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James F. Fagan Jr.

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SMILE. HOW PREJUDICIAL CAN THE CANDID CAMERA BE? THE ADMISSION OF PHOTOGRAPHS IN A CRIMINAL TRIAL

JAMES F. FAGAN, JR.*

Since early childhood we have been taught to clean up our own messes. Recently, the New York Court of Appeals ("Court of Appeals") became reacquainted with this youthful lesson. The "mess" that required "cleaning up" was the proper standard for admissibility of photographs in a criminal trial. Twenty years ago, in People v. Pobliner,\(^1\) the Court of Appeals announced a clear rule on the admissibility of photographs.\(^2\) The Pobliner court declared that relevant photographs are excluded "only if [the photograph's] sole purpose is to arouse the emotions of the jury and to prejudice the defendant."\(^3\) However, in civil cases, the Court of Appeals applied a more stringent test of weighing the prejudicial effect and balancing the inflammatory possibilities against the probative value.\(^4\) The Court of Appeals was correct in attempting to move away from the prior rule and missed an opportunity to improve the standard in its recent determination.

* B.A., M.P.A., Long Island University; J.D., St. John's University; LL.M., Columbia University. I would like to thank Mark Ricca for his excellent research, helpful comments and interesting suggestions.


\(^2\) Id. at 369, 298 N.E.2d at 645, 345 N.Y.S.2d at 493. In Pobliner, the deceased was found in her bed with three bullet wounds in her left temple. Id. at 361-62, 298 N.E.2d at 640, 345 N.Y.S.2d at 485. The prosecution attempted to prove that Brenda Pobliner was shot by her husband as she slept in her home in Merrick, New York. Id. Defendant contended that the admission into evidence of a large color photograph of the corpse in the bed, and two additional photographs taken at the morgue was improper. Id. at 369, 298 N.E.2d at 645, 345 N.Y.S.2d at 493.

\(^3\) Id.

\(^4\) See EDITH FISCH, FISCH ON NEW YORK EVIDENCE § 134, at 78 (2d ed. 1977). In civil cases, courts have always been sensitive to the prejudicial effect photographs may have. Id.; see also Evansville Sch. Corp. v. Price, 208 N.E.2d 689, 690 (Ind. App. 1965). This case involved the use of a color photograph of the deceased youth lying in his casket. Id. Although the court noted that the photograph was not gruesome, it was found irrelevant. Id. at 692.
More recently, however, several decisions from the Court of Appeals undermined the stare decisis effect of Pobliner. This muddying of the evidentiary waters is reflected in decisions of the appellate divisions. Finally, in People v. Wood, the Court of Appeals purified the water by reaffirming its prior holding on admissibility of photographs in criminal trials. This Article will review the development of the standard for admissibility of photographs in criminal trials in New York, and will demonstrate how the court has essentially come full circle to reaffirm its prior rule. Further, recognizing the cliché that a picture is worth a thousand words, this Article will establish that a photograph may be the basis of a conviction. Finally, this Article will explore the admission of photographs in relation to the New York State constitutional requirement of a fair trial.

I. THE GENERAL USE OF PHOTOGRAPHS AS EVIDENCE

Photographs are real evidence. The foundation for a photograph's admission into evidence is laid when a witness, not necessarily the photographer, testifies that the photograph is a fair and

5 The doctrine of stare decisis is important to the development of common law rules, yet it must be flexible. See James F. Fagan, Jr., Say It Ain't So, Lewis—The Agony of a New Legal Method Professor, 4 St. Thomas L. Rev. 149, 151 (1992). Yet, when a court moves away from a rule, without clearly indicating such a movement, confusion, not order, is the result and the doctrine of stare decisis is further eroded. Id.


7 Id. at 959, 591 N.E.2d at 1180, 582 N.Y.S.2d at 993.

8 See Edward Cleary et al., McCormick on Evidence § 212, at 664 (3d ed. 1984). "Seeing is believing," and consequently a picture, as is true for other real evidence, possesses unusually strong persuasive force. Id. With respect to real evidence in general, the New York Court of Appeals noted "when validly and carefully used, there is no class of evidence so convincing and satisfactory to a court or a jury." See People v. Acevedo, 40 N.Y.2d 701, 704, 358 N.Y.S.2d 811, 813 (1976). Photographs have been admitted into evidence since the 1800s. See Cowley v. People, 83 N.Y. 464, 477-79 (1881) (before and after photograph of child used to show emaciation due to neglect by custodian); see also Ruloff v. People, 45 N.Y. 213, 224 (1871) (pictures of drowned victims shown to aid witnesses and jury in identifying victims).

9 See Cleary, supra note 8, § 212, at 663-81. Nomenclature is always a problem in the law. Id. Some authorities use "demonstrative evidence" while others use "real evidence" as the term for the generic class of evidence when the trier of fact uses firsthand sense impression. Id. In either case, there exists two classes of evidence, one which is involved in an issue relating to the circumstances in question, and a second used to illustrate, by any of the senses, an issue related to the circumstances in question. "Real Evidence" is a superset of both categories, and "real evidence" as the former subset and "demonstrative evidence" as the latter subset. Real Evidence is defined as "[e]vidence furnished by things themselves or view or inspection, as distinguished from a description of them by the mouth of the witness." See Black's Law Dictionary 1264 (6th ed. 1990). Demonstrative evidence is defined as "[t]hat evidence addressed directly to the senses without intervention of testimony. Such evidence . . . has no probative value in itself." Id. at 432.
accurate representation of the persons, objects, or scene reproduced. A photograph is "a non-verbal expression of the testimony of some witness competent to speak to the facts represented." Some courts analogize photographs to maps and diagrams, holding that they have no independent evidential effect and operate merely as illustrations. Other courts, however, have adopted the "pictorial testimony theory of photographs," which allows a photograph to be substantive evidence where there is an adequate foundation establishing the accuracy of the process producing the photograph.

In New York, a properly admitted photograph constitutes direct evidence capable of proving or disproving any issue in a case, directly or circumstantially, without need for independent testimony. This is particularly important where a photograph is obtained by surveillance cameras, such as those commonly used by banks. As a general rule, a bank's surveillance camera is triggered by the person's presence and thus, is often the only "eye-witness." Under these circumstances, it is probable that no one other than the defendant has first-hand knowledge to confirm that the photographs are a fair and accurate representation of the scene. However, it is unlikely the defendant will provide such a

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10 3 John H. Wigmore, Evidence § 790, at 218-19 (Chadbourn rev. 1970); see also Cleary, supra note 8, § 214, at 671; Fisch, supra note 4, § 142, at 83; Jerome Prince, Richardson on Evidence § 137, at 109-10 (10th ed. 1973). The key to a proper foundation is that the photograph accurately represent the subject matter depicted therein. Any person with knowledge of the subject matter, and not just the photographer, may establish this foundation. See People v. Byrnes, 33 N.Y.2d 343, 437, 308 N.E.2d 435, 437, 352 N.Y.S.2d 913, 916 (1974). Due to the state of the law, the Byrnes court held that "where no witnesses are available who have viewed the subject matter portrayed, valid alternative grounds may exist for authenticating the photograph and admitting it into evidence, such as testimony, especially that by an expert, tending to establish that the photograph truly and accurately represents what was before the camera." Id. at 348, 308 N.E.2d at 437, 352 N.Y.S.2d at 917. In Byrnes, the victim provided the foundation for the pictures by testifying that the photographs were a fair and accurate representation of the objects presented. Id. at 346, 308 N.E.2d at 436, 352 N.Y.S.2d at 914. However, medieval law did not allow uncorroborated testimony to be the basis for a conviction of rape, sodomy, or incest. Id. Thus, the victim's testimony could not be used to "bootstrap" the photographs into evidence. Id. at 347, 308 N.E.2d at 436-37, 352 N.Y.S.2d at 915.

11 See Wigmore, supra note 10, § 790, at 218-19 (emphasis omitted); see also Byrnes, 33 N.Y.2d at 347, 308 N.E.2d at 437, 352 N.Y.S.2d at 915.

12 See Cleary, supra note 8, § 212, at 671; Wigmore, supra note 10, § 790, at 219-220. The authors note that the distinction is "essentially groundless" and, in practice, has little effect.

13 See Wigmore, supra note 10, § 790, at 219; see also United States v. Rembert, 863 F.2d 1023, 1026-27 (D.C. Cir. 1988).

14 See Byrnes, 33 N.Y.2d at 348, 308 N.E.2d at 437, 352 N.Y.S.2d at 917.
foundation. Fortunately, New York permits the foundation to be established by the testimony of the person in charge of maintaining the camera or a person familiar with the scene in the photograph.

II. THE USE OF PHOTOGRAPHS IN NEW YORK CRIMINAL CASES

In criminal actions, courts have disagreed on the proper standard of admissibility of photographs into evidence. Three different tests have emerged to determine whether photographs should be admitted. One test states that relevant photographs are excluded only if their probative value is outweighed by the danger of unfair prejudice. This test is the one most likely to result in the photographs being excluded. The second test, essentially derived from the Federal Rules of Evidence, is that relevant photographs will be “excluded if their probative value is substantially outweighed by the danger of unfair prejudice.” Clearly, the latter is

15 U.S. Const. amend. V. Clearly a defendant has a constitutional right not to testify. However, other means may be utilized to establish that the person in the photograph is the defendant, such as witnesses that know the defendant or witnesses that are experts in some field. See United States v. Alexander, 816 F.2d 164, 167 (5th Cir. 1987) (orthodontist specializing in cephalometrics), cert. denied, 493 U.S. 1069 (1990).

16 See People v. Byrnes, 33 N.Y.2d 343, 348, 306 N.E.2d 435, 436, 352 N.Y.S.2d 913, 917 (1974) (where no witnesses are available, expert testimony may authenticate a photograph); see also People v. Tortorice, 142 A.D.2d 916, 918, 531 N.Y.S.2d 414, 416 (3d Dep't 1985) (witness need not always testify that photographs were fair and accurate). New York has determined that a lay witness may give an opinion concerning the identity of a person depicted in a surveillance photograph “if there is some basis for concluding that the witness is more likely to correctly identify the defendant from the photograph than is the jury.” See People v. Russell, 165 A.D.2d 327, 333, 567 N.Y.S.2d 548, 552 (2d Dep't 1991), aff'd, 79 N.Y.2d 1024, 1025, 594 N.Y.S.2d 428, 429 (1992). The testimony serves “to aid the jury in making an independent assessment regarding whether the man in the bank photographs was indeed the defendant, a task made more onerous by defendant's altering his appearance after commission of the crime.” Id. at 1025, 594 N.Y.S.2d at 429.


For purposes of this Article, the discussion is limited to these three tests as they are employed in state and federal courts. However, it should be noted that language in some opinions indicates other standards for admission of photographs. One state formulated a "gruesome test," which requires the state to overcome a presumption of prejudice when the photographs are deemed gruesome. See State v. Rowe, 259 S.E.2d 26, 28 (W. Va. 1979). Some courts require that inflammatory photographs be essential to the prosecution's case in order to be admissible. See Hoffert v. State, 559 So. 2d 1246, 1249 (Fla. Dist. Ct. App.
the more stringent test. The first test applies a preponderance standard, while the second test is analogous to a clear and convincing standard. The third test excludes relevant photographs only if the sole function of admitting the photographs is to prejudice the trier of fact.\(^{19}\) This test is the most liberal and would be analogous to the beyond a reasonable doubt standard. The New York Court of Appeals has reaffirmed application of the third test.

A review of the New York Court of Appeals’ decisions in this area indicates the lack of stability with this standard. In 1973, the Court of Appeals in \textit{People v. Pobliner},\(^{20}\) held that photographs of a deceased person, no matter how gruesome, were admissible if they tended to prove, disprove, illustrate, or elucidate a material issue or other evidence offered in a case.\(^{21}\) Admission is within the discretion of the trial court and photographic evidence should be admitted unless it is submitted solely to inflame a jury.\(^{22}\)

\textbf{After Pobliner,} New York’s criminal courts regularly admitted graphic photographs into evidence.\(^{23}\) In fact, it was rare to have


\(^{21}\) Id. at 369, 298 N.E.2d at 645, 345 N.Y.S.2d at 493.

\(^{22}\) Id. There is no balancing of probative value and prejudicial effect. \textit{Id.} In \textit{Pobliner}, the prosecution asserted that the defendant killed his wife while she slept. \textit{Id.} at 370, 298 N.E.2d at 646, 345 N.Y.S.2d at 394. The defendant, however, argued that a burglar surprised his wife and shot her. \textit{Id.} To rebut the defense’s position, the prosecution submitted four photographs of the victim in her bed in a sleeping position, including one 30-inch by 40-inch blow-up of the deceased. \textit{Id.} The prosecution also submitted two photographs taken at the morgue which showed “three clustered bullet holes near the left temple, indicating marksmanship and deliberateness in the killing.” \textit{Id.} The court held that the photographs related to material elements of the case and therefore, the trial court acted within its discretion in allowing their admission. \textit{Id.}

photographs excluded.\textsuperscript{24} When cases involved depraved indifference to human life, the relevancy of photographs was rarely questioned.\textsuperscript{25}

In \textit{People v. Bell},\textsuperscript{26} it seemed as though the Court of Appeals was testing the waters for possibly overruling \textit{Pobliner}. In \textit{Bell}, during a robbery, a store owner was stabbed approximately fifteen times by the defendant’s partner.\textsuperscript{27} Charges of attempted murder and assault were brought against the defendant.\textsuperscript{28} The defendant argued that he was unaware of the stabbings and, therefore, did not possess the requisite mental culpability to sustain a conviction.\textsuperscript{29} In order to prove the defendant’s “conscious objective,” the prosecution sought the admission of two photographs of the victim. The photographs involved, showed the victim after she was stabbed fifteen times and life-sustaining apparatus was inserted into her body.\textsuperscript{30} The Appellate Division, Third Department, in holding that the photographs were relevant stated:

\begin{quote}
\textsuperscript{24} Cf. \textit{People v. Duffy}, 93 A.D.2d 865, 866, 461 N.Y.S.2d 374, 375 (2d Dep’t 1983) (Brown, J., concurring) (photograph served no useful purpose and should not be admitted).
\textsuperscript{27} \textit{Id.} at 894, 463 N.Y.S.2d at 647.
\textsuperscript{28} \textit{Id.} at 895, 463 N.Y.S.2d at 647. New York Penal Law § 20.00 imposes criminal liability: “when one person engages in conduct which constitutes an offense, another person is criminally liable for such conduct when, acting with the mental culpability required for the commission thereof, he solicits, requests, commands, importunes, or intentionally aids such person to engage in such conduct.” N.Y. Penal Law § 20.00 (McKinney 1987). The appellate division noted that the prosecutor had the burden of establishing defendant’s culpable mental state, the “conscious objective,” of assisting in the attempted murder and assault of the owner. \textit{Id.}
\textsuperscript{29} See Appellant's Brief at 8, \textit{Bell}. Appellant's brief noted that the defendant was with his accomplice when the accomplice grabbed victim and pushed her into a back room where the accomplice “placed his hand over her mouth, at the same time drawing a knife and holding it to her torso.” \textit{Id.} The victim testified that the defendant was not present during the stabbing.
\textsuperscript{30} See \textit{Bell}, 94 A.D.2d at 896, 463 N.Y.S.2d at 649-50. “One photograph depicted the insertion of a tube into the victim’s arm for the purpose of inducing life sustaining fluids while the other showed approximately 15 wounds in [victim’s] body with a knife imbedded in her back.” \textit{Id.} The prosecution sought introduction of a third photograph portraying the victim’s unclothed body with a knife in it. See Appellant's Brief at 43, \textit{Bell}. However, the trial court held it inadmissible. See Record at 321-24, \textit{Bell}. While it would seem that this would have been cumulative, not all courts hold that photographs that are repetitive and cumulative are per se inadmissible. See \textit{Weems v. State}, 395 S.E.2d 863, 864 (1990); see
\end{quote}
Considerations of the time necessary to inflict so many wounds, and the concomitant opportunity to exercise a substantial effort to prevent or hinder the actual commission of the particular crime, make the photographic evidence relevant to the issues before the jury. The photographs dramatically exhibit the viciousness of the attack on the victim, the length of time necessary to accomplish the homicidal purpose, the opportunity for the victim to cry for help, and the opportunity for defendant to respond.  

Two justices dissented and stated the photographs served no relevant evidentiary purpose. Defendant neither contested the victim’s injuries, nor that a knife was found in her back. Therefore, the dissent posited that the photographs were not relevant and served merely to inflame the jury and prejudice the defendant. While both the majority and dissenting opinions agreed that the admissibility of the photographs hinged on the issue of relevance, only the majority believed the pictures were relevant and admissible.

The Court of Appeals unanimously affirmed the Third Department. Although the defendant did not seek to overrule the Pobliner test, the Court of Appeals treated defendant’s position as seeking to do just that, and in the process to substitute a balancing test which weighed a photograph’s inflammatory nature against its probative value. The Court of Appeals held that even

also United States v. Weeks, 919 F.2d 248, 253 (5th Cir. 1990) (photograph although cumulative was relevant and therefore admissible).
31 Bell, 94 A.D.2d at 896, 463 N.Y.S.2d at 650.
32 See id. (Mahoney, P.J., concurring in part and dissenting in part). Justice Mahoney was joined by Justice Sweeney. Id.
33 Id. Some jurisdictions have allowed photographs on issues that are not contested. See Richmond v. State, 791 S.W.2d 691, 695 (1990); see also People v. Wood, 79 N.Y.2d 958, 591 N.E.2d 1178, 582 N.Y.S.2d 992 (1992). In Wood, the Court of Appeals seemed to indicate that the defendant’s admission to the murder would not undermine the prosecution’s desiring to have 44 photographs admitted into evidence. Id. In his dissent, Judge Titone described the admission as “a barrage of 44 horrid and gruesome photographs and slides of the battered and unclothed body of the homicide victim, including a number graphically depicting her in the post mortem examination room prior to her autopsy.” Wood, 79 N.E.2d at 960, 591 N.E.2d at 1180, 582 N.Y.S.2d at 994 (Titone, J., dissenting). In light of the majority position in Wood it would seem virtually impossible to keep any photograph out of evidence in a criminal case.
35 See Appellant’s Brief at 43, Bell. Appellant’s brief clearly started with Pobliner and applied the test. Id.
36 Bell, 63 N.Y.2d at 796, 471 N.E.2d at 137, 481 N.Y.S.2d at 324. The court stated: “[e]ven if we accept defendant’s contention that the proper test for admissibility of photographs of a victim being attended in the hospital is a balancing of the inflammatory nature
if it were to adopt a balancing test, there was no abuse of discretion by the trial court in admitting the photographs.\textsuperscript{37} The \textit{Bell} court attempted to incorporate a balancing test into \textit{Pobliner}, but clearly one was not present.\textsuperscript{38} \textit{Pobliner} allows a trial court, in its discretion, to exclude any evidence under a balancing approach. Such discretion, however, generally lies with the trial court when making an evidentiary ruling, unrelated to the specific test for admissibility of photographic evidence.\textsuperscript{39}

New York appellate courts continued to apply the \textit{Pobliner} approach.\textsuperscript{40} While some courts applied a pure balancing test,\textsuperscript{41} of the photographs against their materiality and relevance to the prosecution's case.\ldots" \textit{Id.} However, the Court of Appeals focused primarily on the admission of the photographs as the only issue being appealed. \textit{Id.} at 798, 471 N.E.2d at 138, 481 N.Y.S.2d at 325. However, defendant's brief attempted to use a \textit{Pobliner} analysis by establishing that the photographs had no relevant purpose and that consequently their sole function was to inflame the jury.

\textsuperscript{37} \textit{Bell}, 63 N.Y.2d at 796, 471 N.E.2d at 137, 481 N.Y.S.2d at 324.


\textsuperscript{39} See \textit{Wood}, 79 N.Y.2d at 960, 591 N.E.2d at 1179-80, 582 N.Y.S.2d at 994. The majority illustrated this distinction by setting forth the \textit{Pobliner} test and, in the last paragraph of the memorandum, stated that a final determination necessarily involved the trial court's discretion.

\textsuperscript{40} See, e.g., People v. Van Ostrand, 157 A.D.2d 875, 876, 550 N.Y.S.2d 147, 148 (3d Dep't 1990); People v. Conethan, 147 A.D.2d 654, 654, 538 N.Y.S.2d 56, 57 (2d Dep't 1989); People v. Reilly, 155 A.D.2d 961, 962, 548 N.Y.S.2d 125, 126 (4th Dep't 1989); People v. Johnson, 144 A.D.2d 490, 492, 534 N.Y.S.2d 207, 209 (2d Dep't 1988); State v. Murray, 140 A.D.2d 949, 950, 529 N.Y.S.2d 628, 629 (4th Dep't 1988); People v. Redd, 137 A.D.2d 770, 772, 524 N.Y.S.2d 841, 843 (2d Dep't 1988); People v. Gordon, 131 A.D.2d 588, 589, 516 N.Y.S.2d 297, 298 (2d Dep't 1987); People v. Green, 134 A.D.2d 516, 517, 521 N.Y.S.2d 291, 292 (2d Dep't 1987); People v. Lambert, 125 A.D.2d 495, 497, 509 N.Y.S.2d 413, 415 (2d Dep't 1986); People v. Harrington, 108 A.D.2d 1062, 1063, 485 N.Y.S.2d 631, 633 (2d Dep't 1985); see also People v. Carter, 132 A.D.2d 561, 561, 517 N.Y.S.2d 287, 288 (2d Dep't 1987) (inflammatory photographs because irrelevant to material issues involved). In \textit{People v. Mercado}, 120 A.D.2d 619, 502 N.Y.S.2d 87 (2d Dep't 1986), the court denied admission of two photographs depicting the defendant posing with two handguns. \textit{Id.} at 620, 502 N.Y.S.2d at 88. The court's analysis interpreted the \textit{Pobliner} test as follows:

Thus, the photographs served no purpose other than to improperly portray the defendant as a gun-carrying criminal and the only purpose served by their introduction into evidence was to persuade the jury that the defendant "was a man of vicious and dangerous propensities, who because of those propensities was more likely to kill with deliberate and premeditated design." These photographs did not legitimately "tend to prove or disprove a disputed or material issue \ldots. In fact, their only purpose was to arouse the jurors' emotions and severely prejudice the defendant. Accordingly, they were erroneously admitted and, given their highly inflammatory and prejudicial nature, we find that their admission into evidence deprived the defendant of a fair trial. \textit{Id.} The Second Department utilized the \textit{Pobliner} test as a justification for the admission of medical testimony concerning a victim's injury. See People v. \textit{Hills}, 140 A.D.2d 71, 80, 532 N.Y.S.2d 269, 275-76 (2d Dep't 1988). However, the \textit{Hills} court also seemed to employ a balancing test:

We perceive no reason to distinguish between testimonial and photographic evidence in this regard. Applying the standard set forth in \textit{Pobliner}, it is clear that the evidence in the instant case was admitted, not for the "sole purpose" of arousing the emotions of
others moved, as a result of the *Bell* decision, toward a balancing test.\(^4\) In some instances, trial courts seemed to integrate the two approaches.\(^4\) In *Brown v. Henderson*,\(^4\) the United States District Court for the Eastern District of New York applied the integrated approach. The *Brown* court stated:

[P]hotographic evidence will be admitted into evidence so long as its probative value is not outweighed by its inflammatory nature. However, if the sole purpose of the photographs is to arouse the jury's emotions and thereby prejudice the defendant, the photographs should not be admitted.\(^4\)

While the rule of evidence on admissibility of photographs needed clarification, in *People v. Stevens*,\(^4\) the Court of Appeals further muddied the waters of admissibility of photographs.\(^4\) The trial court admitted a series of photographs of the victim while he was alive and in good health, and others of his body after he was stabbed and an autopsy was conducted. A majority of the Appellate Division, Third Department, held, except for the live portrait depicting the victim prior to the assault, the photographs admit-...
ted were relevant to the issue of whether defendant acted with intent to cause serious physical injury. Although the photograph of the victim prior to the incident was admitted erroneously, the majority found such error harmless. In affirming, the Court of Appeals stated:

Photographs of the victim's corpse are likely to arouse the passions and resentment of the jury and thus should not be admitted unless they tend to prove or disprove some material fact in issue. When relevance is demonstrated, the question as to whether on balance the jury should be permitted to view such photographs is addressed to the sound discretion of the trial court. The fact that other evidence may be available on the point is a factor but is not dispositive. The court may find it appropriate to admit the photographs to illustrate, elucidate or corroborate other evidence offered or to be offered at the trial.

While the memorandum decision cited Pobliner, it failed to cite Bell. However, the language of the decision more closely echoed Bell. Nowhere did the Stevens' court discuss that exclusion could be granted only if a photograph's sole purpose was to inflame the jury. Rather, Stevens spoke of balancing the evidentiary proof of a photograph, against its inflammatory character and the availability of other relevant evidence. Consequently, Stevens seemed to join with Bell in laying the foundation to overrule Pobliner.

Relying on these cases, the First and Second Departments reevaluated the admissibility standard. In People v. Cruz, the Second Department readdressed the issue of the admissibility of a portrait photograph of the victim in a criminal case. The court noted that the use of a portrait photograph of the victim while alive is admissible to show that the defendant caused the death of another. The Oregon statute requires the court to admit photographs of a homicide victim while alive to show general appearance and condition. Such law declares the photographs relevant and not subject to the balancing test required of other photographs. Oregon has a statute that requires the court to admit photographs of a homicide victim while alive to show general appearance and condition. Or. Rev. Stat. § 41.415 (1991). Such law declares the photographs relevant and not subject to the balancing test required of other photographs. See Oregon v. Williams, 828 P.2d 1006, 1013 (1992).


49 Stevens, 153 A.D.2d at 770, 544 N.Y.S.2d at 891. The majority did not elaborate on why the portrait of the victim was inadmissible, but it would seem to be irrelevant. This view is supported because the court cited People v. Winchell, 98 A.D.2d 838, 470 N.Y.S.2d 835 (3d Dep't 1983), aff'd, 64 N.Y.2d 826, 476 N.E.2d 329, 486 N.Y.S.2d 930 (1985). The Winchell court held that admission of a portrait was improper because it was irrelevant. Id. at 840, 470 N.Y.S.2d at 839. But see Spencer v. Georgia, 398 S.E.2d 179, 185 (1990) (use of portrait photograph of victim while alive admissible to show defendant caused death of another).
50 Stevens, 76 N.Y.2d at 835, 559 N.E.2d at 1279, 560 N.Y.S.2d at 121 (emphasis added).
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ond Department, clearly utilized the balancing test. However, in *People v. Watts*, using *Bell* as authority, the First Department held that photographs were admissible if they were not unduly prejudicial and greatly assisted the jury in its crucial factual determination.

Upon reviewing the conflicting standards applied by the lower courts, the Court of Appeals reaffirmed *Pobliner* in *People v. Wood*. In reaffirming the *Pobliner* rule, the *Wood* court only cited *Stevens*. The majority indicated that a general balancing was required and it did not intend to require a specific test to determine the admissibility of photographs in a criminal trial. Since *Wood*, the Court of Appeals has never strayed from the *Pobliner* test.

III. RAISING THE STANDARD OF REVIEW TO A HIGHER LEVEL

The test applied in New York to determine the admissibility of photographs in a criminal trial is the least protective. However, there has been no constitutional scrutiny of the test for admissibility of photographs under either the United States Constitution or the New York State Constitution. Under such scrutiny, the *Pobliner* test would fail.

There are several constitutional issues that can be raised regarding the *Pobliner* test. The first is a challenge to the New York standard on equal protection grounds. In civil cases, photographs are only admissible if they are not inflammatory and they assist the jury. Since the test does not require that the photographs be excluded if they are presented solely to inflame the jury, the standard for exclusion is more accessible to the party opposing admission.

Another constitutional issue to be considered with respect to the *Pobliner* test is the right to a fair trial guaranteed by the Due Pro-

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53 *Id.* at 953, 575 N.Y.S.2d at 892.
54 183 A.D.2d 409, 583 N.Y.S.2d 373 (1st Dep't 1992).
55 *Id.* at 410, 583 N.Y.S.2d at 374.
57 *Id.* at 960, 591 N.E.2d at 1180, 582 N.Y.S.2d at 993.
58 *Id.*
cess clause of the Fourteenth Amendment. One goal of the Due Process clause is to "prevent fundamental unfairness in the use of evidence." 61 Admission of certain photographs in a criminal trial could undermine fundamental fairness. 62 It is clear that either balancing test would eliminate any potential unfairness, since significant prejudice derived from photographs would trigger their exclusion from the trial. In other words, any prejudice that rises to a level of undermining the fundamental fairness of the trial would clearly outweigh the probative value of the photographs so as to demand exclusion. However, under the Pobliner test, there is no sufficient safeguard providing protection.

To illustrate the potential of a Due Process violation by applying the Pobliner test, consider three cases from jurisdictions other than New York. During the murder trial in State v. Johnson, 63 the prosecutor offered testimony of an expert in a blood-spatter analysis. In connection with the expert's testimony, forty-six color photographs depicting various blood spatters at the crime scene, including, some showing the bodies of the victims covered with blood, were admitted. The New Jersey Supreme Court held that the trial court abused its discretion in admitting the photographs because the probative value was outweighed by the substantial danger of prejudice. 64 Under a Pobliner analysis, such photographs would have been admitted, and would seem to be a violation of the defendant's Due Process rights.

62 See Futch v. Dugger, 874 F.2d 1483, 1487 (11th Cir. 1989) (photographic evidence not fundamentally unfair, but may be so gruesome as to violate defendant's right to fair trial); Bryson v. Alabama, 634 F.2d 862, 864 (5th Cir. 1981) (erroneous admission of evidence can be so prejudicial as to justify habeas corpus relief); cf. Romine v. State, 455 N.E.2d 911, 916 (Ind. 1983) ("Prejudice to the right of the accused to a fair trial may outweigh minimal relevance of photograph of the corpse of the victim in a homicide case and dictate exclusion.").
64 Id. at 852. In Johnson, the New Jersey Supreme Court asserted that such a balancing test was settled law and elaborated on the test:

Pictures of a murdered body are likely to cause some emotional stirring in any case, but that of itself does not render them incompetent. They become inadmissible only when their probative value is so significantly outweighed by their inherently inflammatory potential as to have a probable capacity to divert the minds of the jurors from a reasonable and fair evaluation of the basic issue of guilt or innocence.

Id. (emphasis added).
In *Hoffert v. State*, the prosecution sought to admit an autopsy photograph of an incision made into the victim’s scalp. The prosecutor argued that the photograph showed that the victim received separate blows to the head and this disproved defendant’s “heat of passion” defense. This argument seems to provide sufficient basis for admission in New York under *Pobliner*. However, the Florida District Court of Appeals reversed the trial court determination to admit the photograph, noting that there was other evidence in the record to establish the prosecution’s position. The court concluded that “[t]he danger of unfair prejudice to appellant far outweighed the probative value of the photograph.” Consequently, the lack of a fair trial violated defendant’s Due Process rights.

Lastly, in *Banks v. State*, photographs identified as that of the defendant holding a handgun were admitted into evidence. The prosecution conceded that the photographs were of “minimal relevance,” but the trial court admitted each photograph. The Court of Special Appeals of Maryland held that the photographs were admitted erroneously and the prejudicial effect outweighed any minimal probative value. Although the case was remanded for retrial under *Pobliner*, a New York court could admit the photo-

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66 Id. at 1249. The photograph presented the “internal portion of the victim’s head after an incision had been made from behind the ears to the top of the head, with the scalp rolled away. . . .” Id.
67 Id. Defendant argued that it was an excusable homicide. Id. at 1247. The death was the result of a fight where defendant was hit on the head with a bat and soon thereafter returned with a hunting rifle and shot the victim. Id. Since defendant alleged he received the worst of the fight and these injuries caused a “heat of passion” response, the condition of the victim would be probative. Id.
68 Id. at 1249. The court indicated that the “other evidence” showed “that the victim had broken fingers, bruises above the nose and lacerations on the back of the head.” Id. Furthermore, the court noted that the medical examiner could have provided sufficient testimony to establish the prosecution’s position. Id. *But see* Martin v. State, 475 S.W.2d 265, 267 (Tex. Crim. App.) (if verbal description of body would be admissible, so would photograph depicting same), cert. denied, 409 U.S. 1021 (1972), overruled on other grounds, Jackson v. State, 548 S.W.2d 685 (Tex. Crim. App. 1977).
69 *Hoffert*, 559 So. 2d at 1249. The court also indicated that the prosecution failed to establish the requisites for admission of the photograph. Id.
71 Id. at 441.
72 Id. at 443 (pictures used to show how police identified defendant).
73 Id.
74 Id. The trial court denied the motion for judgment or acquittal stating: “I’m not even sure [the photograph is] relevant.” Id. at 442. Furthermore, the error was not harmless. This was demonstrated by the first trial of defendant ending in a mistrial, and the photograph was not used at that trial.
75 *Banks*, 581 A.2d at 443.
graphs because of their "minimal relevance." Therefore, regardless of the proper application of the Pobliner test, a criminal defendant would be denied a fair trial.

IV. CONSIDERATIONS UNDER THE NEW YORK STATE CONSTITUTION

An examination of the Pobliner test reveals that it is facially unconstitutional under the New York constitution. The Due Process clause of the New York State Constitution requires that a criminal defendant be afforded a fair trial. The Court of Appeals has expanded the guarantees afforded to criminal defendants under the New York State Constitution. Some argue that the

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76 One could argue that seeing a defendant with a gun would establish a "criminal propensity per se" around defendant, thereby establishing an emotional basis for conviction. Although criminal propensity is not a basis for conviction, such would not fall within the emotional response of the jury sought to be protected even by Pobliner.

77 See Judith Kaye, Dual Constitutionalism in Practice and Principle, 42 Rec. of Ass'n of Bar of City of New York 285, 297-99. Judge Kaye noted that "the failure to perform an independent analysis under the State Constitution would improperly relegate many of its provisions to redundancy." Id.; see also People v. Wood, 79 N.Y.2d 958, 961, 591 N.E.2d 1178, 1180, 582 N.Y.S.2d 992, 994 (1992) (Titone, J., dissenting). Judge Titone stated that defendant's "constitutional right to a fair trial" was violated. Id. However, Judge Titone did not indicate whether the violation was based upon the federal or New York State constitution. In either case, the determination was as applied to the case and not a facial striking down of the standard.

78 N.Y. Const. art. I, § 6. "No person shall be deprived of life, liberty or property without due process of law." Id.; cf. People v. Plunkett, 158 A.D.2d 949, 949, 551 N.Y.S.2d 108, 109 (4th Dep't 1990) (defendant not deprived of fair trial when prejudicial evidence concerning prior physical and verbal abuse was admitted); People v. McMillan, 66 A.D.2d 830, 830, 411 N.Y.S.2d 634, 636 (2d Dep't 1978) (right to fair trial is fundamental and cannot be denied even if have overwhelming evidence of guilt).

The Due Process clause was derived from Article 39 of the Magna Carta, which stated: "No freeman shall be taken or imprisoned, or disseised, or outlawed, or banished, or any ways destroyed, nor will we pass upon him, nor will we send upon him, unless by the lawful judgment of his peers, or by the law of the land." It was enacted during the Constitutional Convention of 1821. See Robert A. Carter, New York State Constitution: Source of Legislative Intent 5, n.6 (1988); see also Reports of the Proceedings and Debates of the Convention of 1821, Assembled for the Purpose of Amending the Constitution of the State of New York 102 (1821). When the committee made its report to the convention, the report stated:

That they have had the same under consideration, and although the committee believe that the principles of civil liberty are well understood, and will be scrupulously regarded; yet they are of opinion, that it would be an additional safeguard to the people to specify distinctly, and adopt some of the most important of those principles; and they therefore recommend the adoption of the following, as amendments to the constitution.

Id.

79 See People v. Scott, 79 N.Y.2d 474, 496, 593 N.E.2d 1328, 1342, 583 N.Y.S.2d 931, 934 (1992). The Court of Appeals has "not hesitated" to interpret the New York State Constitution independent of the "Federal counterpart when necessary to assume that our State's citizens are adequately protected from unreasonable governmental intrusions." Id. Further expansion of rights under other sections of the constitution has not been excluded. Expan-
“Courts of Appeals’ approach to state constitutional claims has been to discourage litigants from making such claims at all.” However, the Court of Appeals clearly respects the New York State Constitution. Although the provisions of the federal and state constitutions are similar, this should not inhibit the Court of Appeals from “reading the parallel clauses independently and af-

sion of free speech rights under the New York State Constitution have been determined to exist based upon the tradition of tolerance of the unconventional. See People ex rel. Arcara v. Cloud Books, 68 N.Y.2d 553, 558, 503 N.E.2d 492, 495, 510 N.Y.S.2d 844, 847 (1986).

Although the history provides no significant evidence to interpret the Due Process clause more broadly than the Fifth Amendment of the United States Constitution, one could argue that the spirit of scrupulously guarding civil liberty would allow such expansion in this case. This is based upon the fact that the state “has its own exceptional history and rich tradition.” See Immuno A.G. v. Moor-Jankowski, 77 N.Y.2d 235, 250, 567 N.E.2d 1270, 1278, 566 N.Y.S.2d 906, 914 (1991). Some argue that such history and tradition has not been well defined so as to establish a legitimate basis to depart from federal precedent. See James A. Gardner, The Failed Discourse of State Constitutionalism, 90 Mich. L. Rev. 761, 784 n.82 (1992).


Justice Brennan, recognized as the leader of state constitutional based rights, argues a reason for state expansion of rights is to allow experimentation, since federalism permits diversity. See William J. Brennan, Jr., The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights, 61 N.Y.U. L. Rev. 535, 550 (1986). Some argue that Justice Brennan’s position “distorts state constitutional analysis.” See Earl M. Maltze, False Prophet—Justice Brennan and the Theory of State Constitutional Law, 15 Hastings Const. L.Q. 429, 449 (1988). Professor Maltze based his position, in part, on the fact that courts attempted to expand rights under a state constitution, must begin with a “floor” established by the United States Supreme Court. Id. at 443. Therefore, state courts allow their state constitutions to be defined by a federal court. Id. at 444. However, it seems that state courts are adopting the analysis of the United States Supreme Court and applying it to their own state constitutions. Of course, even after expanding rights, a state court can find that the experiment failed. See People v. Bing, 76 N.Y.2d 331, 558 N.E.2d 1011, 559 N.Y.S.2d 474 (1990).

80 See Gardner, supra note 79, at 783. Professor Gardner believes the message sent by the Court of Appeals is that it will not treat state constitutional claims “with much attention or care, so you are probably wasting your time raising them.” Id.

81 Professor Gardner believes that the Court of Appeals shows a “grudging character” with respect to dealing with state constitutional issues. Id. at 781. However, in part, the reason for lack of full analysis is the frequency of memorandum and per curiam decisions. During the period from September 1990 to July 1991, the Court of Appeals issued 204 opinions including 79 memorandum and 13 per curiam decisions. See Daniel Wise, Wachtler Court at 5: Panel Defies Labels; But Individual Trends Emerge, N.Y.L.J., Oct. 15, 1991, at S3, col. 3. However, in many signed opinions, the Court of Appeals has clearly shown a willingness to interpret the state constitution.
fording broader protection." Furthermore, the right to a fair trial is not determined solely by the value of the past, but also the State’s present value. Reasons for expanding rights include: preexisting state laws defining the scope of the individual right in question; the history and tradition of New York State in its protection of individual rights; any identification of the right in the State constitution as being one of peculiar local concern; and any distinctive attitudes of the State’s citizenry toward the protection of individual rights.

**Conclusion**

Under the New York State Constitution, the Court of Appeals has required that a criminal trial be conducted so that “the proof will be legal evidence, unimpaired by intemperate conduct, impertinent counsel and irrelevant asides, all of which obfuscate the development of factual issues and sidetrack the jury from its basic mission of determining the facts relevant to guilt or innocence.” Furthermore, “a fair trial is a paramount constitutional condition in any judicial proceeding; it is the foundation of a criminal trial, if justice be its essence.” Clearly, there cannot be a fair trial where

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[S]tate courts cannot rest when they have afforded their citizens the full protections of the federal Constitution. State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court’s interpretation of federal law. The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law—for without it, the full realization of our liberties cannot be guaranteed. See William J. Brennan, Jr., State Constitutions and the Protection of Individual Rights, 90 Harv. L. Rev. 489, 491 (1977).


86 See LaRocca v. Lane, 37 N.Y.2d 574, 582, 338 N.E.2d 606, 612, 376 N.Y.S.2d 93, 101 (1975); see also People v. Bost, 133 A.D.2d 930, 930, 520 N.Y.S.2d 645, 646 (3d Dep’t) (no trial is perfect, record as whole must be considered), appeal denied, 70 N.Y.2d 929, 519 N.E.2d 627, 524 N.Y.S.2d 681 (1987); People v. Jean-Charles, 122 A.D.2d 166, 166, 504
evidence is "highly inflammatory and capable of arousing a juror's inchoate fears." The Pobliner test needs to be reviewed under the Due Process clause of the New York State Constitution. Since Due Process mandates a fair trial, such a review would result in a determination that a balancing test is more appropriate.

N.Y.S.2d 544, 545 (2d Dep't 1986) (defendant only entitled to fair trial); People v. Mack, 111 A.D.2d 266, 266, 489 N.Y.S.2d 101, 102 (2d Dep't 1985) (federal and state constitutions guarantee fair trial, not perfect trial).


88 See La Rossa v. Abrams, 62 N.Y.2d 583, 588, 468 N.E.2d 19, 24, 479 N.Y.S.2d 181, 183 (1984) ("due process is a flexible constitutional concept calling for such procedural protection as a particular situation may demand"). Clearly, the state Due Process clause should remove the potential prejudice interest in the Pobliner test. Although not the focus of this Article, the court should adopt the balancing test employed under Federal Rule of Evidence 403, which provides sufficient constitutional protection while allowing probative photographs to be admitted.