ADDRESS

STATE HIGH COURTS AND INDIVIDUAL RIGHTS: THE NEW YORK STATE COURT OF APPEALS RECENT JURISPRUDENCE, FROM SKIN-COLOR BASED PEREMPTORY CHALLENGES TO THE RIGHT OF SEPULCHER

Judge Jenny Rivera[*]

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Thank you, Dean Leonard Baynes, for the lovely introduction and for inviting me to deliver the Sondock Jurist-in-Residence Lecture. Thank you to Judge Ruby Sondock for being a pioneer

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female member of the judiciary and serving as an inspiration for all jurists. We have much to learn from your unwavering commitment to equal access to justice and the rule of law.

With recent changes in our national government, the appointment of United States Supreme Court Associate Justice Neil Gorsuch, and the new administration's nominees to the federal bench, there has been a reinvigorated discussion of the role of the state courts in protecting individual rights and ensuring access to justice. Given the tenor of the times, I have chosen to discuss the work of the New York State Court of Appeals, on which I sit.

I. THE NEW YORK STATE COURT OF APPEALS: THE HIGH COURT

The Court of Appeals is New York State's High Court. Unlike all but one other state[1] and the federal system, our court of last resort is called the Court of Appeals and our trial and intermediate appellate courts are named Supreme Court. Intermediate appeals go to the Appellate Division, which consists of four departments.[2] The Court of Appeals was created by our state constitution in 1846 and originally had eight members, four seated by election and four by appointment from among Supreme Court justices, who were also elected.

Our Court now consists of seven judges, appointed to 14-year terms, with an opportunity for reappointment and subject to a mandatory retirement age of 70. Judges are no longer seated by election. In accordance with a 1977 amendment to the Constitution, judges are appointed by the Governor and confirmed by the State Senate.[3] The merit-based appointment process begins with the State of New York Commission on Judicial Nomination, which screens applicants and submits a list of candidates to the

1. Maryland's highest state tribunal is also the Court of Appeals.

2. The four departments have geographically defined jurisdictions. The First Department, seated in Manhattan, has jurisdiction over New York and Bronx counties. The Second Department—the largest in the state—is seated in Brooklyn and has jurisdiction over Kings, Queens, Richmond, Nassau, Suffolk, Westchester, Dutchess, Orange, Putnam, and Rockland counties. The Third Department is seated in Albany, the state capital, and has jurisdiction over 28 counties from the Canadian border in the north to the lower Catskills in the south, and from the Vermont and Massachusetts borders in the east to the Finger Lakes in the west; it encompasses Albany, Troy, Schenectady, Saratoga Springs, and Binghamton. The Fourth Department is seated in Rochester and has jurisdiction over 22 counties in Central and Western New York, extending from the Pennsylvania border in the south and the Mohawk Valley in the east to Lake Erie and Ontario, Canada to the west, and encompasses Buffalo, Rochester, and Syracuse.

3. The current appointment system replaced the former electoral system for seating Court of Appeals judges, which was in place until the last election of November 1974.

Governor to fill vacancies on the Court.[4] The Governor then submits the name of the nominee for Senate approval.[5] As it happens, the current Governor has appointed every sitting member of the present Court—an unusual circumstance given the term lengths and slow rate of turnover.

Our Court is quite diverse. The diversity extends into professional experience, personal background, and geographic representation. Our Chief Judge is the second female Chief Judge of the Court and a former District Attorney. Three of my colleagues were former intermediate appellate judges before their elevation to the Court, two of whom had previously been in private practice, and the other a public interest defense lawyer for the Legal Aid Society. The remaining two members, excepting myself, include a former United States Attorney for the Southern District of New York, and a former partner at a large international law firm. I am a former civil rights lawyer and law professor. There are three women on the court, as well as two Latinos, and one African-American male. Our junior judge is the first openly LGBT member of the Court. Each of us brings an interesting perspective to our work. It is worth noting that, even with our wide range of backgrounds and experiences, we agree the majority of the time on the issues before us, which only confirms that we are guided by the law. When we disagree, we do so based on the law and facts presented and our principled view of the case.

The New York State Court of Appeals has a heavy docket. To give you a sense of our workload, in 2013 the Court disposed of 259 appeals—consisting of 148 civil and 111 criminal cases—and decided 1,292 motions—which included 84 civil leave grants. The Court also decided 2,044 criminal leave applications, of which 74 were granted. In 2014, the Court disposed of 235 appeals—144 civil and 91 criminal—and decided 1,293 motions—which included 100 civil leave grants—as well as 2,100 criminal leave applications, of which 81 were granted. In 2015, the Court

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4. *See* N.Y. CONST. art. VI, § 2(c). The section provides:

> There shall be a commission on judicial nomination to evaluate the qualifications of candidates for appointment to the court of appeals and to prepare a written report and recommend to the governor those persons who by their character, temperament, professional aptitude and experience are well qualified to hold such judicial office. The legislature shall provide by law for the organization and procedure for the judicial nominating commission."

Id. The Commission consists of twelve members, four appointed by the Governor, four by the Chief Judge of the Court of Appeals, one each by the speaker of the State Assembly, the temporary president of the Senate, the minority leader of the Senate, and the minority leader of the Assembly. *See id.* § 2(e)(1).

5. *Id.* § 2(e).

disposed of 202 appeals—112 civil and 90 criminal—and decided 1,395 motions—which included 76 civil leave grants—as well as 2,338 criminal leave applications, of which 91 were granted.[6]

II. COURT OF APPEALS DECISIONS AND STATE-BASED JURISPRUDENCE EXPANDING INDIVIDUAL RIGHTS

Historically, the New York Court of Appeals has issued decisions of interest beyond our state borders. The dynamism of New York, as well as the caliber and history of the Court itself, has often led other jurisdictions to look to our treatment of cutting-edge legal issues, as well as the development of our common law. Also, like many other state courts of last resort, we have a longstanding deep-seated and distinctive tradition of state constitutional jurisprudence. Our Court regularly draws attention for our consistent interpretation of our constitution to provide greater protections for individual liberties than those afforded by our federal analog.

To illustrate the breadth and impact of our jurisprudence, I have selected recent significant decisions where the Court decided an open question of law, overturned precedent, or relied on a novel legal analysis. The cases reflect the diversity of judicial voices on the Court. Some of these cases may have received press coverage or been the subject of scholarly consideration.

A. Criminal Cases: Batson *Challenges and Skin Color, Right of Confrontation and DNA Evidence, Language Rights and Equal Protection*

In *People v. Bridgeforth*, the Court held that skin color is a cognizable characteristic that may not serve as a basis for a peremptory strike of a prospective juror.[7] The United States Supreme Court, in a series of cases beginning with *Batson v. Kentucky*,[8] had held that the Equal Protection Clause of the 14th amendment prohibits the use of peremptory strikes of prospective jurors based on race, sex, and ethnicity. The Court of Appeals

6. In comparison, the Texas Supreme Court last year issued 133 written opinions and its 10-year average is 144. However, the Texas Court of Criminal Appeals issued 698 written opinions last year, a 69% increase from the prior year, and its 10-year average is 488.

7. People v. Bridgeforth, 69 N.E.3d 611, 613–16 (N.Y. 2016).

8. Batson v. Kentucky, 476 U.S. 79 (1986). *Batson* was extended to civil cases in Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991), and to gender-based peremptory challenges in J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127 (1994). In Hernandez v. New York, 500 U.S. 352 (1991), the Supreme Court recognized that a peremptory strike based on language might be grounds for a *Batson* challenge.

adopted *Batson* and forbade discrimination against prospective jurors based on "race, gender or any other status that implicates equal protection concerns."[9]

In *Bridgeforth*, the defendant asserted a *Batson* challenge to the prosecutor's peremptory strikes of five dark-skinned female prospective jurors, including a dark-complexioned Indian-American woman. We concluded that our state recognizes a distinction between color and race, and that color implicates equal protection concerns as well. We explained that our Constitution's Equal Protection Clause, like the Texas Constitution's equal rights provision, refers separately to discrimination based on race and color, which indicates that color is a distinct classification, and that § 13 of New York's Civil Rights Law prohibits disqualification from jury service on the basis of race and color, also indicating that race and color are distinct classifications. We noted that:

> Discrimination on the basis of one's skin color—or 'colorism'—has been well researched and analyzed, demonstrating that 'not all colors (or tones) are equal.' Persons with similar skin tones are often perceived to be of a certain race and discriminated against as a result, even if they are of a different race or ethnicity. That is why color must be distinguished from race.[10]

We then concluded that the defendant made out a prima facie case of skin-color discrimination, and since the prosecutor could not remember the reason for striking the Indian-American prospective juror, the People failed to carry their burden of providing a non-discriminatory reason for striking her. The trial court thus erred in failing to seat the juror.

Given our state and country's long history of categorizing people based on pigmentation and New York's diverse population, we shall see the impact of this ruling moving forward.

Another significant criminal case with important future consequences decided by our Court last year is *People v. John*.[11] In that case, the defendant claimed his Sixth Amendment right to confront witnesses against him at trial was violated by the People's introduction of DNA reports through a witness who reviewed the lab reports but had not conducted, witnessed, or supervised the creation of the DNA profile used at trial. In *John*, the criminal lab reports matched defendant's DNA to the DNA

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9. People v. Luciano, 890 N.E. 2d 499, 503 (N.Y. 2008) (citing People v. Kern, 554 N.E. 2d 1235 (N.Y. 1990) (adopting *Batson*)).

10. *Bridgeforth*, 69 N.E.3d at 614 (quoting Trina Jones, *Shades of Brown: The Law of Skin Color*, 49 DUKE L.J. 1487, 1499 (2000)).

11. People v. John, 52 N.E.3d 1114 (N.Y. 2016).

found on a gun, which formed the basis for defendant's conviction of second-degree criminal possession of a weapon and menacing.

The Court held that the lab reports setting forth the defendant's DNA profile were testimonial in nature and thus subject to the rule that a defendant has a right to confront the person who makes a statement against them unless that witness is unavailable and the defendant had a prior opportunity for confrontation. After analyzing the United States Supreme Court's confrontation clause opinions in *Crawford v. Washington*,[12] *Melendez-Diaz v. Massachusetts*,[13] and *Bullcoming v. New Mexico*,[14] as well as our Court of Appeals decisions on lab tests as testimonial evidence, we concluded that the People violate a defendant's right to confront a witness when the prosecutor introduces DNA reports into evidence through a criminalist who "neither conducted nor witnessed nor supervised any part of the DNA testing."[15] The criminalist in *John* had reviewed the reports to confirm they were okay and that they had been approved by the necessary people. At trial, she also explained certain aspects of the testing process. She herself, however, had not been involved in any aspect of the testing.

We made clear that "where the laboratory report is testimonial . . . at least one analyst with the requisite knowledge must testify."[16] In *John*, the criminalist did not have that knowledge. In response to the dissent's claim that the majority had adopted an "all analyst" rule—meaning that everyone who touched the DNA would have to testify at defendant's trial—the Court explained that not everyone involved in the testing must be produced at trial. Even where multiple analysts have been involved in the testing, it is possible for an analyst who observed or supervised the generation of the defendant's DNA profile to testify, or simply for the testifying analyst to retest the sample. What the People may not do is rely on a "testifying analyst functioning as a conduit for the conclusions of others."[17]

In the wake of *John*, labs in New York that use a multiple-analyst process have been reviewing how to ensure the integrity of the testing and comply with our ruling should an analyst's testimony be required.

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12. Crawford v. Washington, 541 U.S. 36 (2004).
13. Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009).
14. Bullcoming v. New Mexico, 564 U.S. 647 (2011).
15. *John*, 52 N.E.3d at 1118.
16. *Id.* at 1126.
18. *Id.* at 1128.

In *People v. Aviles*, our Court considered whether the New York City Police Department's ("NYPD") policy of administering both breathalyzer and physical coordination tests to English-speaking motorists suspected of driving intoxicated, while offering only the breathalyzer test to non-English speakers, violated a defendant's equal protection or due process rights under both the federal and state constitutions.[18]

The defendant in *Aviles* was arrested for driving while intoxicated and moved to dismiss the misdemeanor information against him on the grounds that the NYPD unconstitutionally withheld the physical coordination test because he did not speak English. The Criminal Court granted defendant's motion, but the intermediate appellate court reversed and reinstated the charges. In so holding, the appellate court relied on its prior decision in *People v. Salazar*, in which that court held that the NYPD's policy did not violate either the equal protection or due process clauses of the New York Constitution.[19] On the equal protection claim, the *Salazar* court concluded that a policy that classified suspects based on language did not trigger strict scrutiny and that, under a rational basis review, the language classification was rationally related to the NYPD's legitimate interest in accurate sobriety test results.[20] In reaching this conclusion, the S*alazar* court credited evidence indicating that the use of untrained interpreters could compromise the results of the physical coordination test and that the NYPD would be burdened by training officers to administer the test in multiple languages.[21] On the due process claim, the *Salazar* court determined that the defendant did not have a recognized interest in compelling an investigatory procedure.[22]

In *Aviles*, the majority of our Court concluded that, although the New York Constitution provides broader due process protections than the Due Process Clause of the Fifth Amendment,[23] its equal protection safeguards are equivalent to those provided by the United States Constitution.[24] Alleged equal protection violations are, thus, primarily evaluated using either a

18. People v. Aviles, 68 N.E.3d 1208, 1211–14 (N.Y. 2016).

19. *See* People v. Salazar, 973 N.Y.S.2d 140, 143–47 (N.Y. App. Div. 2013).

20. *Id.* at 1212–13.

21. *Id.*

22. *Id.* at 1213–14.

23. *See* People v. Lavalle, 817 N.E.2d 341 (N.Y. 2004).

24. Elser v. Walters, 56 N.Y.2d 306, 313–14 (N.Y. 1982); *see also* U.S. CONST. amend. XIV, § 1; N.Y. CONST. art. I, § 11.

"strict scrutiny" or a "rational basis" standard of review, as in federal law.[25]

Applying these standards, the Court of Appeals held that NYPD's policy of not administering coordination tests based on a perceived language barrier that prevented the administering officer from communicating test instructions to a non-English-speaking suspect did not violate the defendant's equal protection rights, as non-English speakers were not a suspect class and the policy was rationally related to the legitimate governmental purposes of ensuring the reliability of coordination tests and avoiding the burdens of employing interpretative services or multilingual officers. In so holding, the Court accepted NYPD's reasons for withholding the test, i.e., that a language barrier prevents the administering officer from communicating the test instructions to a non-English-speaking suspect and therefore undermines the test's effectiveness. The Court further held that the policy did not violate defendant's due process rights because he had no constitutional right to an interpreter during the pre-arrest investigation through the administration of coordination tests, and there were substantial state interests supporting the department's policy.

I, joined by one of my colleagues, dissented and argued the NYPD policy of offering the coordination test to everyone except those persons who are not proficient in English places certain individuals in a better position than others to defend against criminal charges, in violation of the state's equal protection clause.[26] I pointed to the NYPD's language access protocols and resources, which are made available to address the needs of New York City's linguistically diverse communities. Given New York City's commitment to providing access to justice, regardless of language status, the NYPD's refusal to administer the coordination test equally violated defendant's federal and state equal protection rights. I further noted the nation's evolving approach to language classification, reflected in the United States Supreme Court's decision in *Hernandez v. New York*: "It may well be, for certain ethnic groups and in some communities, that proficiency in a particular language, like skin color, should be treated as a surrogate for race under an equal protection analysis."[27]

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25. *See* Johnson v. California, 543 U.S. 499, 505 (2005) (applying strict scrutiny to a suspect classification); Aliessa v. Novello, 96 N.Y.2d 418, 431 (N.Y. 2001) (same); Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 367 (2001) (applying rational basis review to a non-suspect classification); Maresca v. Cuomo, 64 N.Y.2d 242, 250 (N.Y. 1984) (same).

26. People v. Aviles, 68 N.E.3d 1208, 1214–21 (N.Y. 2016) (Rivera, J., dissenting).

27. Hernandez v. New York, 500 U.S. 352, 371 (1991).

B. Civil Cases: Right of Sepulcher, Same Sex Parent Standing, Facebook, and Aid-in-Dying

Although our criminal case docket is usually where fundamental rights are most deeply implicated, it is not the only area in which our Court has made recent consequential rulings. Of particular significance was our decision in *Shipley v. City of New York*, in which the Court addressed the scope of the centuries-old common law right of sepulcher—the next of kin's right to possession of the decedent's body for preservation and burial.[28] In that case, the Court held that a medical examiner was not obligated by statute or the common law to notify a decedent's next of kin that one or more organs and/or tissues had been retained for further examination and testing as part of an autopsy.

The case involved the remains of a Staten Island teenager killed in a car crash. After the autopsy, the medical examiner turned over for burial the body and organs but kept tissue samples and the brain for further examination, without informing the parents that these body parts were being retained. The brain was retained because it needed to be autopsied, and the expert responsible for brain dissections only traveled to Staten Island periodically.

The parents learned that their son's brain had not been buried with his body under undeniably horrendous circumstances: during a school visit to the medical examiner's office, students saw a jar with a brain labeled with the decedent's name. When the parents learned that their son's brain had not been reintegrated into his corpse before burial, they demanded and eventually received their son's brain. They subsequently held an additional burial ceremony. They then sued the city and medical examiner for damages based on a violation of the right of sepulcher. The Appellate Division decided in favor of plaintiffs to the extent of finding that there was a right of notification and required the medical examiner to inform next of kin that the organs were being withheld and that kin could request return for burial purposes.

The Court reversed and held that while there is a right of action for violation of the right of sepulcher for an unauthorized autopsy, in the case of an authorized autopsy the medical examiner is only required to return the body for a proper disposition. The Court interpreted the Public Health Law's requirement that the medical examiner return "remains of the body after dissection" for "burial or other lawful disposition" to require the return of only what is left of the body after an autopsy.

28. Shipley v. City of New York, 37 N.E.3d 58 (N.Y. 2015).

Therefore, the medical examiner did not have to return the brain and did not have to give notice to the parents.

In the two-judge dissent I authored, I maintained that the right of sepulcher recognizes the next of kin's absolute right to the body for preservation and burial, and that the Public Health Law imposes limitations on the medical examiner's authority to conduct an autopsy and retain those remains.[29] Moreover, statutes and case law have treated organs as body parts and "remains of the body."[30] Therefore, absent a statutory purpose to retain such organs, once the medical examiner completes an examination, the medical examiner cannot refuse to return parts requested by the next of kin.

After the decision, there was some interest in a statutory fix, but none materialized. Consequently, in New York State, at this time, there is no right to return of a decedent's organs, nor a common law requirement that the medical examiner notify next of kin that body parts have been retained.

Turning to a completely different topic, in *Brooke S.B. v. Elizabeth A.C.C.* and the companion case of *In re Estrellita A.*, our Court recognized a same-sex, non-biological parent's standing to seek visitation and custody under New York State's Domestic Relations Law § 70(a).[31] We overruled *Alison D. v. Virginia M.*,[32] decided by the Court in 1991, which held that in the case of an unmarried couple, a partner without a biological or adoptive relation to a child is not that child's parent and thus has no standing to seek custody or visitation. *Alison D.* had been roundly criticized over the years, and the case included a strong dissent by former Chief Judge Judith Kaye. She had argued that a person *in loco parentis* should have standing to seek visitation under our law. She further argued that *Alison D.* "falls hardest on children [raised in nontraditional families]" and that the Court had reneged on its tradition of reading the law as promoting the welfare of the child.[33]

In *Brooke*, we had the opportunity to revisit the issue and we saw the wisdom of Chief Judge Kaye's analysis. We explained that under recent legal principles and evolving societal changes *Alison D*'s definition of parent was unworkable and could not withstand scrutiny. In both *Brooke* and *Estrellita*, the same-sex couples had agreed to have and raise a child together, and one partner served

29. *Id.* at 68–77 (Rivera, J., dissenting).

30. *See id.* at 72–74.

31. Brooke S.B. v. Elizabeth A.C.C., 61 N.E.3d 488 (N.Y. 2016).

32. Alison D. v. Virginia M., 572 N.E.2d 27 (N.Y. 1991).

33. *Id.* at 30 (Kaye, J., dissenting).

as the biological parent and gave birth to the child. In deciding that the time had come to recognize that a non-biological parent could seek visitation and custody, the Court noted the inequities that had developed in the law, New York's statutory requirement that decisions focus on the best interests of the child, as well as the changes wrought by New York's same-sex marriage law and shifting societal perceptions. As we stated:

> *Alison D.*'s foundational premise of heterosexual parenting and non-recognition of same-sex couples is unsustainable, particularly in light of the enactment of same-sex marriage in New York State, and the United States Supreme Court's holding in *Obergefell v. Hodges*,[34] which noted that the right to marry provides benefits not only for same-sex couples, but also the children being raised by those couples.[35]

Although we did not adopt one test, we held that it is sufficient for standing purposes if the parties entered into a pre-conception agreement to conceive and raise a child as co-parents. We left open what test, if any, applies in cases where the couple has not entered a pre-conception agreement

To be clear, *Brooke* and *Estrellita* addressed only the question of standing. Whether to grant visitation or custody remains within the discretion of the court, based on the best interests of the child. Yet the impact of our Court's decision and its recognition of same-sex families cannot be minimized.

I anticipate that other jurisdictions will read *Brooke* with interest and consider our analysis as they determine how to apply their laws and constitutions to these issues.

Brooke raised the question of how to adopt state law to changing norms, particularly norms reflected or embodied in federal law. A similar question was squarely presented in *In re 381 Search Warrants Directed to Facebook, Inc.*, which called on us to construe a state law that relies on the construction of federal statutes.[36] In that case, the New York County District Attorney's office obtained a search warrant under the federal Stored Communications Act ("SCA"),[37] seeking to compel Facebook to deliver a variety of information contained in the accounts of 381 Facebook users suspected of committing disability fraud. Facebook moved to quash the warrants under the Fourth Amendment. The trial court denied the motion, and Facebook complied with the warrants while continuing to pursue the challenge on appeal. The

34. Obergefell v. Hodges, 576 U.S.___ (2015).

35. *Brooke*, 61 N.E.3d at 498.

36. *In re* 381 Search Warrants Directed to Facebook, Inc., 78 N.E.3d 141 (N.Y. 2017).

37. 18 U.S.C. §§ 2701–2712 (2012).

Appellate Division dismissed the appeal, holding that Facebook did not have a right to challenge the warrants and that the trial court's ruling was non-appealable.

The case resulted in several writings, with the majority affirming, and holding that an order resolving a motion to quash SCA warrants is not appealable. As the majority noted, Congress intended the SCA to "'protect privacy interests in personal and proprietary information' transmitted through then-emerging computer-based forms of communication, but it was also enacted to strike a 'balance' between privacy expectations and protecting 'the Government's legitimate law enforcement needs.'"[38] The majority found that the SCA warrants, despite sharing some characteristics with subpoenas, were in fact warrants, as evidenced by the plain language of the SCA itself, and as such are not appealable under New York State law.

I concurred that the order denying Facebook's motion to quash the warrant was not appealable, but on a narrower basis.[39] In my opinion, since Facebook did not assert the two grounds set forth in the SCA to challenge a warrant—specifically that procuring the information sought by the warrant was unusually voluminous or would cause an undue burden on the provider—and instead argued that the request violated its users' rights, the Appellate Division should be affirmed. Unlike the majority, however, I read the SCA to grant service providers, like Facebook, standing to move to quash or modify warrants on the aforementioned grounds. The denial of such a motion would therefore be appealable.

The dissent vigorously argued that the denial of a motion to quash is appealable and that Facebook had standing to move to quash.[40] The dissent interpreted "undue burden" to include a violation of a service provider's users' privacy rights because complying with a search warrant could tarnish the provider's brand or alienate users. The dissent further argued that an SCA warrant is more akin to a subpoena, and that federal law and New York common law would both allow Facebook to appeal the denial of its motion to quash independent of the SCA.

Given the large amounts of personal information Facebook and other providers have within their control, this issue will continue to make its way through the courts and may eventually reach the United States Supreme Court. State courts of last resort like ours often serve a special role in cases like this—not simply

38. *Facebook*, 78 N.E.3d at 144.

39. *Id.* at 153–55 (Rivera, J., concurring).

40. *Id.* at 155–60 (Wilson, J., dissenting).

deciding the law for our state but acting as a forum in which parties debate issues of national importance. We play this role with particular frequency and consequence where new possibilities created by technology confront older laws and regulatory regimes.

In that vein, the Court recently heard a deeply significant and affecting case involving end-of-life care. The question presented to our Court was whether the terminally ill have a right to a physician-prescribed lethal dosage of drugs in order to bring about a peaceful death—what some call aid-in-dying. You may find our decision of particular interest given that Texas laws allow a doctor to remove life support with a patient's consent but do not permit aid-in-dying.

New York has a longstanding history of providing expansive protections to an individual's medical choices and bodily integrity. It was against this constitutional backdrop that the Court decided *Myers v. Schneiderman*.[41] Due to the Chief Judge's recusal and the tragic and unexpected death of one of our colleagues, only five judges heard this case. The Court issued a unanimous per curiam opinion, but four judges nevertheless wrote separately.

In *Myers*, two terminally ill, mentally competent patients and a third patient in remission, together with doctors who care for patients at the end of their lives, joined by a non-profit concerned with end-of-life care, brought an action against New York State's Attorney General seeking a declaration that the criminal statutory ban on assisted suicide did not apply to physicians who provide aid-in-dying, described by the plaintiffs as the practice of providing a terminally-ill patient with a lethal prescription. Alternatively, plaintiffs sought a declaration that if the statutory ban covered aid-in-dying, it violated the terminally ill patient's equal protection and due process rights under the New York Constitution.

The per curiam opinion held, first, that the plain language of the assisted suicide statutes cover what plaintiffs referred to as aid-in-dying, because the statutes, which prohibit promoting a suicide or assisting in an attempted or completed suicide, apply to a physician who intentionally prescribes a lethal dosage of a drug. As a side note, New York State had previously decriminalized attempted suicide but maintained the criminal sanctions on those who sought to help individuals end their lives.

Second, in line with the United States Supreme Court's decision in *Vacco v. Quill*[42]—a challenge from the 1970s to New

41. Myers v. Schneiderman, 30 N.Y.3d 1 (N.Y. 2017).

42. Vacco v. Quill, 521 U.S. 793, 797 (1997).

York state's suicide statutes—the majority held that the assisted suicide policies do not unconstitutionally distinguish between individuals, because no one is permitted to assist a suicide and thus the laws comply with equal protection.

Third, and similar to the United States Supreme Court's decision in *Washington v. Glucksberg*,[43] the per curiam opinion stated that while New York recognizes the right of individuals to determine their own medical treatment, including the right to refuse such treatment when the consequence is certain death, the Court has never recognized the right to assisted suicide as a fundamental right. As such, these statutes are only subject to rational basis review. Under that standard, the majority concluded that the state amply demonstrated the statutes were rationally related to legitimate government interests, including guarding against the risks of mistake and abuse.

I was one of the four judges to author a separate writing. In it, I concurred and agreed with the Court's opinion that individuals do not have the broad right to aid-in-dying as framed by plaintiffs, who argued that terminally-ill, mentally competent patients should have an unconditional right to aid-in-dying. I wrote to clarify, however, that the same might not be true for a smaller class of patients. Aid-in-dying, I believe, should be available to those terminally-ill persons experiencing intolerable pain who seek to achieve a peaceful death as the end draws near.

As I explained:

> [The state had] compelling and legitimate interests in prohibiting unlimited and unconditional access to physician-assisted suicide. These interests, however, are not absolute or unconditional. In particular, the state's interests in protecting and promoting life diminish when a mentally-competent, terminally ill person approaches the final stage of the dying process that is agonizingly painful and debilitating. In such a situation, the state cannot prevent the inevitable, and its interests do not outweigh either the individual's right of self-determination or the freedom to choose a death that comports with the individual's values and sense of dignity.[44]

Given that the state already permits a physician to take affirmative steps to comply with a patient's request to hasten death, and that the state concedes that the legislature could permit the practice sought by plaintiffs, the state's interests lack constitutional force for this specific sub-group of patients.

43. Washington v. Glucksberg, 521 U.S. 702 (1997).

44. *Myers*, 30 N.Y.3d at 17–34 (Rivera, J., concurring).

Considering the state's sanctioning of terminal sedation in particular—whereby a patient is induced into a coma and dies—and which, as far as I am concerned, is not meaningfully distinguishable from aid-in-dying. In my opinion, the statutes could not survive rational basis review.

Another colleague wrote separately to argue in his concurrence that while there is nothing stopping the legislature from legalizing aid-in-dying—a point conceded by the parties and in the per curiam opinion—the risks are too great, and therefore the legislature should think twice before changing the law.[45] In his opinion, "to permit the practice would open the door to voluntary and non-voluntary euthanasia" and "place New York on a slippery slope toward legalizing non-voluntary euthanasia."[46] Further, "a right to assisted suicide by the terminally ill in circumscribed last-resort situations would inevitably expand to include persons who are not terminally ill."[47] My colleague thus argued that the risk of coercion of vulnerable patients should preclude the legislature from decriminalizing assisted suicide by physicians.

Another concurrence joined by two judges argued that the Court should have gone further and rejected the claims of the narrower set of patients discussed in my concurrence because the state has a rational basis for prohibiting aid-in-dying even for them. These concurring judges agreed with the state's arguments that the state has a substantial interest in protecting life; guarding against the risks of mistake, abuse, or misdiagnosis; and maintaining the integrity of the medical profession. Consequently, the state could choose to address these concerns with an absolute ban.

Some members of the New York legislature have publicly stated that they will take up the issue and seek to pass aid-in-dying legislation. So we shall see if, like other demands for rights recognition that the court has rejected, aid-in-dying finds support in the legislative branch. The very same process is happening across the country as several states consider joining Washington, Oregon, Vermont, and California in permitting some form of aid-in-dying.

C. Certified Questions

In addition to the appeals as of right that come to the Court and those cases in which we grant leave to appeal, we also accept

45. *Id.* at 34–47 (Fahey, J., concurring).

46. *Id.* at 35 (Fahey, J. concurring).

47. *Id.* (Fahey, J. concurring).

certified questions. Generally, these come from the federal Second Circuit Court of Appeals and, because of New York's commercial prominence, the Delaware Court of Chancery.

Recently we certified a question from the Second Circuit asking whether our common law copyright recognizes a right of public performance for creators of sound recordings fixed prior to February 16, 1972. Under federal copyright law there is a limited right of public performance—the right to perform, that is to play—for sound recordings set down *after* February 15, 1972. For example, the creator of the sound recording receives payment every time a song published after that date is played on the radio. Federal copyright law specifically permits the states' common and statutory law to recognize a right of public performance in pre-February 1972 sound recordings, beyond that recognized under federal law.

The question certified by the Second Circuit arose in the case of *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, in which Flo and Eddie, a corporation owned by two members of the song group the Turtles, sued Sirius—a satellite digital radio and streaming service—for broadcasting and streaming several of its pre-1972 songs, including the 1965 hit "Happy Together."[48] The Court of Appeals held that our common law right of copyright in sound recordings, recognized in a 2005 decision, *Capital Records v. Naxos of America*,[49] did not include a right of public performance. The question generated three opinions: one joined by four members of the Court, a concurrence by one of those judges, and a two-judge dissent which I authored.

The majority opinion reviewed federal copyright law and significant New York common law cases in reaching its conclusion that our common law copyright protections extend only to unauthorized reproduction, not the "playback" of a sound recording. The Court also pointed to what it considered to be industry expectations that no such right existed, as demonstrated by the efforts of some industry members to secure or proscribe such a right under federal copyright law.

Perhaps most significant was the majority's conclusion that the task of defining a right of public performance is a policy choice for the legislature, not the courts:

> Ultimately, it cannot be overstated that, if this court were to recognize a right of public performance under the common law, we would be ill-equipped—or simply unable—to create a structure of rules to properly guide the application of that

48. Flo & Eddie v. Sirius XM Radio, 70 N.E.3d 936 (N.Y. 2016)

49. Capital Records v. Naxos of America, 4 N.Y.3d 540 (N.Y. 2005).

> right. The legislative branch, on the other hand, is uniquely qualified, and imbued with the authority, to conduct the required balancing of interests and make the necessary policy choices.[50]

The concurring opinion agreed that the issue was a question for the legislature, but argued that public performance does not include internet-on-demand services, which should be considered a form of publication.

I argued in dissent that rights of ownership, use, and possession are just the bundle of sticks that make up the collection of individual rights that constitute property. No basis existed for excluding from the bundle a right of public performance, and no logical reason supported excluding a common law right of public performance in sound recordings while permitting, as New York had done in the past, such a right in other media. I rejected the majority's industry-expectation argument, viewing the "fact that the issue is now presented for our consideration" as reflecting "the realities of the music industry and the impact of technological advances on industry and customer practices."[51]

These cases illustrate some of the issues that come before our Court. At times, we have broadly interpreted the rights of the individual, and at other times, we have balanced those rights against the rights of an industry or with a view towards the social goals reflected in legislation or our common law. I hope this short overview of our recent jurisprudence made you consider the significance of the work courts like ours do, and the vibrancy of the discourse they engender. Courts like the New York Court of Appeals stand as a reminder of the importance of our state institutions and an illustration of the way vibrant, collegial debate enriches our democratic culture.

50. *Flo & Eddie*, 70 N.E.3d at 950.

51. *Id.* at 967 (Rivera, J., dissenting).