buttress his claim that a defendant lacking the capacity to understand the proceedings against him may not be subjected to a trial, and if there is any reasonable ground to doubt his competency, the court must order a hearing.<sup>91</sup> According to Judge Hancock, this is not a matter of trial court discretion as the majority claimed, but rather "is a constitutional requirement born of the need to protect a defendant's right to a fair trial."<sup>92</sup> He then listed a litany of evidence, available to the trial court, which would establish a reasonable doubt as to defendant's competency.<sup>93</sup> Clearly, aspects of common sense and fairness in Judge Hancock's jurisprudence are expressed in his belief that only competent people should be subjected to criminal prosecutions.

### III. FREEDOMS OF EXPRESSION AND NOTIONS OF PRIVACY

Judge Hancock's majority and freely chosen dissenting opinions concerning freedom of expression also address government in-

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88. *Id.* (Hancock, J., dissenting).

89. *Id.* (Hancock, J., dissenting).

90. 72 N.Y.2d 239, 527 N.E.2d 1209, 532 N.Y.S.2d 72 (1988).

91. *Id.* at 248, 527 N.E.2d at 1214, 532 N.Y.S.2d at 77-78 (Hancock, J., dissenting).

92. *Id.* at 248, 527 N.E.2d at 1214, 532 N.Y.S.2d at 77 (Hancock, J., dissenting).

93. *Id.* at 254-60, 527 N.E.2d at 1218-21, 532 N.Y.S.2d at 81-84 (Hancock, J., dissenting). Judge Hancock pointed to the defendant's history of mental illness, mental difficulties, the expert psychiatric evaluations, the defendant's demeanor at trial and his counsel's exhortations to the court. *Id.*

trusion and a "right to be let alone."<sup>94</sup> From this an even more discernible jurisprudence emerges.<sup>95</sup> Writing for the majority in *People v. Dietze*,<sup>96</sup> Judge Hancock invalidated the abusive language section of a harassment statute,<sup>97</sup> proclaiming it barred a substantial amount of state and federal constitutionally protected speech<sup>98</sup> and was thus overbroad.<sup>99</sup>

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94. *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). Judge Hancock stated that this "right to be let alone" is "a core principle reflected in [the court's] cases vindicating a broader privacy right in areas other than search and seizure." *People v. Scott*, 79 N.Y.2d 474, 486-87, 593 N.E.2d 1328, 1335, 583 N.Y.S.2d 920, 927 (1992) (citations omitted). Judge Hancock also stated that New York has accepted this right "as a fundamental right deserving legal protection." *Id.* at 490, 593 N.E.2d at 1337, 583 N.Y.S.2d at 929.

95. *But see People v. P.J. Video*, 68 N.Y.2d 296, 501 N.E.2d 556, 508 N.Y.S.2d 311 (1986) (Hancock, J., dissenting). Judge Hancock stated that he would have upheld the contested validity of the search warrants issued in an obscenity case, however, in this instance, Judge Hancock noted that the use of a more stringent standard would not have advanced the defendant's right to privacy. *Id.* at 311, 501 N.E.2d at 566, 508 N.Y.S.2d at 917 (Hancock, J., dissenting). As to the state constitutional issue, Judge Hancock declined to find the considerations which "clearly call for reliance on our State Constitution . . ." *Id.* (Hancock, J., dissenting). It would appear that Judge Hancock did not find the type of harm or unfairness to a party which he felt implicated constitutional protection.

96. 75 N.Y.2d 47, 549 N.E.2d 1166, 550 N.Y.S.2d 595 (1989).

97. N.Y. PENAL LAW § 240.25(1), (2) (McKinney 1980). The pertinent part of the statute defines harassment as the use of "abusive or obscene language," or threatening another with physical contact. *See id.* The defendant had called the complainant and her son a "bitch" and a "dog," respectively. *Dietze*, 75 N.Y.2d at 50, 549 N.E.2d at 1167, 550 N.Y.S.2d at 596.

98. *Dietze*, 75 N.Y.2d at 50, 549 N.E.2d at 1167, 550 N.Y.S.2d at 596 (stating that the First and the Fourteenth Amendments of the Federal Constitution and article I, section 8 of the New York State Constitution were violated). *See also Steinhilber v. Alphonse*, 68 N.Y.2d 283, 501 N.E.2d 550, 508 N.Y.S.2d 901 (1986). In *Steinhilber*, Judge Hancock, writing for the majority, held a union leader's statements that a former member was a "scab" who lacked ambition and talent were nonactionable expressions of pure opinion, and a mere "tasteless effort to lampoon the plaintiff." *Id.* at 294, 501 N.E.2d at 556, 508 N.Y.S.2d at 907. Instead of depending on both the state and federal constitutions as in *Dietze*, Judge Hancock relied exclusively on federal case law in *Steinhilber*. He later expressed that this was because federal law provided the most fully developed body of law concerning libel. Interview

Judge Hancock refused to give the statute a constitutional construction,<sup>100</sup> stating this would not only turn an overbroad statute into an "impermissibly vague one," it also constituted judicial legislating.<sup>101</sup> This, he declared, "chills the expressive freedom of those who believe the statute means what it says and, thus, are reluctant to disobey its literal command . . . ."<sup>102</sup> In a more incisive tone, he concluded that "such a statute subjects individuals to arrest and prosecution, even if ultimately unsuccessful, by officials strictly enforcing the statute's prohibitions."<sup>103</sup> Judge Hancock stated that keeping this statute on the books would allow the injustice of arresting people who had not otherwise committed any "crime."<sup>104</sup>

Judge Hancock authored one of his more earnest and powerful dissents in *Golden v. Clark*,<sup>105</sup> where the majority upheld a restriction on certain New York City government officials from also holding high political party positions.<sup>106</sup> Judge Hancock

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with the Hon. Stewart F. Hancock, Jr., Judge of the New York Court of Appeals, in Albany, N.Y. (Dec. 6, 1991). In my discussions with Judge Hancock, he mentioned that the depth of case law is often determinative when deciding on whether to use a state and/or federal analysis. *Id.*

99. *Dietze*, 75 N.Y.2d at 50, 549 N.E.2d at 1167, 550 N.Y.S.2d at 596. Judge Hancock stated that unless speech presented a "clear and present danger of some substantive evil . . . [or] by [its] utterance alone inflict[ed] injury or tend[ed] naturally to evoke immediate violence," it could not be prohibited. *Id.* at 51-52, 549 N.E.2d at 1168, 550 N.Y.S.2d at 597.

100. This proposition was put forth by former Chief Judge Wachtler in a concurring opinion in which Judge Bellacosa joined.

101. *Dietze*, 75 N.Y.2d at 53, 549 N.E.2d at 1169, 550 N.Y.S.2d at 598.

102. *Id.*

103. *Id.*

104. Interview with the Hon. Stewart F. Hancock, Jr., Judge of the New York Court of Appeals, in Albany, N.Y. (Dec. 6, 1991).

105. 76 N.Y.2d 618, 564 N.E.2d 611, 563 N.Y.S.2d 1 (1990).

106. *See* New York City Charter § 2604(b)(15) (1986). This section provides in pertinent part:

No elected official, deputy mayor, deputy to a citywide or boroughwide elected official, head of an agency, or other public servant who is charged with substantial policy discretion as defined by rule of board may be a member of the national or state committee of a political party, serve as an assembly district leader of a political party or serve as the chair or as an officer of the county committee or county executive

decried this restriction as a curtailment of associational and expressional freedoms which implicated fundamental rights under the New York State Constitution.<sup>107</sup> He maintained that because of this curtailment, the government must prove the charter provision restriction "serves a compelling government interest under strict scrutiny."<sup>108</sup> Judge Hancock claimed this test<sup>109</sup> had not been met by the proffered justification that the provision would reduce corruption in New York City government.<sup>110</sup>

Judge Hancock then pronounced that "political parties have a constitutional right to be free from government interference with their internal affairs. This . . . includes the freedom of a political party to choose its own leaders and select its own candidates."<sup>111</sup>

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committee of a political party, except that a member of the council may serve as an assembly district leader or hold any lesser political office as defined by rule of the board.

*Id.*

107. *Golden*, 76 N.Y.2d at 641, 564 N.E.2d 625, 563 N.Y.S.2d at 15 (Hancock, J., dissenting). Judge Hancock recited the history, tradition and constitutional language particular to New York, which "reflects a deeply rooted concern in our State for safeguarding expression-related freedoms." *Id.* at 631, 564 N.E.2d at 618, 563 N.Y.S.2d at 8 (Hancock, J., dissenting). He then deplored the majority for attacking "(1) the freedom of association of political parties and their adherents; and (2) the expressional and associational rights of candidates for political office and of the voters who might support and vote for them." *Id.* at 632, 564 N.E.2d at 619, 563 N.Y.S.2d at 9 (Hancock, J., dissenting); N.Y. CONST. art. I, §§ 1, 8 & 9.

108. *Id.* at 632-633, 564 N.E.2d at 619, 563 N.Y.S.2d at 9 (Hancock, J., dissenting). Judge Hancock stated: "This statute, which is premised on the notion that major party leaders are not to be trusted to hold high political office, can by no means be viewed as one which is narrowly tailored to accomplish the intended result of preventing corruption." *Id.* at 642, 564 N.E.2d at 626, 563 N.Y.S.2d at 16 (Hancock, J., dissenting).

109. The strict scrutiny test requires that the statute in question serve a compelling governmental interest. *See id.* at 641, 546 N.E.2d at 625, 563 N.Y.S.2d at 15 (Hancock, J., dissenting).

110. Judge Hancock asserted that it is "far better . . . to rely on an alert citizenry, diligent prosecutors and resourceful reporters to combat corruption . . . than to resort to legislation that strikes at the very heart of the associational freedoms on which the process is based." *Golden*, 76 N.Y.2d at 643, 564 N.E.2d at 626, 563 N.Y.S.2d at 16 (Hancock, J., dissenting).

111. *Id.* at 624, 564 N.E.2d at 620, 563 N.Y.S.2d at 10 (Hancock, J., dissenting).

Judge Hancock's notions on the right to be let alone and of government intrusion are characteristically embedded in this opinion and emphatically clear.

In another decision concerning expressional freedoms, *O'Neill v. Oakgrove Construction, Inc.*,<sup>112</sup> Judge Hancock, this time writing for the majority, struck down the compelled disclosure of a journalist's photographs sought by a personal injury plaintiff in an unrelated action. Judge Hancock delineated the practical justifications for adopting a qualified reporter's privilege against such disclosure,<sup>113</sup> as well as the basis for doing so under the New York and United States Constitutions.<sup>114</sup> Judge Hancock stated that the press must have "freedom to collect, edit and disseminate the news,"<sup>115</sup> unhampered by outside demands on its resources.<sup>116</sup>

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112. 71 N.Y.2d 521, 523 N.E.2d 277, 528 N.Y.S.2d 1 (1988).

113. *Id.* at 526-27, 523 N.E.2d 279, 528 N.Y.S.2d at 3.

114. *Id.* at 528, 523 N.E.2d 280, 528 N.Y.S.2d at 4. While acknowledging the Supreme Court's refusal to recognize a qualified reporter's privilege, Judge Hancock stated that "we have no difficulty in concluding that the guarantee of a free press in . . . the New York Constitution independently mandates the protection afforded by the qualified privilege." *Id.* Still, Judge Hancock felt compelled to state that lower federal courts had reached the same result under the Federal Constitution. *See Auersperg v. Von Bulow*, 811 F.2d 136, 142 (2d Cir.), *cert. denied*, 481 U.S. 1015 (1987); *United States v. Cuthbertson*, 630 F.2d 139, 147 (3d Cir.), *cert. denied*, 449 U.S. 1126 (1980); *Matter of Consumers Union*, 495 F. Supp 582, 586 (S.D.N.Y. 1980); *Loadholtz v. Fields*, 389 F. Supp 1299, 1303 (M.D. Fla. 1975).

115. *But see Johnson Newspaper Corp. v. Melino*, 77 N.Y.2d 1, 10, 564 N.E.2d 1046, 1056, 563 N.Y.S.2d 380, 390 (1990) (Judge Hancock, writing for the majority, restricted the media's right of access to ongoing professional disciplinary hearings because of important confidentiality and privacy interests.).

116. *O'Neill*, 71 N.Y.2d at 526, 523 N.E.2d at 279, 528 N.Y.S.2d at 3. Judge Hancock stated that to hold otherwise, would compromise the autonomy of the press, and together with "the consequent diversion of journalistic effort and disruption of newsgathering activity, would be particularly inimical to the vigor of a free press." *Id.* at 527, 523 N.E.2d at 279, 528 N.Y.S.2d at 3. Therefore, discovery may only be ordered "if the litigant demonstrates, clearly and specifically, that the items sought are (1) highly material, (2) critical to the litigant's claim, and (3) not otherwise available." *Id.*

He found support for this contention in New York's unique history and tradition regarding the press.<sup>117</sup>

Turning to privacy rights, Judge Hancock's recent opinion in *People v. Scott*<sup>118</sup> declared that landowners can establish a reasonable expectation of privacy, and, therefore, merit constitutional protection from warrantless searches by state agents, when they take measures to exclude others by fencing or posting no trespassing signs.<sup>119</sup> His opinion, for a 4-3 majority,<sup>120</sup> prohibited state agents from conducting warrantless searches on secluded, private lands which are fenced or marked with no trespassing signs. Otherwise, he declared, to allow such police behavior would be "repugnant to the most basic notions of fairness in our criminal law."<sup>121</sup>

Judge Hancock expressly rejected the federal "open fields" doctrine,<sup>122</sup> which does not treat warrantless searches in such

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117. *Id.* at 528-29, 523 N.E.2d at 280-81, 528 N.Y.S.2d at 4-5. Judge Hancock explained that historically, New York has provided a "constitutionally guaranteed liberty of the press," thus affording it the broadest protection in order to gather and disseminate the news of different public events. *Id.* at 529, 523 N.E.2d at 281, 528 N.Y.S.2d at 5.

118. 79 N.Y.2d 474, 593 N.E.2d 1328, 583 N.Y.S.2d 920 (1992).

119. *Id.* at 486, 593 N.E.2d at 1335, 583 N.Y.S.2d at 927. This decision is contrary to the "open fields" doctrine enunciated in *Oliver v. United States*, 466 U.S. 170 (1984), which affords no protectable privacy right concerning land outside the curtilage of a home regardless of any steps taken to exclude entry.

120. The decision was joined by Judges Alexander, Titone and Kaye (who wrote a forceful concurrence responding to the dissent's rejection of an independent state constitutional interpretation), while Judge Bellacosa authored a dissent in which former Chief Judge Wachtler and Judge Simons concurred. *But see People v. Reynolds*, 71 N.Y.2d 552, 523 N.E.2d 291, 528 N.Y.S.2d 15 (1988). *Reynolds* was a similarly divided case (4-3), decided when Judge Dillon sat by designation in lieu of Judge Titone. The *Scott* dissenters formed the majority in *Reynolds* with Judge Dillon joining them. Judge Hancock's dissent in *Reynolds*, joined by Judges Alexander and Kaye, expressed similar fairness and state constitutional arguments which were put forth in *Scott*.

121. *Scott*, 79 N.Y.2d at 490, 593 N.E.2d at 1337, 583 N.Y.S.2d at 929.

122. *Id.* at 478, 593 N.E.2d at 1330, 583 N.Y.S.2d at 922.



circumstances as unreasonable,<sup>123</sup> and instead relied on an interpretation of State constitutional law<sup>124</sup> proclaiming:

We believe that under the law of this State the citizens are entitled to more protection. A constitutional rule which permits state agents to invade private lands for no reason at all — without permission and in outright disregard of the owner's effort to maintain privacy by fencing or posting signs — is one that we can not accept as adequately preserving fundamental rights of New York's citizens . . . .<sup>125</sup>

In a factually similar case, *People v. Reynolds*,<sup>126</sup> which was decided by the court five years before *Scott*, Judge Hancock had dissented, stating that the Supreme Court's precedents did not provide a basis for rejecting defendant's claim of an expectation of privacy.<sup>127</sup> He claimed the majority made unwarranted assumptions concerning the property's location and defendant's efforts to exclude the evidence.<sup>128</sup> Nevertheless, Judge Hancock

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123. The circumstances in *Scott* closely resemble those of *People v. Reynolds*, which was decided by the court a few years earlier. In both cases, the defendants were arrested for growing marijuana illegally. However, in *Reynolds*, the majority decided that defendant's land was an open field where no precautions were taken to exclude public entry. 71 N.Y.2d at 556, 523 N.E.2d at 293, 528 N.Y.S.2d at 17. Therefore, the court, under the *Oliver* precedent, easily found that the defendant had not established a reasonable expectation of privacy as to her property. *Id.* at 556-57, 523 N.E.2d at 293, 528 N.Y.S.2d at 17. However, Judge Hancock dissented, claiming that "[t]his case cannot be decided . . . by simply applying the Supreme Court's decisions in *Ciraolo* and *Oliver*." *Id.* at 559-60, 523 N.E.2d at 294-95, 528 N.Y.S.2d at 18-19 (Hancock, J., dissenting). Moreover, he stated that "[t]hose cases differ from this one, and, in any event, have not yet been adopted by this court — nor do I think they should be — as the measure of protection under our State Constitution." *Id.* (Hancock, J., dissenting).

124. N.Y. CONST. art. I, § 12. Section 12 states in pertinent part: "The right of the people to be secure . . . against unreasonable searches and seizures, shall not be violated . . ." *Id.*

125. *Scott*, 79 N.Y.2d at 486, 593 N.E.2d at 1335, 583 N.Y.S.2d at 927.

126. 71 N.Y.2d 552, 523 N.E.2d 291, 528 N.Y.S.2d 15 (1988).

127. *Id.* at 561-62, 523 N.E.2d at 295, 528 N.Y.S.2d at 19 (Hancock, J., dissenting).

128. *Id.* at 559-60, 523 N.E.2d at 294-95, 528 N.Y.S.2d at 18-19 (Hancock, J., dissenting).

concluded that the court need not follow the federal law if it would lead to an unjust result.<sup>129</sup>

Judge Hancock's opinions in *Scott* and *Reynolds* exemplify his strong belief that the right to be let alone is a fundamental right of constitutional magnitude.<sup>130</sup> It also exemplifies his readiness to employ independent state constitutional analysis when he feels federal precedent does not provide a fair and equitable resolution to litigants.

#### IV. STATE CONSTITUTIONAL ADJUDICATION

It has long been recognized that state courts may apply their own constitutional law to resolve issues before it.<sup>131</sup> What the state courts cannot do is provide less protection than that guaranteed by the Federal Constitution. The Federal Constitution serves as a floor below which the states may not fall, but the states may expand or supplement the federal law when interpreting their own constitutions.<sup>132</sup> The New York Court of Appeals, most notably during the Wachtler era, has heightened the "fractious" debate<sup>133</sup>

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129. *Id.* at 562, 523 N.E.2d at 296-97, 528 N.Y.S.2d at 20-21 (Hancock, J., dissenting).

130. *See Scott*, 79 N.Y.2d at 490, 593 N.E.2d at 1337, 583 N.Y.S.2d at 929.

131. *See PruneYard Shopping Ctr. v. Robbins*, 447 U.S. 74, 81 (1980) (state courts may use their sovereign powers to expand rights to their own citizens). *See also Immuno AG. v. Moor-Jankowski*, 77 N.Y.2d 235, 249, 567 N.E.2d 1270, 1277, 566 N.Y.S.2d 906, 913 (1991), *cert. denied*, 111 S. Ct. 2661 (1991) (instead of following the First Amendment of the Federal Constitution, the New York State Constitutional Convention established its own definition of "liberty of the press.>").

132. *Immuno*, 77 N.Y.2d at 248, 567 N.E.2d at 1277, 566 N.Y.S.2d at 913; *People v. P.J. Video, Inc.*, 68 N.Y.2d 296, 302, 501 N.E.2d 556, 560, 508 N.Y.S.2d 907, 911 (1986), *cert. denied*, 479 U.S. 1091 (1987).

133. *See People v. Keta*, 79 N.Y.2d 474, 503, 593 N.E.2d 1328, 1346, 583 N.Y.S.2d 920, 938 (1992) (Kaye, J., concurring) ("Perhaps more than any other issue, the State constitutional law cases over the past decade have seemed to fracture the Court."); *see also Vincent M. Bonventre, The New York Court of Appeals: An Old Tradition Struggles With Current Issues*, 22 PERSP. ON POL. SCI. \_\_\_\_ (1993) (*see text accompanying notes 20, 63, 74-79*) (Forthcoming).

over which methodology of state constitutional adjudication to adopt<sup>134</sup> and whether it should be applied instead of a pre-existing federal constitutional analysis.<sup>135</sup> Judge Hancock, on the other hand, has resisted adherence to any particular method.<sup>136</sup>

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134. The dispute regarding the appropriate methodology for deciding a case on independent state grounds centers on whether the court should apply an interpretive or noninterpretive analysis. *P.J. Video*, 68 N.Y.2d at 302, 501 N.E.2d at 560, 508 N.Y.S.2d at 911. An interpretive analysis is applicable where the text of the state constitution differs from its federal counterpart. Under this analysis, the court looks to the text and the particular state history surrounding that provision to determine whether it is "sufficiently unique to support a broader interpretation of the individual right under State law." *Id.* A noninterpretive analysis, on the other hand, focuses not on the language of the text, but on the underlying traditions and policies of the particular state in defining the scope of that constitutional right. *Id.* at 303, 501 N.E.2d at 560, 508 N.Y.S.2d at 911. This "review proceeds from a judicial perception of sound policy, justice and fundamental fairness." *Id.* See also *People v. Scott*, 79 N.Y.2d 474, 593 N.E.2d 1328, 583 N.Y.S.2d 920 (1992); *People v. Keta*, 79 N.Y.2d 474, 593 N.E.2d 1328, 583 N.Y.S.2d 920 (1992); *People v. Harris*, 77 N.Y.2d 434, 570 N.E.2d 1051, 568 N.Y.S.2d 702 (1991); *Immuno AG. v. Moor-Jankowski*, 77 N.Y.2d 235, 567 N.E.2d 1270, 566 N.Y.S.2d 906, *cert. denied*, 111 S., Ct. 2261 (1991).

135. The debate primarily centers upon when the court should rely on independent state constitutional law as opposed to federal law. See generally *People v. Scott*, 79 N.Y.2d 474, 593 N.E.2d 1328, 583 N.Y.S.2d 920 (1992); *People v. Keta*, 79 N.Y.2d 474, 593 N.E.2d 1328, 583 N.Y.S.2d 920 (1992). In these two companion cases, the disparate views amongst the court towards state constitutional adjudication and its role with Supreme Court precedent involving similar constitutional protections were sharply expressed. See also *Immuno AG. v. Moor-Jankowski*, 77 N.Y.2d 235, 567 N.E.2d 1270, 566 N.Y.S.2d 906 (three separate concurring opinions each put forth different views on the role of independent state constitutional analysis), *cert. denied*, 111 S. Ct. 2261 (1991); Peter J. Galie, *Modes of Constitutional Interpretation: The New York Court of Appeals' Search for a Role*, 4 EMERGING ISSUES ST. CONST. L. 225 (1991); Robert F. Utter, *Swimming in the Jaws of the Crocodile: State Court Comment on Federal Constitutional Issues when Disposing of Cases on State Constitutional Grounds*, 63 TEX. L. REV. 1025 (1985).

136. See Hancock, *Upon Due Deliberation*, *supra* note 3, at 6. Judge Hancock disdains adherence to any "philosophical or jurisprudential method" for analyzing cases. *Id.* He instead concurs with United States Supreme Court Justice Powell's perspective because: "He took each case as it came. He considered each a new and separate problem and tried to decide it with a

However, a thorough discussion of this debate is beyond the scope of this article. Instead, the remaining discussion shall center solely on Judge Hancock's approach to state adjudication.

As his opinions, writings, and discussions suggest,<sup>137</sup> Judge Hancock views his role on the court as one of reaching a fair and just result, and he rejects being wed to any particular legal philosophy.<sup>138</sup> In *People v. Scott*,<sup>139</sup> Judge Hancock refused to "adopt any rigid method of analysis which would . . . require [the court] to interpret provisions of the State Constitution in "Lockstep" with the Supreme Court's interpretations of similarly worded provisions of the Federal Constitution."<sup>140</sup> He stated that such a 'Lockstep' methodology or "fixed analytical formula" has never been adopted by the court of appeals when determining whether a fundamental right requires "resort to the State Constitution."<sup>141</sup>

Frankly, Judge Hancock's primary goal is a fair result. In order to achieve this, he will seek support for his decision from either federal or state bodies of constitutional law, or both. His determination is dependent upon which body of law most fairly and "adequately preserv[es] fundamental rights of New York[']s citi-

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detached objectivity and freedom from preconceived notions." *Id.* Nevertheless, Judge Hancock conceded that in the different cases "something leads the judge to prefer one result over another," and offered that fairness and policy arguments are often determinative. *Id.* (emphasis added).

Judge Simons, in his concurring opinion in *Immuno AG. v. Moor-Jankowski*, stated that the lack of a single methodology permits parties, in cases asserting both a federal and state constitutional claim, "to appeal to the subjective views of individual judges on what the rule ought to be and to urge adoption of the methodology best suited to arrive at the desired result." 77 N.Y.2d at 262 n.2, 567 N.E.2d at 1286 n.2, 566 N.Y.S.2d at 922 n.2 (Simons, J., concurring). Furthermore, Judge Simons found that "[u]nnecessary reliance on state law frustrates th[e] process" of the Supreme Court's jurisdiction to review a federal question. *Id.* at 261, 567 N.E.2d at 1285, 566 N.Y.S.2d at 921.

137. Interview with the Hon. Stewart F. Hancock, Jr., Judge of the New York Court of Appeals, in Albany, N.Y. (Dec. 6, 1991).

138. See *supra* note 136 and accompanying text.

139. 79 N.Y.2d 474, 593 N.E.2d 1328, 583 N.Y.S.2d 920 (1992).

140. *Id.* at 490, 593 N.E.2d at 1338, 583 N.Y.S.2d at 930.

141. *Id.* at 490-91, 593 N.E.2d at 1338, 583 N.Y.S.2d at 930.

zens."<sup>142</sup> Frequently, Judge Hancock applies federal law simply because he believes, with regard to a particular legal issue, it is a more established body of law.<sup>143</sup> This was particularly true in *Steinhilber v. Alphonse*,<sup>144</sup> where Judge Hancock relied on federal constitutional law when he held that a union leader's derogatory statement made against a former union member was a constitutionally protected expression of opinion.<sup>145</sup> Judge Hancock later stated that his decision was influenced by the fact that he considered federal law regarding libel to be more developed.<sup>146</sup>

Judge Hancock also relied on established federal law in his dissent in *People v. Green*,<sup>147</sup> when he charged that the defendant had been subjected to a federal *Batson* violation<sup>148</sup> through the prosecutor's use of racially motivated peremptory challenges.<sup>149</sup> Furthermore, in *Immuno AG. v. Moor-Jankowski*,<sup>150</sup> Judge Hancock, while concurring in the judgment, contended that *Milkovich v. Lorain Journal Company*<sup>151</sup> resolved the issue at hand, and that nothing in the Supreme Court's decision in *Milkovich* caused

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142. *Id.* at 486, 593 N.E.2d at 1335, 583 N.Y.S.2d at 927.

143. Interview with the Hon. Stewart F. Hancock, Jr., Judge of the New York Court of Appeals, in Albany, N.Y. (Dec. 6, 1991). Judge Hancock commented that today's global society as well as the relationship between the individual states and the federal government have greatly changed since the respective constitutions were written. *Id.* He believes both of these factors have propelled reliance on the Federal Constitution, although situations arise which require reliance on the state constitution as well. *Id.*

144. 68 N.Y.2d 283, 501 N.E.2d 550, 508 N.Y.S.2d 901 (1986); *see also supra* note 99.

145. *Steinhilber*, 68 N.Y.2d at 289, 501 N.E.2d at 552, 508 N.Y.S.2d at 904.

146. Interview with the Hon. Stewart F. Hancock, Jr., Judge of the New York Court of Appeals, in Albany, N.Y. (Dec. 6, 1991).

147. 75 N.Y.2d 902, 553 N.E.2d 1331, 554 N.Y.S.2d 821 (1990) *cert. denied*, 111 S. Ct. 2261 (1991). *See also supra* notes 19-32 and accompanying text.

148. *See supra* notes 20-21 and accompanying text.

149. *Green*, 75 N.Y.2d at 911, 553 N.E.2d at 1336, 554 N.Y.S.2d at 826 (Hancock, J., dissenting).

150. 77 N.Y.2d 235, 567 N.E.2d 1270, 566 N.Y.S.2d 906, *cert. denied*, 111 S. Ct. 2261 (1991).

151. 497 U.S. 1 (1990).

a change in the law requiring the court to base its decision on state constitutional law as well.<sup>152</sup>

However, Judge Hancock will turn to the state constitution when he feels that the Supreme Court has changed its position in a restrictive manner. For example, in *People v. P.J. Video Inc.*,<sup>153</sup> Judge Hancock, in his dissenting opinion, stated: "Certainly, when it appears that some preexisting right which has been guaranteed under our common law or 'the history and traditions of the State' . . . is no longer protected under the Federal Constitution we should not hesitate to rely on our State Constitution."<sup>154</sup> While Judge Hancock recognized the "desirability of promoting uniformity and consistency in the State and Federal rules," he would nevertheless deviate from the federal law if he found it failed to protect "important and fundamental rights."<sup>155</sup>

Recall also Judge Hancock's dissenting opinions in *People v. Reynolds*<sup>156</sup> and *People v. Kohl*.<sup>157</sup> In both cases Judge Hancock rejected the Supreme Court's constitutional reasoning and relied instead on New York State law to provide more protection for the defendants. In *Kohl*, Judge Hancock, in analyzing when to interpret state law, stated that the court of appeals "may disagree with the reasoning of the Supreme Court . . . or conclude that the

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152. *Immuno*, 77 N.Y.2d at 268, 567 N.E.2d at 1290, 566 N.Y.S.2d at 926 (Hancock, J., concurring).

153. 68 N.Y.2d 296, 501 N.E.2d 556, 508 N.Y.S.2d 907 (1986), *cert. denied*, 479 U.S. 1091 (1987).

154. *Id.* at 309, 501 N.E.2d at 565, 508 N.Y.S.2d at 916 (Hancock, J., dissenting) (citations omitted). In *People v. P.J. Video, Inc.*, Judge Hancock cited to *People v. Class*, 67 N.Y.2d 431, 494 N.E.2d 444, 503 N.Y.S.2d 313 (1986) (per curiam), as a decision in which he concurred. *P.J. Video*, 68 N.Y.2d at 310, 501 N.E.2d at 565, 508 N.Y.S.2d at 916 (Hancock, J., dissenting). In addressing whether the court should follow the Supreme Court's decision reversing the court on federal grounds, the *Class* opinion stated: "Where, as here, we have already held that the State Constitution has been violated, we should not reach a different result following reversal on Federal constitutional grounds . . ." *Class*, 67 N.Y.2d at 433, 494 N.E.2d at 445, 503 N.Y.S.2d at 314.

155. *P.J. Video*, 68 N.Y.2d at 310, 501 N.E.2d at 565, 508 N.Y.S.2d at 916 (Hancock, J., dissenting).

156. *See supra* notes 125, 128-31 and accompanying text.

157. *See supra* notes 80-89 and accompanying text.

minimal guarantees of the Federal Constitution, as interpreted by them, simply do not satisfy the requirements of our State law."<sup>158</sup>

This same tactic was employed in *People v. Scott*,<sup>159</sup> where Judge Hancock's majority opinion abandoned the less protective federal standard and adopted a more rights-expanding expectation of privacy rule. Judge Hancock expressed the court's role of independent state constitutionalism as "analyz[ing] the particular case and the federal constitutional rule at issue . . . in order to determine whether under established New York law and traditions some greater degree of protection must be given."<sup>160</sup> He stressed that using the New York State Constitution to prohibit government conduct when the Federal Constitution would not<sup>161</sup> be necessary to guarantee citizens "the proper protection of [their] fundamental rights."<sup>162</sup>

Judge Hancock also chose a state law analysis in his dissent in *Golden v. Clark*.<sup>163</sup> He based his determination on the particularity of New York's tradition toward expressional freedoms which, Judge Hancock noted, is rooted in the state constitution, and because these fundamental freedoms were not adequately protected under federal law.<sup>164</sup>

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158. *Kohl*, 72 N.Y.2d 191, 210, 527 N.E.2d 1182, 1193, 532 N.Y.S.2d 45, 56 (1988) (Hancock, J., dissenting).

159. *See supra* notes 118-30 and accompanying text.

160. *Scott*, 79 N.Y.2d 474, 491, 593 N.E.2d 1328, 1338, 583 N.Y.S.2d 920, 930 (1992).

161. *Id.* This is the main premise over which the dissent disagreed, stating that the majority was inappropriately "rejecting uniformity" with federal constitutional law and "discarding the U.S. Supreme Court's guidance." *Id.* at 507, 593 N.E.2d at 1348, 583 N.Y.S.2d at 940 (Bellacosa, J., dissenting).

162. *Id.* at 491, 593 N.E.2d at 1338, 583 N.Y.S.2d at 930.

163. *See supra* notes 105-11 and accompanying text.

164. *Golden*, 76 N.Y.2d 618, 631-32, 564 N.E.2d 615, 618-19, 563 N.Y.S.2d 1, 8-9 (1990) (Hancock, J., dissenting). Judge Hancock noted that New York's Constitution, unlike the Federal Constitution, specifically recognizes the role political parties play in the state's democratic process *Id.* at 633-35 nn.4-5, 564 N.E.2d at 620-21 nn.4-5, 563 N.Y.S.2d at 10-11 nn.4-5 (Hancock, J., dissenting) (citing N.Y. CONST. art. I, § 1; art. II, § 8). He also noted that the freedom of association of political parties is "deeply embedded"

Judge Hancock has also found instances where a decision based on both state and federal constitutions is appropriate. Thus, in *O'Neill v. Oakgrove Construction, Inc.*,<sup>165</sup> Judge Hancock did not hesitate to employ both bodies of law to support his position. In *O'Neill*, Judge Hancock noted that although the Supreme Court had not yet recognized a qualified reporter's privilege, he bolstered his opinion supporting such a privilege on the fact that several lower federal courts had done so on the basis of the First Amendment.<sup>166</sup> Judge Hancock often considers this "dual" approach the court's proper role because it "help[s] to expound the Federal, as well as [the] State Constitution and. . . it contributes to the development of a body of case law of potential use to federal and other state courts."<sup>167</sup>

Likewise, in *People v. Millan*,<sup>168</sup> Judge Hancock based the court's holding that the defendant had standing to challenge a search where his connection to the item seized was based on constructive possession on both federal and state constitutional caselaw.<sup>169</sup> His conclusion rested on the notion that to deny the defendant a hearing to challenge the search was "repugnant to the requirements of fair play which have 'evolved through the centuries of Anglo-American constitutional history,' particularly as applied to the relationship 'between the individual and the government.'"<sup>170</sup>

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in the state's constitutional law. *Id.* (Hancock, J., dissenting) (citing N.Y. CONST. art. I, §§ 8, 9).

165. *See supra* notes 112-17 and accompanying text.

166. *O'Neill*, 71 N.Y.2d 521, 524, 523 N.E.2d 277, 278, 528 N.Y.S.2d 1, 2 (1988). It is interesting that Judge Hancock chose to apply federal law, absent a determination by the Supreme Court, based solely on the lower federal courts which had recognized such a right under the First Amendment. Perhaps Judge Hancock's "dual" approach, while certainly made to bolster his position, was intended to prod the Supreme Court to act as well.

167. *Id.*

168. *See supra* notes 46-53 and accompanying text.

169. *Millan*, 69 N.Y.2d 514, 519, 508 N.E.2d 903, 905-06, 516 N.Y.S.2d 168, 170-71 (1987).

170. *Id.* at 519-20, 508 N.E.2d at 906, 516 N.Y.S.2d at 171 (quoting *Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 162 (1951) (Frankfurter, J., concurring)).



Two years later, in *People v. Wesley*,<sup>171</sup> Judge Hancock's dissent decried the majority's abandonment of the court's state and federal based position in *Millan*.<sup>172</sup> He rejected the majority's claim that state precedence required the contrary result and maintained that "[t]he State and Federal Constitutions and the rule . . . announced in *Millan*, . . . clearly compel[ed] just the opposite result."<sup>173</sup>

Finally, in *People v. Dietze*,<sup>174</sup> Judge Hancock used both federal and state caselaw to establish that a harassment statute violated constitutionally protected speech. In a footnote, Judge Hancock acknowledged that New York States Constitution provided an independent basis for the court's holding.<sup>175</sup> However, he thought little doubt existed that the statute ran "afoul of the Federal Constitution as well."<sup>176</sup>

Clearly, Judge Hancock has shown his willingness to apply both federal and state constitutional law as necessary to achieve the results he deems in accord with the rights and requirements of the New York State Constitution. While his ultimate purpose is to achieve a fair and just result, he has not forsaken jurisprudential integrity in the process.

#### CONCLUSION

Neither a primacy approach favoring state law nor a deferential approach favoring federal law would characterize Judge Hancock jurisprudence. While he has, at times, employed a dual sovereignty analysis when adjudicating constitutional issues, he is not bound by such a method. Judge Hancock will freely base his decision solely on the New York State Constitution if he believes that the application of the Federal law is inappropriate, or on the

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171. See *supra* notes 40-45 & 54-57 and accompanying text.

172. *Wesley*, 73 N.Y.2d at 362, 364, 538 N.E.2d at 83-84, 540 N.Y.S.2d at 764-65 (1989) (Hancock, J., dissenting).

173. *Id.* at 369-70, 538 N.E.2d at 87, 540 N.Y.S.2d at 768 (Hancock, J., dissenting).

174. See *supra* notes 96-104 and accompanying text.

175. *People v. Dietze*, 75 N.Y.2d 47, 50 n.1, 549 N.E.2d 1166, 1167 n.1, 550 N.Y.S.2d 595, 596 n.1 (1989).

176. *Id.*

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Federal law if he believes it is more developed. To otherwise limit his approach would only restrict his options in defining the fairness in the law he feels bound to uphold.

Judge Stewart Hancock has described the law as containing a moral component, a quality of what is right and just. His distinguished career certainly depicts an untiring devotion to this most fundamental premise.