Is There High Ground in the Middle of the Road? A Review and Analysis of the Jurisprudence of the Honorable Fritz W. Alexander II

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On January 29, 1985, the New York State Senate unanimously confirmed the appointment of the Honorable Fritz W. Alexander II to the New York State Court of Appeals. Judge Alexander became the first African-American jurist selected to serve a full fourteen-year term on the court of appeals. In April of 1992, in a move

1 See Senate Confirms Judge Alexander, N.Y. TIMES, Jan. 30, 1985, at B2. See generally Isabel Wilkerson, Two Court Appointees from Different Backgrounds, N.Y. TIMES, Jan. 3, 1986, at B6. Fritz Winfred Alexander II was born on April 24, 1926, in Apopka, Florida and raised in Gary, Indiana. Id. During World War II, he served as a quartermaster, 2d class, in the United States Navy. Id. Following the War, he enrolled at Dartmouth College and after his graduation in 1947, he received his L.L.B. from New York University School of Law. Id.; AMERICAN BENCH 1582 (Marie T. Hough et al. eds., 6th ed. 1991-92). In 1952, Judge Alexander was admitted to the bar in New York, and began his career as an attorney in private practice in New York City. Id.; Wilkerson, supra at B6. In 1957, he, along with David M. Dinkins and Thomas Benjamin Dyett, founded the firm of Dyett & Alexander. Id. After several years of private practice, serving a largely black clientele, he "moved into the judicial and political mainstream with successive appointments to New York City judgeships." Id.

After serving as a judge for both the Civil Court and Family Court, Judge Alexander was appointed as a Supreme Court Justice in 1976. See Alexander Confirmed for Appeals Court, UPI, Jan. 29, 1985, available in LEXIS, Nexis Library, UPI File [hereinafter Alexander Confirmed]. In 1982, he became an associate justice of the Appellate Division for the First Department in Manhattan. Id. On January 2, 1985, Governor Mario Cuomo nominated Judge Alexander to fill the seat on the New York Court of Appeals that had been vacated upon the retirement of Judge Hugh R. Jones. Id. When nominated, the New York State Bar Association found him to be "well-qualified," a term the 14 member Committee on Judicial Selection reserved for candidates found to possess "pre-eminent qualifications." See Senate Confirms Judge Alexander, supra, at B2; N.Y. State Bar Association Rates Nominees, PR Newswire, Dec. 21, 1984, available in LEXIS, Nexis Library, PR Newswire File.

Additionally, Judge Alexander, a respected community leader, served as president of the Harlem Lawyers Association, and helped found a black lawyer's group known as the National Bar Association and 100 Black Men, Inc. See Wilkerson, supra at B6. He also served as a member of the New York State Commission on Judicial Conduct, and was an adjunct Professor of Law at Cornell University Law School in 1974. See State of New York Letter to Governor Cuomo, PR Newswire, Dec. 3, 1984, available in LEXIS, Nexis Library, PR Newswire File.

2 Alexander Stille & Amy Tarr, New York Appointments, NAR'L L.J., Jan. 14, 1985, at 2; Alexander Confirmed, supra note 1. Harold Stevens had been appointed to the court in 1974, but only to fill a vacancy for one year. Id.

At the time of Judge Alexander's appointment he told the Senate Judiciary committee: "I would be remiss if I did not acknowledge the symbolic significance of my elevation to the Court of Appeals." See Senate Confirms Judge Alexander, supra note 1, at B2. Judge Alexander stated that he hoped he could serve as an inspiration, especially to "the minority youth who so desperately need to be made to feel that there is a real future for them." Alexander Confirmed, supra note 1. While he expressed hope that his appointment would
which surprised many of his colleagues, and while at the "pinnacle" of his judicial career, Judge Alexander resigned from the

inspire "black kids to do something other than stand on the corner," Judge Alexander was nonetheless emphatic that he had not been nominated because [he] was black but rather because [he] was a good judicial choice. See Wilkerson, supra note 1, at B6. "The fact that I am black is an accident of birth. I am here to serve the people of the state as a judge of this court." Id.

Judge Alexander believed in a strong minority presence in the judiciary and some years earlier, accused the Koch administration of being "less than vigorous" in their appointment of other black justices to the various state courts. See E.R. Shipp, Black Judges Criticize Koch on Court Posts, N.Y. TIMES, Feb. 27, 1983, at A1, 33. He "question[ed] whether there was one standard for white candidates and another for blacks." Id.

In 1981, while attending a black-tie gala at New York University Law School, then New York State Supreme Court Justice Alexander commented on the gathering of black judges: "In many respects we have achieved success in our field, but outside our courtrooms we are looked upon and treated without regard to that achievement." See E.R. Shipp, "Family Party" is Staged at N.Y.U.; For the Black Judges in New York, N.Y. TIMES, Dec. 13, 1981, § 1, at 55. "Blacks really haven't made it in this country, and I don't think we should succumb to the illusion of inclusion." Id.

The reaction of community leaders to his appointment was generally positive. See Alexander Confirmed, supra note 1. New York State Senator Leon Boques of Manhattan, downplayed the racial aspect of the nomination and stated: "Those of us who know Judge Alexander gleam with pride for this is a person who was clearly appointed primarily because of his qualifications and not because of his ethnicity." Id. Senator Ohrenstein, also of Manhattan, took a different view and stated: "[T]he fact that Judge Alexander happens to be a black man should not be ignored but should be praised." Id. Presiding Justice of the Appellate Division, First Department, Justice Francis T. Murphy stated: "Fritz Alexander represents that unique kind of judge. He is scholarly and humane, just and merciful." Jon Fleming, Regional News, UPI, Jan. 2, 1985, available in LEXIS, Nexis Library, UPI File.

In 1985, when Judge Alexander was presented the prestigious Golda Meir Memorial Award by the Jewish Lawyers Guild, Justice Murphy again spoke and stated: "You, Fritz Alexander, rise from a people who have long suffered social injustices so total, varied and profound that they are beyond the imagination of any person in this room. Yet, like Golda, you were not broken by adversity. Like Golda, you stood and fought." See David W. Dunlap & Sara Rimer, New York Day by Day; Honoring Judge Alexander, N.Y. TIMES, Apr. 5, 1985, at B3.

Judge Alexander's position did not insulate him from experiencing the inequities of prejudice. See Chambers of Black Judge Defaced During Break-In, N.Y. TIMES, Jan. 18, 1981, § 1, at 27. In 1981, while on the bench of the Supreme Court, New York County, his chambers on the seventeenth floor of the Criminal Courts Building at One Hundred Centre Street were ransacked. Id. The intruders scrawled the letters "KKK" on his office wall. Id. Although it was true that other chambers were also broken into and several pieces of office equipment were stolen, Judge Alexander's chambers was the only one defaced in this manner.

See Maurice Carroll et al., Dinkins Scores with Fire Dept., NEWSDAY (New York), June 12, 1992, at 20. Albany politicians were puzzled by Fritz Alexander's decision to leave the Court of Appeals for a position as deputy mayor. "Chief Judge Sol Wachtler (who understandably has a high regard for the court he heads) mused during his speech at last week's Legislative Correspondents Association: 'If he [Judge Alexander] follows the trajectory, his next job will be school crossing guard.'" Id.

I served the judiciary for twenty-two years, having reached the pinnacle there was no place else I could go in terms of the judiciary. I was not interested in going to Washington even if there had been the remote chance that I could have gone to the Supreme Court, which there was not. In terms of deciding if I wanted to do that for the rest of my working life, I kept coming up with questions, which for me said: "Think about something else." I had been interested in Mayor Dinkin's administration from the very
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Bench. He accepted the post of Deputy Mayor for Public Safety in the administration of his long time friend, David M. Dinkins, the Mayor of the City of New York.\(^5\)

Although considered a "centrist,"\(^6\) Judge Alexander authored several opinions during his seven years on the Court of Appeals,\(^7\) which suggest a decidedly more liberal and expansive philosophy in cases involving protections afforded by the Bill of Rights. This Note reviews and analyzes several of his majority and dissenting opinions to ascertain the impact of Judge Alexander's jurisprudence upon the laws of the State of New York. Part One discusses several significant majority opinions which affect the rights of the mentally ill; the jury selection process; the press's right to maintain confidential sources; and the right of a business person to be free from unreasonable government searches. Part Two examines two dissenting opinions which reflect a desire to protect individuals in the face of governmental restrictions; specifically, the rights of civil servants to choose where they will live and the protection of marital privacy.

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beginning . . . so when an opportunity came to join the administration, I left the Court of Appeals, coming to the city and an uncertain future . . . to a whole different lifestyle. But I enjoy it . . . I was satisfied that I was doing something that was appropriate to do.

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\(^{5}\) See Kevin Flynn, Dinkins' Inaugural Party Mix, Newsday (New York), Dec. 27, 1989, at 8 (Mayor Dinkins formally sworn in by friend and former law partner, Judge Fritz Alexander); Daniel Wise, No Drastic Shift Seen with New Judge: Alexander, Smith Compared, N.Y.L.J., Nov. 2, 1992, at S2 (Special Supplement) (Judge Alexander voluntarily resigned from Court of Appeals position to become Deputy Mayor for Public Safety).

\(^{6}\) See Kevin Sack, Alexander's Departure Leaves Cuomo Tricky Task of Picking a New Judge, N.Y. Times, Feb. 9, 1992, § 1, at 36 ("Judge Alexander] has been a centrist swing vote on a bench that has been inching toward the right."); see also Daniel Wise, Wachtler Court: Centrist, Pragmatic, N.Y.L.J., Sept. 7, 1989, at 1, col. 1 (noting that despite its centrist, pragmatic posture, Wachtler Court blazed new trails in cases involving individual liberties); Daniel Wise, Study Finds Court of Appeals Becoming More Conservative, N.Y.L.J., June 3, 1991, at 1, col. 1 (analyzing voting trends on Court of Appeals and noting recent retrenchment in treatment of state constitutional rights); Wise, supra note 4, at S2 (analyzing Judge Alexander's general "middle-of-the-road" outlook).

\(^{7}\) Alexander Interview, supra note 4. According to Judge Alexander:

Generally, the rule in the court is that the Chief Judge would put on three by five cards the title of each of the six or seven cases argued that day and you would draw in order of seniority, and a rotating seniority, so that if I drew first today, I would draw last the next day. And the case you drew was the case you were responsible to report on. If your report to affirm, modify, or reverse garnered three other votes then that became the majority for the court and you would be the author of the opinion. If you failed to garner the court, then you had the option of either joining the court or writing a dissent . . . . Now it might happen that one judge had a yen for a case, and if the judge who drew the case didn't have any particular feeling about it he might pass it on.

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Id.
I. THE MAJORITY OPINIONS

A. Expanding the Rights of the Involuntarily Committed

In 1978 and 1979, two federal district courts recognized that an involuntarily hospitalized mental patient had a qualified constitutional right to refuse antipsychotic medication. These decisions prompted involuntarily hospitalized mental patients throughout the country to secure that right in state courts. In Rivers v. Katz, the New York Court of Appeals, considered whether and under what circumstances the State could forcibly administer antipsychotic drugs to a mentally ill patient who was involuntarily committed to a state facility. Relying solely on

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8 See Rennie v. Klein, 653 F.2d 836 (3d Cir. 1981), vacated, 458 U.S. 1119 (1982), remanded, 720 F.2d 266, 269 (3d Cir. 1983) "[Antipsychotic drugs may be constitutionally administered to an involuntarily committed mentally ill patient whenever, in the exercise of professional judgment, such action is necessary to prevent patient from hurting himself or others.]" Id.; Rogers v. Okin, 478 F. Supp. 1342, 1361-63 (D. Mass. 1979) (holding medical patient presumed competent to make decisions regarding treatment in non-emergencies and could only be forced to take medication in emergency situations), aff'd in part and rev'd in part, 634 F.2d 650 (1st Cir. 1980).

9 See Alexander D. Brooks, The Right to Refuse Antipsychotic Medication: Law and Policy, 39 Rutgers L. Rev. 339, 355 (1987). In federal court, the constitutional right to refuse medical treatment espoused in Rennie and Rogers meant that "a competent and non-dangerous mental patient in a non-emergency situation could prevent the hospital from imposing medications on him." Id. The patient, not the hospital doctors, had the final say. Id. Today, as a result of Youngberg v. Romeo, 457 U.S. 307 (1982), a patient has the right to have his medication program reviewed, but the hospital doctors make the ultimate decision. Id. In other words, today the patient has nothing more than a right to object or to obtain a second opinion. Id.

10 See Brooks, supra note 9, at 341-42. The New Jersey District Court in Rennie relied on the right to privacy, and the Massachusetts District Court based its decision on the First Amendment right to freedom of thought and communication. Id. Both courts, however, qualified the right to refuse medication in situations "where . . . the refusing patient was either dangerous to himself or to others in the hospital or was not capable of making a rational treatment decision." Id. at 354-55.


12 See Brooks, supra note 9, at 343 n.14 (listing state court cases brought by mentally ill patients to obtain right to refuse medication). See generally Sol Wachtler, The Patient's Right to Decline Medical Treatment: The New York View, 7 J. Contemp. Health L. & Pol'y 9, 9 (1991) (discussing evolving case law in New York State concerning patients' right to decline medical treatment in different situations).


14 Rivers involved three individuals who were involuntarily committed to Harlem Valley Psychiatric Center and retained pursuant to court order. Id. at 490-92, 495 N.E.2d at 339-40, 504 N.Y.S.2d at 76-78. Prior to the entry of their respective retention orders, each patient refused to be medicated with various antipsychotic drugs. Id. Each individual sought review pursuant to [1986] 14 N.Y.C.R.R. § 27.8, which provides, in pertinent part:

(c) Review of Objection. Prior to initiating a treatment procedure over the objection of a patient, such objection must be reviewed by the head of the service. The decision of the head of the service shall be communicated to the patient and his or her representative, if any, and to the Mental Health Information Service, and treatment may be initiated.
New York's common-law precedents, Judge Alexander concluded that involuntarily committed mental patients had a fundamental right under the Due Process Clause of the New York State Constitution to refuse antipsychotic medication. Judge Alexander explained that absent compelling state interests, before the administration of drugs pursuant to the state's parens patriae power, a judicial determination would be required to establish whether the patient possessed the requisite capacity to make a reasoned decision unless the patient or her or his representative chooses to appeal this decision to the director, each patient's objections were considered, but ultimately overruled.

Id. at 490 n.2, 495 N.E.2d at 339 n.2, 504 N.Y.S.2d at 77 n.2. Thereafter, two of the individuals commenced declaratory judgment actions to enjoin the "nonconsensual administration of these drugs," and to "obtain a declaration of their common-law and constitutional right to refuse medication," and the third commenced an Article 78 proceeding seeking identical relief. Id. at 491, 495 N.E.2d at 340, 504 N.Y.S.2d at 77. The New York Supreme Court, Special Term, denied relief to all three individuals on the ground that "the involuntary retention orders necessarily determined that these patients were so impaired by their mental illness that they were unable to competently make a choice in respect to their treatment." Id. The Appellate Division consolidated the three appeals and affirmed, and plaintiffs appealed to the Court of Appeals. Id. at 492, 495 N.E.2d at 340, 504 N.Y.S.2d at 78.

15 See Rivers, 67 N.Y.2d at 492-93, 495 N.E.2d at 341, 504 N.Y.S.2d at 78; see also In re Storar, 52 N.Y.2d 363, 372, 420 N.E.2d 64, 68, 438 N.Y.S.2d 266, 270 (patient's right to refuse treatment guaranteed by common law as well as constitution), cert. denied, 454 U.S. 858 (1981); Schloendorff v. New York Hosp., 211 N.Y. 125, 129, 105 N.E. 92, 93 (1914) (every individual "of adult years and sound mind has a right to determine what shall be done with his own body"); Vincent M. Bonventre, State Constitutionalism in New York: A Non-Reactive Tradition, 2 EMERGING ISSUES IN ST. CONST. L. 31, 55 (1989) ("[C]ourt relied exclusively on its common-law precedents to invalidate state regulations which authorized the forcible anti-psychotic medication of involuntarily committed mental patients, regardless of their capacity to make decisions and regardless of the absence of any danger from non-medication").

16 N.Y. CONST. art I, § 6. "No person shall be deprived of life, liberty or property without due process of law." Id.

17 Rivers, 67 N.Y.2d at 492, 495 N.E.2d at 341, 504 N.Y.S.2d at 78. See generally Samuel J. Brakel, J.D. & John M. Davis, M.D., Taking Harms Seriously: Involuntary Mental Patients and the Right to Refuse Treatment, 25 IND. L. REV. 429, 437-72 (1991) (discussing benefits and risks of drug treatment and harms resulting from no treatment and inability of involuntarily committed to make decisions regarding their treatment); Brooks, supra note 9, at 344-52 (analyzing harms and benefits of antipsychotic medication); Mary C. McCarron, Comment, The Right to Refuse Antipsychotic Drugs: Safeguarding the Mentally Incompetent Patient's Right to Procedural Due Process, 73 MARQ. L. REV. 477, 477 (1990) ("Within the psychiatric profession the use of these drugs to treat psychotic patients remains controversial as psychiatrists debate the benefits and long term risks of antipsychotic drug administration.").

18 See Rivers, 67 N.Y.2d at 495, 495 N.E.2d at 343, 504 N.Y.S.2d at 80 (1986). The State may be permitted, pursuant to its police power, to administer antipsychotic medication over a patient's objections "where the patient presents a danger to himself or to other members of society or engages in dangerous or potentially destructive conduct within the institution." Id. There was no claim made here that the medication was required for either of these reasons. Id. at 496, 495 N.E.2d at 343, 504 N.Y.S.2d at 80.

19 Id. at 497, 495 N.E.2d at 343-44, 504 N.Y.S.2d at 81. But see Brakel & Davis, supra note 17, at 433 ("decision to override a treatment is best made by medical personnel rather than judges or other legal functionaries").
sion with respect to the proposed treatment. Judge Alexander believed that:

[in our system of a free government, where notions of individual autonomy and free choice are cherished, it is the individual who must have the final say in respect to decisions regarding his medical treatment in order to insure that the greatest possible protection is accorded his autonomy and freedom from unwanted interference with the furtherance of his own desires. This right extends equally to mentally ill persons who are not to be treated as persons of lesser status or dignity because of their illness.]

This decision recognized the fundamental right of the involuntarily institutionalized mentally ill to refuse treatment, invalidated the existing administrative regulations, and implemented additional due process safeguards.

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20 See Rivers, 67 N.Y.2d at 498 n.7, 495 N.E.2d at 344 n.7, 504 N.Y.S.2d at 81 n.7. The court noted that the following factors should be considered in evaluating a patient's ability to consent or refuse treatment:

1. the person's knowledge that he has a choice to make;
2. the patient's ability to understand the available options, their advantages and disadvantages;
3. the patient's cognitive capacity to consider the relevant factors;
4. the absence of any interfering pathologic perception or belief, such as a delusion concerning the decision;
5. the absence of any interfering emotional state, such as severe manic depression, euphoria or emotional disability;
6. the absence of any interfering pathologic motivational pressure;
7. the absence of any interfering pathologic relationship, such as the conviction of helpless dependency on another person;
8. an awareness of how others view the decision, the general social attitude toward the choices and an understanding of his reason for deviating from that attitude if he does.


21 Rivers, 67 N.Y.2d at 493, 495 N.E.2d at 341, 504 N.Y.S.2d at 78.

22 See Mintz, supra note 11, at 899 ("[I]n deciding that involuntary commitment does not equal incapacity to determine the course of treatment, the court extended the fundamental right to refuse treatment to the institutionalized mentally ill.").

23 Rivers, 67 N.Y.2d at 498, 495 N.E.2d at 344, 504 N.Y.S.2d at 74 (administrative review procedures of [1986] 14 N.Y.C.R.R. § 27.8 "do not sufficiently protect due process rights of involuntarily committed patients guaranteed by Article I, § 6 of the New York State Constitution"); see also supra note 14 (providing administrative procedure pursuant to [1986] 14 N.Y.C.R.R. § 27.8(c)).

Judge Alexander found the administrative procedures inadequate because they failed to "articulate the standards to be followed or criteria to be considered at each stage of the administrative process, i.e., what the need is for the particular drug, whether a particular drug is the least intrusive, whether it is capable of producing the least serious side effects, and the proper length of its use." Rivers, 67 N.Y.2d at 497-498, 495 N.E.2d at 344, 504 N.Y.S.2d at 81.

24 Rivers, 67 N.Y.2d at 497 N.E.2d at 344, 504 N.Y.S.2d at 81. The determination of whether the patient is capable of making a competent decision regarding his or her own treatment should be made at a hearing following exhaustion of the administrative review procedures provided for in 14 New York Code of Rules and Regulations 27.8. The hearing should be de novo, and the patient should be afforded representation by counsel (Judic-
The guidelines established by Judge Alexander in *Rivers* were instrumental in safeguarding the due process rights of the involuntarily committed mental patients who wish to refuse antipsychotic drugs. For instance, in *Eleanor R. v. South Oaks Hospital*, the Appellate Division for the Second Department applied the *Rivers* guidelines before deciding to uphold an order to administer antipsychotic medication to an involuntarily committed patient against her will. The court considered the testimony of the hospital’s expert witness, a psychiatrist, as well as the patient’s direct statements before concluding that the hospital demonstrated by clear and convincing evidence that the patient was incapable of rendering a decision regarding the proposed treatment.

Again, in *Adele S. v. Kingsboro Psychiatric Center*, the Appellate Division for the Second Department held that the hospital had demonstrated by clear and convincing evidence that the patient lacked the ability to make a reasoned decision with respect to the proposed hospital treatment. In reaching its decision, the

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26 See *supra* note 24 (outlining guidelines established by *Rivers* decision).
27 *Eleanor R.*, 123 A.D.2d at 461, 506 N.Y.S.2d at 764 (patient did not have capacity to make treatment decision).
28 See *id.* at 460, 506 N.Y.S.2d at 764. The psychiatrist testified “that the patient had been diagnosed as suffering from ‘schizophrenic paranoia’... and her illness had destroyed her ability to make a reasoned decision regarding her treatment which, in his opinion, called for the proposed antipsychotic medication.” *Id.*
29 *Id.* at 460, 506 N.Y.S.2d at 763. The patient denied she was mentally ill and in need of medication. *Id.* Additionally, she “spoke in a rambling and incoherent manner... about her fear of cyanide in the proposed medication and her desire to sue the hospital for malpractice and her husband for fraud.” *Id.* at 460-61, 506 N.Y.S.2d at 764.
30 *Id.* at 460, 506 N.Y.S.2d at 764.
31 149 A.D.2d 424, 539 N.Y.S.2d 769 (2d Dep’t 1989).
32 See *id.* at 424, 539 N.Y.S.2d at 770.
court considered both the hospital expert’s testimony\textsuperscript{33} and the patient’s evaluation statement.\textsuperscript{34}

Adhering to the Rivers guidelines, the court also concluded that the proposed medication was narrowly tailored to preserve the patient’s “liberty interest.”\textsuperscript{35} The court noted that the medication would stabilize the patient, improve her daily activities, skills, and hygiene, as well as combat any potential adverse side effects such as mild tremors, weight gain, and sleeplessness.\textsuperscript{36} Accordingly, the Appellate Division upheld the lower court’s authorization to administer the proposed antipsychotic treatment pursuant to the state’s parens patriae power.\textsuperscript{37}

While in both Eleanor R. and Adele S. involuntarily committed mental patients were forced to take medication against their will, as a result of the Rivers decision, their objections were not disregarded. Judge Alexander’s opinion, in Rivers, helps to ensure that involuntarily committed persons who are prescribed antipsychotic medication will receive additional due process protection.

In addition to expanding the rights of involuntarily committed mentally ill patients in New York State, Judge Alexander also endeavored to preserve racial equality in the New York jury selection process.

**B. Equal Protection in Jury Selection**

In Batson v. Kentucky,\textsuperscript{38} the United States Supreme Court reaf-
firmed the principle espoused in *Swain v. Alabama* that a "[s]tate's purposeful or deliberate denial to Negroes on account of race of participation as jurors in the administration of justice violated the Equal Protection Clause." The *Batson* Court, however, rejected the evidentiary standard outlined in *Swain* and established a new procedure to prove an equal protection claim arising from the petit jury selection process. Furthermore, the *Batson* Court never discussed whether its holding would apply to the defense's use of peremptory challenges, or what factors would be considered in determining whether a prima facie case of discrimination had been made. Judge Alexander, writing for a unanimous court, answered these questions in two recent cases.

ant alleging lack of a fair cross section must demonstrate systematic exclusion of a group of jurors from the venire." *Id.* at 84. The Supreme Court granted certiorari and reversed. *Id.* 380 U.S. 202 (1965).

*Batson*, 476 U.S. at 84. The *Batson* Court stated:

Purposeful racial discrimination in selection of the venire violates a defendant's right to equal protection because it denies him the protection that a trial by jury is intended to secure. "The very idea of a jury is a body... composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds."

*Id.* at 86 (quoting *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880)). Additionally, purposeful exclusion in jury selection on account of race unconstitutionally discriminates against the excluded juror and affects the entire community by undermining "public confidence in the fairness of our system of justice." *Id.* at 87.


Under *Batson*, the defendant has the burden of proving purposeful discrimination just as in any other equal protection case. See *Batson*, 476 U.S. at 93. However, the defendant may now do so relying solely on evidence surrounding his own trial. *Id.* at 96. To establish prima facie discrimination, the defendant must show that "he is a member of a cognizable racial group," that peremptory challenges were used by the prosecution to exclude members of the defendant's race, and that the relevant circumstances raise an inference that the prosecutor discriminated in selection of the petit jury on account of race. *Id.* Thereafter, the prosecution must provide racially neutral reasons for its jury selection choices. *Id.* at 97.

*Batson*, 476 U.S. at 89 n.12 ("We express no views on whether the Constitution imposes any limit on the exercise of peremptory challenges by defense counsel.").

See Fisher, *supra* note 41, at 1. *Batson* left open other questions including: 1) "whether it would prohibit a prosecutor from systematically excluding jurors belonging to a racial group other than the defendant's,....[and] 2) what would constitute an acceptable race-neutral explanation for a disputed peremptory challenge." *Id.*

See *People v. Kern*, 75 N.Y.2d 638, 554 N.E.2d 1235, 555 N.Y.S.2d 647, *cert. denied*, 111 S. Ct. 77 (1990); *People v. Jenkins*, 75 N.Y.2d 550, 554 N.E.2d 47, 555 N.Y.S.2d 10 (1990); see also Fisher, *supra* note 41, at 1. "Regardless of how the Supreme Court ultimately resolves the federal constitutional question, the law in New York is now settled. In this state a defendant may not exclude jurors solely on the basis of race and constitutional limitations on the exercise of peremptory challenges apply equally to the prosecution and the defense." *Id.*
In *People v. Kern*, Jeh Judge Alexander rejected the defendants' contended right to use peremptory challenges to prevent individuals of a specific race from serving on the criminal jury and reasoned "that such racial discrimination has no place in our courtrooms and that such conduct by defense counsel is prohibited by both the Civil Rights Clause and the Equal Protection Clause of our State Constitution."  

45 Kerne 75 N.Y.2d at 643, 554 N.E.2d at 1236-37, 555 N.Y.S.2d at 648-49. Defendants were convicted of manslaughter and other charges as a result of their participation in an attack upon three black men who sought assistance in the Howard Beach neighborhood after their car broke down. *Id.*  

On December 20, 1986, the night of the attack, the defendants, and approximately 27 other teenagers, were attending a birthday party in Howard Beach. *Id.* at 643, 554 N.E.2d at 1237, 555 N.Y.S.2d at 649. Several of the teenagers, upon leaving the party to drive someone home, encountered three black men in the neighborhood and a confrontation ensued. *Id.* The teenagers thereafter returned to the party and one of the defendants, shouted, "there were some niggers on the boulevard, let's go up there and kill them." *Id.* at 644, 554 N.E.2d at 1237, 555 N.Y.S.2d at 649.  

The defendants, armed with bats and sticks, left the party and tracked the victims down. *Id.* A fight ensued causing the victims to run in separate directions. *Id.* One victim managed to escape. *Id.* One was caught and repeatedly assaulted while his assailants chanted, "Niggers, get... out of the neighborhood." *Id.* Eventually, the second victim broke free and was joined by the third victim. *Id.* at 644-45, 554 N.E.2d at 1237, 555 N.Y.S.2d at 649. These two victims continued to be chased by the teenagers, on foot and then by car. *Id.* at 645, 554 N.E.2d at 1238, 555 N.Y.S.2d at 650. Eventually, the teenagers pulled ahead of the two victims. *Id.* With nowhere else to go, one of the victims jumped over the three-foot-high guardrail of the Belt Parkway, ran across the three eastbound lanes, jumped the median and ran into the westbound lanes where he was struck by a vehicle and killed. *Id.* Eventually, someone called the police. *Id.* The body was identified and the assaulted victim was taken to the hospital and treated for his injuries. *Id.* at 646, 554 N.E.2d at 1238, 555 N.Y.S.2d at 650.  

45 Kern, 75 N.Y.2d at 642-43, 554 N.E.2d at 1236, 555 N.Y.S.2d at 648; see N.Y. CONST. art. I, § 11. This section of the State Constitution provides: "No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, creed or religion, be subjected to any discrimination in his civil rights by any other person or by any firm, corporation or institution, or by the state or any agency or subdivision of the state." *Id.*  

On the first day of jury selection, defense counsel challenged three-out-of-four black jurors for cause, but only one successfully, and thereafter peremptorily challenged the remaining three. *See Kern,* 75 N.Y.2d at 647, 554 N.E.2d at 1238, 555 N.Y.S.2d at 651. Before exercising these peremptory challenges, however, defense counsel applied for eight more challenges because they felt black jurors were volunteering to serve and did not want to be excused whereas white jurors were using any excuse to get off. *Id.* At that point, the prosecution argued that defense counsel's use of its peremptory challenges constituted a prima facie case of discrimination and requested that they provide race neutral reasons for their decisions, but the court felt the application was premature and denied the motion. *Id.* By the close of the third day, defense counsel challenged six black jurors on the panel for cause, but only one was granted. *Id.* The prosecution renewed its motion, but decision was reserved. *Id.* The following day, the New York State Supreme Court ruled that *Batson* applied to defense counsel and required defense counsel, prospectively, to provide race neutral explanations for any further peremptory challenges used. *Id.* Defense counsel thereafter provided race neutral explanations for six of the seven black jurors peremptorily challenged. *Id.* In the end, one juror was excused with no explanation, three were successfully peremptorily challenged, and the remaining three were excused for different reasons. *Id.* at 647-48, 554 N.E.2d at 1239, 555 N.Y.S.2d at 651.
While recognizing the historical importance of peremptory challenges in the criminal trial process, Judge Alexander concluded that they were not of a "constitutional dimension." He also noted that the Fourteenth Amendment of the United States Constitution already restricted the prosecution's use of peremptory challenges, and concluded that such limitations must also be applied to defense counsel pursuant to the New York State Constitution. Clearly, Judge Alexander and the Court of Appeals refused to condone purposeful racial discrimination shielded by the facade of peremptory challenges.

In reaching this conclusion, Judge Alexander shifted his focus from the rights of the criminal defendant to the rights of the potentially excluded juror and society in general. Although the defendants asserted that the Civil Rights Clause of the New York State Constitution was inapplicable in this case because peremptory challenges were not prohibited statutorily, Judge Alexander rejected the defendants' narrow interpretation of the New York State Constitution. He noted that:

Jury service, by contrast, is a civil right established by Constitution and statute... [and] [f]or racial discrimination to result in the exclusion from jury service of otherwise qualified

47 Kern, 75 N.Y.2d at 647, 554 N.E.2d at 1239, 555 N.Y.S.2d at 651.
48 Id. at 648, 554 N.E.2d at 1240, 555 N.Y.S.2d at 652. "Today the right derives from CPL 270.25, which defines a peremptory challenge as 'an objection to a prospective juror for which no reason need be assigned' and sets the number of peremptory challenges for both the prosecution and the defense in accordance with the seriousness of the crimes charged." Id. at 649, 554 N.E.2d at 1240, 555 N.Y.S.2d at 652.
49 Id., 75 N.Y.2d at 649, 554 N.E.2d at 1240, 555 N.Y.S.2d at 652 (noting equal protection restrictions imposed by United States Constitution and New York State Constitution).
50 Id. at 650, 554 N.E.2d at 1241, 555 N.Y.S.2d at 647; see Sidney Stein, Defense and Prosecution Challenges, N.Y.L.J., Apr. 12, 1990, at 3. "Unlike Batson, however, which was founded on the equal protection clause of the United States Constitution, the Court of Appeals' ruling was anchored in the civil rights and equal protection clauses of the New York State Constitution." Id.
51 Kern, 75 N.Y.2d at 652, 554 N.E.2d at 1242, 555 N.Y.S.2d at 654. "Racial discrimination in the selection of juries harms the excluded juror by denying this opportunity to participate in the administration of justice, and it harms society by impairing the integrity of the criminal trial process." Id.
52 N.Y. Const. art I, § 11.
53 Kern, 75 N.Y.2d at 651, 554 N.E.2d at 1242, 555 N.Y.S.2d at 653. "This argument, however, reduces our constitutional Civil Rights Clause to a mere redundancy; in defendants' view, the clause would operate to prohibit private discrimination only where such discrimination was already expressly prohibited by statute." Id.
54 Id., 75 N.Y.2d at 651, 554 N.E.2d at 1242, 555 N.Y.S.2d at 653. Judge Alexander recognized that in addition to being a constitutionally established privilege, petit jury selection was expressly proclaimed a civil right under N.Y. CIVIL RIGHTS LAW § 13 (McKinney 1992). Id. at 653, 554 N.E.2d at 1243, 555 N.Y.S.2d at 655.
groups not only violates our Constitution and the laws enacted under it but is at war with our basic concepts of a democratic society and a representative government.\textsuperscript{55}

Judge Alexander made it clear that racial discrimination would not be tolerated either in the selection of the venire or in the petit jury selection process.\textsuperscript{56} He stated that "this opportunity for service on a petit jury is a privilege of citizenship which may not be denied our citizens solely on the basis of their race."\textsuperscript{57}

In \textit{People v. Jenkins},\textsuperscript{58} Judge Alexander concluded that the prosecution's "pattern of strikes" against potential black jurors constituted a prima facie case of discrimination.\textsuperscript{59} The Court of

\textsuperscript{55}Id. at 652, 554 N.E.2d at 1242, 555 N.Y.S.2d at 654.

\textsuperscript{56}Id.

\textsuperscript{57}Id. at 652, 554 N.E.2d at 1243, 555 N.Y.S.2d at 655. Judge Alexander also noted Civil Rights Law § 13 and the Legislature's deliberate assertion to make petit jury selection a civil right. \textit{Id.} at 653, 554 N.E.2d at 1243, 555 N.Y.S.2d at 655. "The statute leaves no doubt that service on the petit jury is a civil right in this State, and this being so, it is the Civil Rights Clause of article I, § 11 of the Constitution which limits the defense exercise of its peremptories." \textit{Id.}

\textsuperscript{58}75 N.Y.2d 550, 554 N.E.2d 47, 555 N.Y.S.2d 10 (1990). Alexander Jenkins and Ronald Johnson were charged with "two counts of attempted murder of a police officer, robbery in the first and second degrees, and criminal possession of a weapon" following an armed robbery of a Bronx supermarket and a subsequent shootout involving pursuing police officers. \textit{Id.} at 553, 554 N.E.2d at 48, 555 N.Y.S.2d at 11. Both of them were black. \textit{Id.}

Forty-seven prospective jurors were examined for the ensuing trial; ten were black and thirty-seven were white and latino. \textit{Id.} Of the ten peremptory challenges exercised by the prosecutor, "seven . . . were used to remove seven of the ten blacks on the panel while only three were used against the white and latino group." \textit{Id.} Defense counsel challenged two of the three remaining black jurors because they each had a connection to law enforcement and the final jury consisted of the remaining black juror and eleven whites. \textit{Id.} at 554, 554 N.E.2d at 48, 555 N.Y.S.2d at 11.

Defense counsel moved for a mistrial on the grounds that the one black juror was not truly representative of the 50% black population in the Bronx and that the prosecutor knew defense counsel would dismiss the two black jurors connected to law enforcement thereby accomplishing his strategy to permit a "token number of blacks to remain on the panel unchallenged in order to avoid a charge of systematic exclusion." \textit{Id.} at 554, 554 N.E.2d at 48-49, 555 N.Y.S.2d at 11-12. The trial court denied defense counsel's mistrial motion, concluded there was no systematic exclusion of black jurors, and declined the prosecutor's offer to explain her challenges. \textit{Id.} After being convicted, for second degree robbery, defendant appealed. \textit{Id.} The Appellate Division reversed his conviction and granted him a new trial on the ground that "a pattern of strikes against blacks evincing a discriminatory use of peremptory challenges had been established." \textit{Id.} at 554-55, 554 N.E.2d at 49, 555 N.Y.S.2d at 12. On appeal, the People argued that "inasmuch as the prosecutor did not exclude all blacks from the jury defendant failed to establish a prima facie showing of discrimination under \textit{Batson}, 476 U.S. 79, (1986)." \textit{Id.} at 555, 554 N.E.2d at 49, 555 N.Y.S.2d at 12.

\textsuperscript{59}Id., 75 N.Y.2d at 556, 554 N.E.2d at 50, 555 N.Y.S.2d at 13. Out of the 10 peremptory challenges used by the prosecution, seven were used to strike potentially suitable black jurors from the venire. \textit{Id.} The remaining three were used against 37 non-black potential jurors. \textit{Id.} "These circumstances were sufficient to establish a 'pattern of strikes' against black prospective jurors based 'solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant.'" \textit{Id.} (quoting \textit{People v. Scott}, 70 N.Y.2d 420, 425, 516 N.E.2d 1208, 1211, 522 N.Y.S.2d 94, 97 (1987) (quoting \textit{Batson v. Kentucky}, 476 U.S. 79, 97 (1986))).
Appeals rejected the prosecutor's assertion that no discrimination was exercised in the jury selection process because the percentage of blacks unchallenged by the prosecutor and remaining on the jury closely reflected the percentage of the black population in the Bronx at the time of the trial. Judge Alexander wrote:

A Batson violation is not avoided . . . simply because notwithstanding the discriminatory use of peremptory challenges, the prosecutor leaves some blacks on the jury panel and those left are enough to form a petit jury containing a percentage of blacks not significantly lower than the percentage of blacks in the local community.

His rationale again was anchored in the equal protection rights of all potential jurors and protection of the entire criminal justice system. According to Judge Alexander:

No argument based on percentages of the population would remove from these excluded prospective jurors the sense of exclusion resulting from being assumed to be incompetent to sit on a jury solely because of their race. Further, this type of discrimination undermines public confidence in the fairness of our system of justice and is repugnant to the just operation of a free society.

These opinions are significant not only because they answered questions left unresolved by the United States Supreme Court, but also because they proclaimed New York's intolerance for racial discrimination.

C. The Scope of the New York Press Shield Law

Due process and equal protection are not the only areas of constitutional law in which Judge Alexander's decisions have been catalysts for change. In Knight-Ridder Broadcasting, Inc. v. Greenberg, Judge Alexander discussed the scope of the First

60 Id. at 557, 554 N.E.2d at 50, 555 N.Y.S.2d at 13. Judge Alexander recognized that the prosecution did not challenge the remaining two potential black jurors because they knew that defense counsel would because of their law enforcement connections. Id.

61 Id. at 557, 554 N.E.2d at 50-51, 555 N.Y.S.2d at 13-14.

62 Id. at 557, 554 N.E.2d at 51, 555 N.Y.S.2d at 14. "The exercise of peremptory challenges against prospective jurors solely because of race discriminates unconstitutionally against the excluded juror." Id. Furthermore, "[s]election procedures that purposefully excluded black persons from juries undermine public confidence in the fairness of our system of justice." Id. at 558, 554 N.E.2d at 51, 555 N.Y.S.2d at 14.

63 Jenkins, 75 N.Y.2d at 558, 554 N.E.2d at 51, 555 N.Y.S.2d at 14.

Amendment’s guarantee of freedom of the press and the exact nature of the protection afforded to reporters and their sources under the New York Press Shield Law ("Shield Law").

In February of 1986, Donald Bent of Watervliet, New York, was interviewed by John McLoughlin, a reporter for WTEN-TV Albany, concerning the disappearance of his wife. The interview subsequently ignited a bitter debate in the New York Court of Appeals regarding the proper scope of the Shield Law. The issue

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65 Id. at 153, 511 N.E.2d at 1117, 518 N.Y.S.2d at 596; see N.Y. Civ. Rights Law § 79-h(8)(b) (McKinney 1992). The statute provides: "No professional journalist . . . shall be adjudged in contempt by any court . . . for refusing or failing to disclose any news or the source of any news coming into such person's possession in the course of gathering or obtaining news for publication." Id.

66 Id. at 153-54, 511 N.E.2d 1117, 518 N.Y.S.2d 596. Donald Bent was interviewed by WTEN-TV in Albany, New York, regarding the disappearance of his wife, Joan Bent, whom he had reported to the authorities as missing. Id. Ten days later, on February 27, 1986, the body of Joan Bent was discovered in the trunk of her car behind her place of employment. Id. See Man Charged in Wife's Death, UPI, Apr. 30, 1987, available in LEXIS, Nexis Library, UPI File. An autopsy established that she had been strangled. See Regional News: Albany, New York UPI, Mar. 14, 1986, available in LEXIS, Nexis Library, UPI File.

In April of 1987, Bent was charged with the murder; see Bent Found Guilty of Murder, UPI, May 4, 1988, available in LEXIS, Nexis Library, UPI File. During the trial, testimony demonstrated that there was trouble in the Bent's marriage. Id. Apparently, Bent strangled his wife after learning that she had been seeing another man and was planning to seek a divorce. Id. An Albany County jury convicted him of second degree murder on May 2, 1988. Id.

67 See N.Y. Civ. Rights Law § 79-h(8)(b) (McKinney 1992); see supra note 65. The New York Press Shield Law, as it is commonly known, applies only to a newsperson's defense to government subpoenas for information as part of a criminal investigation, all other intrusions fall under the First Amendment and New York State Constitution provisions. See Richard Rosen, Comment, A Call for Legislative Response to New York's Narrow Interpretation of the Newperson's Privilege; Knight-Ridder Broadcasting, Inc. v. Greenberg, 54 Brook. L. Rev. 285, 288 n.18 (1988) (citing O'Neill v. Oakgrove Construction, Inc., 71 N.Y.2d 521, 523 N.E.2d 277, 528 N.Y.S.2d 1 (1988)).

After reporters from the television station owned by Knight-Ridder Broadcasting, Inc., interviewed Bent, approximately one minute of the tape they had shot aired on the six o'clock news. See Knight-Ridder, 70 N.Y.2d at 154, 511 N.E.2d at 1117, 518 N.Y.S.2d at 596. When Donald Bent later became a suspect in his wife's murder, the District Attorney, Sol Greenberg, began a grand jury investigation. Id. WTEN was served with a subpoena duces tecum, which sought all of the videotapes and reporters' notes taken in connection with the interview. Id. The station refused to give the District Attorney's office copies of the outtakes and notes from the interview conducted by their reporter. Id.; see also Domestic News: Albany, UPI, Mar. 14, 1986, available in LEXIS, Nexis Library, UPI File (WTEN claimed outtakes were confidential under Shield Law and First Amendment).

At a hearing before State Supreme Court Justice Lawrence Kahn on March 13, 1986, Timothy Dyke, the attorney for Knight-Ridder, claimed that the New York Shield Law afforded an "absolute privilege" to the interview notes. Id. Assistant District Attorney, George Banner, said the New York protection was not as wide as the station believed it to be. Id.

Judge Kahn ruled for the television station, stating that the intent of the Shield Law was to "jealously guard the independence and freedom of the news media." See Domestic News: Albany, New York, UPI, Mar. 27, 1986, available in LEXIS, Nexis Library, UPI File. The Appellate Division disagreed, holding that the Shield Law did not extend to information that had not been received under a promise of confidentiality reminding the matter for an
before the court in *Knight-Ridder* was whether the protection under the Shield Law applied solely to confidential sources, or if the statute provided an unqualified and absolute privilege against compelled disclosure regardless of the nature of the source.\(^6^8\)

Writing for the majority,\(^6^9\) Judge Alexander stated that although the Shield Law was enacted to protect the newsgathering and dissemination process,\(^7^0\) the scope of the privilege was not absolute.\(^7^1\) He found support for his position in decisions by the Appellate Divisions of each judicial department of New York, which had all consistently applied a confidentiality prerequisite.\(^7^2\) Judge Alexander found it particularly persuasive that in 1981 the New York Legislature failed to adopt language to discredit this judicial interpretation.\(^7^3\) In spite of a vigorous dissent by Judge Bel-
lacosa, the court agreed that the conclusion that the Shield Law was applicable only to confidential sources or information was inescapable.

Harsh criticism of the statutory interpretation employed in Knight-Ridder was almost immediate. However, the criticism

N.E.2d at 1119, 518 N.Y.S.2d at 598. "It is well settled that the legislative history of a particular enactment must be reviewed in light of the existing decisional law which the Legislature is presumed to be familiar with and to the extent that it left it unchanged, that it accepted." Id. The failure to act on the part of the Legislature must be viewed as "indicative that legislative intent has been correctly ascertained." Id.

The majority also dismissed the station's First Amendment claim of privilege on the grounds that the qualified privilege did not protect the taped interview since it contained information relevant and necessary to the grand jury and the information was unavailable elsewhere. Id. at 160, 511 N.E.2d at 1121, 518 N.Y.S.2d at 600.

Id. at 167, 511 N.E.2d at 1125, 518 N.Y.S.2d at 604 (Bellacosa, J., dissenting) (majority never addressed, nor quoted the language of the statute).

Judge Joseph W. Bellacosa argued that the majority violated a "threshold statutory construction rule" since the plain meaning of the statute was never addressed. Id. Instead, the majority proceeded directly to an interpretation of legislative intent. Id. An interpretation which he believed completely ignored prior precedent. Id. at 161, 511 N.E.2d at 1121-22, 518 N.Y.S.2d at 600-01. Judge Bellacosa stated:

Indeed the majority opinion cannot disguise what it effects by "interpretation", "judicial construction," and "legislative intent." They functionally enact their own amendment to the core provision of the Shield Law by striking the word "any" and substituting the word "some" so that the protection is now only afforded to "some news" rather than "any news," as the Legislature enacted it and as the Governor signed it into law . . . . The majority's holding produces classic irony. New York State's judiciary, which should be the bastion of protection of this right . . . instead chills that right by inserting its own confidentiality clause into an unqualified statute. Their holding may be reduced to this syllogism: (1) the lower courts put confidentiality into the statute; (2) the judiciary then says the legislature did not take it out; and (3) the judiciary finally declares that the Legislature put it in in the first place.

Id.; see also Beach v. Shanley, 62 N.Y.2d 241, 251, 465 N.E.2d 304, 310, 476 N.Y.S.2d 765, 771 (1984). "The inescapable conclusion is that the Shield Law provides a broad protection to journalists without any qualifying language." Id. But see Oak Beach Inn v. Babylon Beach, 62 N.Y.2d 158, 165, 464 N.E.2d 967, 970, 476 N.Y.S.2d 269, 272, cert. denied, 105 U.S. 907 (1984). "However, the Legislature has never established an absolute right or granted journalists complete immunity from all legal consequences of refusing to disclose evidence relating to a news source." Id.

Judge Bellacosa argued that stare decisis demanded that the language in Shanley "should have been persuasive in deciding this case." Knight-Ridder, 70 N.Y.2d at 165, 511 N.E.2d at 1124, 518 N.Y.S.2d at 603. He found it "astonishing" that both of these cases, which he and the other dissenters considered to be so squarely on point, would be "relegated to a denigrating end-piece footnote in the majority opinion." Id. at 167, 511 N.E.2d at 1126, 518 N.Y.S.2d at 605.

Judge Bellacosa echoed Shanley and argued that the Shield Law provides a broad protection to journalists without qualification. Id. at 166, 511 N.E.2d at 1125, 518 N.Y.S.2d at 604. Judge Bellacosa expressed the concern that the position taken by the majority would serve to "transmogrify newspople into agents of the government . . . ." Id. at 168, 511 N.E.2d at 1126, 518 N.Y.S.2d at 605.

Knight-Ridder, 70 N.Y.2d at 158, 511 N.E.2d at 1120, 518 N.Y.S.2d at 599 ("consideration of all the circumstances . . . leads inexorably to the conclusion" that privilege is not absolute).

See O'Neill v. Oakgrove Const., 71 N.Y.2d 521, 533, 523 N.E.2d 277, 283, 528 N.Y.S.2d 1, 7 (1988) (Bellacosa, J., concurring) ("cramped statutory construction"); see also Rosen, supra note 67, at 288. "[T]he Court of Appeals overlooked controlling precedent and incor-
was not universal as law enforcement officials viewed the decision as a victory. Nevertheless, Governor Mario Cuomo and others vigorously lobbied for a legislative amendment to settle the issue. The amendment, adopted in 1990, provided a two-tier privilege to the press: an unqualified privilege for confidential sources and a qualified privilege for information gathered without a promise of confidentiality.

Judge Alexander recognized that a balance needed to be struck...
between the constitutional guarantee of freedom of the press and the government's legitimate interest in obtaining crucial information unavailable elsewhere. In *Knight-Ridder*, Judge Alexander presumed the legislature had "debated the efficacy of granting broad protection to the press, weighted competing policy considerations, and reached a formulation that in its view serves the best interest of the public." Judge Alexander believed that his opinion reflected this balance. While in light of the subsequent amendment it is easy to be critical of Judge Alexander's position, it must be noted that these were not the words of a lone dissenting judge, but rather the opinion of the majority of the court.

**D. Warrantless Searches**

As was the case in *Knight-Ridder*, judges are often called upon to balance competing interests in order to render a decision compatible with public policy considerations. Judge Alexander's decision in *People v. Burger*, balanced law enforcement's need to

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81 *Id.* at 155, 511 N.E.2d at 1117-18, 518 N.Y.S.2d 596-97 (court should not substitute its view for that of Legislature).
Defendant, Joseph Burger, was the owner of a Brooklyn junkyard involved in the dismantling of automobiles. *Id.* at 340, 493 N.E.2d at 926, 502 N.Y.S.2d at 702. On November 17, 1982, five plain-clothes officers of the New York City Police Department entered his yard and inquired of the defendant whether he had a valid license as required by New York law to operate the junkyard and to dismantle automobiles. *Id.*, at 338, 493 N.E.2d at 926-27, 502 N.Y.S.2d at 702-03. Whereupon Mr. Burger informed the officers that he did not keep a "police book," which recorded the vehicle identification numbers of all the vehicles and parts on the premises, as required by Vehicle and Traffic Law § 415-a(5)(a). *Id.* The officers then conducted a warrantless inspection pursuant to the provisions of Vehicle and Traffic Law § 415-a, which provided, that all records "and any vehicles or parts of vehicles which are subject to the record keeping requirements of this section which are on the premises" must be produced for inspection upon demand. *Id.* at 340 n.2, 493 N.E.2d at 927 n.2, 502 N.Y.S.2d at 703 n.2. During the ensuing inspection, the police uncovered two vehicles that had been reported stolen; along with personal property that reportedly had been in one of the vehicles. *Id.* at 341, 493 N.E.2d at 927, 502 N.Y.S.2d at 703. Mr. Burger was charged with criminal possession of stolen property. *Id.*

Defendant filed a motion for an order of suppression which was denied on April 12, 1984. *See People v. Burger*, 125 Misc. 2d 709, 709, 479 N.Y.S.2d 936, 937 (Sup. Ct. Kings County 1984). However, on April 30, 1984, the Appellate Division decided *People v. Pace*, 101 A.D.2d 336, 475 N.Y.S.2d 443 (1984). In *Pace*, the police officers stopped a truck which was carrying a large section of an automobile, which, upon inspection, was found to have no VIN numbers. *Id.* at 337, 475 N.Y.S.2d at 444. The officers learned that the drivers had picked up the chassis at Economy Auto Salvage. *Id.* When the police officers arrived at the junkyard, they were told that the police book had been stolen in a burglary. *Id.* The court found that the "officers undertook to survey the yard, not for the purpose of an administrative inspection but expressly to gather evidence of a crime." *Id.* at 338, 475 N.Y.S.2d at 444. All physical evidence obtained as a result of the search was suppressed because the focus of the search had shifted from an administrative inspection to a criminal investigation. *Id.* at 340-41, 475 N.Y.S.2d at 446-47.
gather information in order to successfully prosecute those guilty of crimes, and the constitutionally protected right of an individual to be free from unwarranted government intrusion. In *Burger*, the New York Court of Appeals determined that two New York statutes, which permitted the warrantless searches of automobile junkyards and certain businesses storing discarded or second-hand merchandise, were unconstitutional.

Judge Alexander, writing for a unanimous court, held the two New York statutes "facially unconstitutional." He found the statutes fundamentally defective because they permitted searches to be undertaken "solely to uncover evidence of criminality and not to enforce a comprehensive regulatory scheme." The primary purpose of these statutes was to afford police a more efficient

Burger requested a rehearing in light of *Pace*. See *Burger*, 125 Misc. 2d at 709, 479 N.Y.S.2d at 937. The request was granted. *Id.* Upon rehearing, Justice Lewis L. Douglas, Jr., held that the search in *Burger* was valid since the junkyard industry was pervasively regulated and the statute was properly limited in time, place, and scope. *Id.* at 710-15, 479 N.Y.S.2d at 938-940. Justice Douglas found this case to be "materially" different from the situation in *Pace*. *Id.* at 713, 479 N.Y.S.2d at 939-40. These officers were not hunting for evidence of a crime, but rather, were "actually conducting an administrative inspection when they showed up at defendant's place of business." *Id.* at 713-14, 479 N.Y.S.2d at 940. The Appellate Division, Second Department affirmed. See *People v. Burger*, 112 A.D.2d 1046, 493 N.Y.S.2d 34 (2d Dep't 1985).

83 U.S. CONST. amend. IV., which provides:
The right of the people to be secure in their persons, houses papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

84 *Burger*, 67 N.Y.2d at 340, 493 N.E.2d at 966, 502 N.Y.S.2d at 702. The two statutes challenged were Vehicle and Traffic Law § 415-a(5)(a), which allowed vehicle dismantling businesses to be inspected without a warrant, and New York City Charter § 436, which allowed junkyards and businesses storing second-hand merchandise to be searched without a warrant. *Id.* While the Fourth Amendment has been found to extend to commercial premises, a warrantless search will nonetheless be permitted in those industries that are "pervasively regulated" and under such circumstances that "the search itself is part of a regulatory scheme designed to further an urgent state interest." *Id.* at 343, 493 N.E.2d at 928, 502 N.Y.S.2d at 704.

85 *Id.* at 343-45, 493 N.E.2d at 928-30, 502 N.Y.S.2d at 704-06 (statutes unconstitutional as violation of Fourth Amendment).

86 *Id.*, 67 N.Y.2d at 345, 493 N.E.2d at 930, 502 N.Y.S.2d at 706 ("facially unconstitutional").

87 *Id.*, 67 N.Y.2d at 345, 493 N.E.2d at 930, 502 N.Y.S.2d at 706.

88 *Id.* at 344, 493 N.E.2d at 929, 502 N.Y.S.2d at 705. A warrantless search will be permitted in those industries that are "pervasively regulated" providing that "the search itself is part of the regulatory scheme designed to further an urgent state interest." *Id.* at 343, 493 N.E.2d at 928, 502 N.Y.S.2d at 704. The ability to conduct warrantless inspections must be essential to the effectuation of an administrative scheme. *Id.* (citations omitted) (emphasis added). And the inspection must be authorized by a valid statute that is carefully limited in time, place, and scope. *Id.* (citations omitted).
means of dealing with those who traffic in stolen goods.\textsuperscript{89} Judge Alexander reasoned that the defendant’s admission to the police officers that he did not have the “police book”\textsuperscript{90} he was required to keep, rendered the subsequent search of the premises an improper administrative inspection.\textsuperscript{91} The search was “undertaken solely to determine whether the defendant was storing stolen property on his premises,”\textsuperscript{92} and was accordingly, a violation of the owner’s constitutional rights.\textsuperscript{93}

On appeal, however, the United States Supreme Court reversed the Court of Appeals’ ruling.\textsuperscript{94} Justice Harry Blackmun explained that the searches were constitutional because they fell within the exemption for “closely regulated” businesses.\textsuperscript{95} These industries have a history of governmental oversight which renders an expectation of privacy unreasonable.\textsuperscript{96} The Court found that exemption to be justified by the state’s substantial interest in combating the recent explosion in the incidence of car theft.\textsuperscript{97}

The Supreme Court remanded the case to the New York Court

\textsuperscript{89} 67 N.Y.S.2d 338, 344, 493 N.E.2d at 929, 502 N.Y.S.2d 926, 705 (1986) (“expedient means of enforcing penal sanctions for the possession of stolen property”), rev’d 482 U.S. 691 (1987). The situation faced by the court in Pace, was whether the search was undertaken solely to gather evidence of a crime which the police already had reason to believe had occurred. See Burger, 67 N.Y.2d at 343, 493 N.E.2d at 928, 502 N.Y.S.2d at 704. In Burger, Judge Alexander found the constitutional inquiry to be proper because the facts presented the precisely the “type of search contemplated by the statutes.” Id.

The court found that neither statute did more than authorize general searches of commercial premises. Id. In fact, since the junkyard search provision of the New York City Charter contained no record keeping requirements it would be impossible for the police to argue that they were determining compliance with any regulatory scheme. Id.

\textsuperscript{90} Id. at 341 n.1, 493 N.E.2d at 927 n.1, 502 N.Y.S.2d at 703 n.1 (“police book,” required under Vehicle and Traffic Law § 415-a(5)(a), is record of all vehicles and parts in possession of dismantler).

\textsuperscript{91} Id. at 343, 493 N.E.2d at 929, 502 N.Y.S.2d at 702 (inspection must be “essential” to administrative scheme).

\textsuperscript{92} Id. at 345, 493 N.E.2d at 930, 502 N.Y.S.2d at 706. The People concluded in their brief that the “immediate purpose of investigating [the junkyard was] to determine [if defendant’s] inventory include[d] stolen property.” Id.

\textsuperscript{93} Id.


\textsuperscript{95} Id. at 703-04.

\textsuperscript{96} Id. at 700 (citing Marshall v. Barlow’s, Inc. 436 U.S. 307, 313 (1978)).

\textsuperscript{97} Id. at 708-12 (car theft has become significant social concern). The Supreme Court stated that a “pervasively regulated business” may be inspected without a warrant so long as three criteria are first met. Id. at 702. First, the inspection must be made pursuant to a “substantial government interest.” Id. Second, the inspection must be “necessary to further [the] regulatory scheme.” Id. And third, the statute’s inspection program must provide the owner of the business an adequate substitute for a warrant, by advising the owner that the search will be made pursuant to the law and by limiting the discretion of the officers inspecting the premises. Id. at 703. But since the court found the search constitutional under Vehicle and Traffic Law § 415-a(5), they did not address the constitutionality of section 436 of the New York City Charter. Id. at 703 n.13.
of Appeals for "further proceedings not inconsistent with this opinion."98 However, the case was dismissed on the People's motion on November 12, 1987 when it was determined that the "defendant [was not] ... presently available to obey the mandate of the Court in the event of an affirmance."99

As a result of the disappearance of the defendant in Burger, the New York Court of Appeals did not have an opportunity to respond to the United States Supreme Court opinion until 1992, when it decided People v. Keta.100

In Keta, Judge Alexander joined in the opinion written by Judge Titone101 in which Judge Titone stated: "States have the power to interpret provisions of their State constitutions as providing greater protections than their federal counterparts."102 The court found that statutory provisions, like the one in Burger, which permit warrantless searches of vehicle dismantaling businesses, must be part of a pervasive administrative program unrelated to enforcement of the criminal laws in order to be valid under the New York State Constitution.103 Judge Titone's opinion is strongly reminiscent of Judge Alexander's in Burger, wherein he stated that "an administrative search must serve an administrative purpose; when designed instead to uncover evidence of a crime the traditional requirements of the Fourth Amendment apply."104

II. THE DISSenting OpINIONS

While Judge Alexander was not a frequent dissenter,105 he was willing to do so when he felt it was warranted.106 The following

98 Burger, 482 U.S. 691, 718.
101 Id. at 523, 593 N.E.2d at 1339, 583 N.Y.S.2d at 931.
102 Id. at 496, 593 N.E.2d at 1342, 583 N.Y.S.2d at 934 (citations omitted).
103 Id. at 499, 593 N.E.2d at 1343, 583 N.Y.S.2d at 936.
105 See Wise, supra note 5, at S2, S3. In seven years on the Court of Appeals, Alexander wrote 108 majority opinions, 4 concurrences, and 18 dissents. Id.
106 Alexander Interview, supra note 4. When asked about the decision to dissent, Judge Alexander had these comments: One of the things that Chief Judge Wachtler sought to achieve was consensus. As the articulator of the common law it is well to speak with a single voice. But no one would interfere with the right of a member of the court to articulate a contrary view. To dissent is your right. And to express your opinion is your duty. The court was constantly confronted with policy considerations and the court makes policy to a significant degree. I never felt any pressure [to conform]. We had some very heated arguments to be sure. Reasonable minds can differ.
examples require the application of lofty constitutional principles to somewhat prosaic concerns of everyday life.

A. Residency Requirements for State Employees

On April 3, 1989, the United States Supreme Court denied certiorari and declined, without comment, to hear an appeal in Winkler v. Spinnato.\footnote{id} In Winkler, a group of firefighters challenged the constitutionality of New York's public employee residency statute.\footnote{id} The firefighters sought to convince the Supreme Court\footnote{id} to adopt the arguments set forth in Judge Alexander's lone dissent.\footnote{id}

In Winkler, the Court of Appeals held that since firemen had no fundamental right to be employed as firemen,\footnote{id} the State only needed to establish that it had a legitimate interest in requiring the firemen to reside within state boundaries.\footnote{id} Based on pre-


\footnote{id}{Id. at 402, 530 N.E.2d at 836, 534 N.Y.S.2d at 128. The firefighters in Winkler challenged the constitutionality of N.Y. Pub. Off. Law §§ 3(19), 30 (McKinney 1988) relying on both the New York and Federal Constitutions. Id. at 404-05, 530 N.E.2d at 836, 534 N.Y.S.2d at 128-29. The amendments at issue were "passed as a form of amnesty" to a statute, enacted in 1829, but which had never been strictly enforced. Id. at 405, 530 N.E.2d at 836-37, 534 N.Y.S.2d at 129. In 1986, the Fire Department of the City of New York ordered that all firefighters who resided outside New York State had to move into one of certain designated counties within New York State within one year of the effective date. Id. However, those officers who already resided within the state could remain where they were, but if they did subsequently move, it would have to be to one of the designated counties. Id.; see David L. Gregory, Labor Relations Law, 40 SYRACUSE L. REV. 463, 492-92 (1989) ("limited residency requirements can be imposed by local government employers throughout the state"); Maurice Carroll, Out-of-State Firefighters Lose Bid, NEWSDAY (New York), Apr. 4, 1989, at 6 (Supreme Court's refusal to grant certiorari allows New York to constitutionally draw distinctions between in-state and out-of-state residents); Arnold H. Lubasch, Firefighters Lose Challenge to New York Residence Act, N.Y. TIMES, Apr. 4, 1989, at B3 (Supreme Court refused to grant certiorari with regard to statute requiring New York City firefighters to move to city or adjacent counties if they want to keep job).}

\footnote{id}{Winkler, 72 N.Y.2d at 405, 530 N.E.2d at 836, 534 N.Y.S.2d at 129 (New York may constitutionally draw distinction between those who violate only local residency requirement and those who violate both local and state requirements). See generally Court Uphold Residency Regulations for New York City Safety Employees, Gov't Empl. Rel. Rep. (BNA) No. 1288, at 1584, (Nov. 7, 1988) available in LEXIS, Nexis Library, BNA File.}

\footnote{id}{See Winkler, 72 N.Y.2d at 408-09, 530 N.E.2d at 838-39, 534 N.Y.S.2d at 130-31 (Alexander, J., dissenting) (New York may not constitutionally confer benefit upon in-state residents solely on basis of domicile on date of amendments).}

\footnote{id}{Id. at 406, 530 N.E.2d at 836, 534 N.Y.S.2d at 129. "Plaintiffs have no fundamental right within purview of the Privileges and Immunities Clause to be employed as New York City firefighters." Id.}

\footnote{id}{See id. at 406, 530 N.E.2d at 837, 534 N.Y.S.2d at 129-30. The court found that since plaintiffs could not be considered a suspect class, the amendments at issue would be upheld if it was determined that the State had a legitimate interest upon which to base them. Id.}
summations of loyalty and economic gain to the State, the court held the interest in the instant matter was legitimate and the residency regulations were rationally related to that interest.

In his dissent, Judge Alexander agreed that a legitimate state interest could be served by requiring firefighters and other government employees live within the state. However, he did not agree that the State's interests were rationally served by requiring those employees to live within designated counties in the state. Judge Alexander acknowledged that local county interests could possibly be served by requiring firefighters to reside within a particular county; but if such was the case, then a regulation that allowed some firefighters to escape the requirement did not rationally serve that interest. Judge Alexander took a pragmatic approach and considered the economic realities of life in New York City and the immediately adjacent counties and the impact thereof on the individual firefighter and his family. He found that the amendment would confer a palpable benefit on those firefighters who already lived within the state by allowing them to remain in the less expensive suburbs and rural counties, while mandating that those moving in from out-of-state had to reside in the more expensive New York City boroughs and six neigh-

113 See id. (employees who reside in-state spend more locally, pay state and local taxes, and tend to exhibit loyalty to state).

114 Id. The distinction between those who were already New York residents and those who were forced to move in from out-of-state was a subordination of the State's local interest in an attempt to "accommodate those in violation." Id. at 407, 530 N.E.2d at 838, 534 N.Y.S.2d at 130. The court felt that "[t]his limited accommodation to those who already satisfied the state residency requirement, and therefore, [did] not have to move for that purpose, [was] rational and [did] not violate equal protection." Id.

115 Winkler, 72 N.Y.2d at 408, 530 N.E.2d at 838, 534 N.Y.S.2d at 131 (Alexander, J., dissenting) (State has legitimate interest in requiring its public officers to be state residents).

116 Id. (state interest not rationally served by requirement that firefighters live in a particular county).

117 Id. (local interest not rationally served by imposing local requirement on only some New York City firefighters).

Judge Alexander felt that "the challenged amendments would be constitutional if they required all New York City firefighters to move into the State or if they required all New York City firefighters to move into a lawful county." Id. However, neither interest was "rationally served by requiring only the out-of-state firefighters to move into the lawful counties." Id.

118 Id., at 408, 530 N.E.2d at 838, 534 N.Y.S.2d at 131; see N.Y. Pub. Off. Law §§ 3(19), 30(5-a) (McKinney 1988). The local residency requirements require that all New York City Public Officers reside in one of the five boroughs of the City of New York: Bronx, Brooklyn, Manhattan, Queens, or Staten Island; or into one of six adjoining counties: Nassau, Suffolk, Westchester, Rockland, Putnam, or Orange. Id.; see also Lubasch, supra note 108, at B3 (residency requirement established over a century ago).
boring counties. Judge Alexander opined that this was clearly unconstitutional in effect since the State conferred an economic benefit upon some residents based solely on established state residency at a previous point in time.

B. Marital Privacy Rights, Conjugal Visits, and AIDS

Judge Alexander authored another a dissent in Doe v. Coughlin. In Coughlin, a state prisoner infected with Acquired Immune Deficiency Syndrome ("AIDS") and his wife challenged the authority of prison officials to prevent them from continued participation in a conjugal visit program.

The plurality in Coughlin, responded to the constitutional challenges of the petitioners by holding that "the limitations of

119 See Winkler, 72 N.Y.2d at 408-09, 530 N.E.2d at 838-39, 534 N.Y.S.2d at 131. Judge Alexander did not find a legitimate state interest in the resulting conferral of economic benefit in the form of more affordable housing upon those who were in-state residents at the time the amendment was passed. Id. For support of his position, Judge Alexander relied on the Supreme Court decisions which held that "a State [could not] constitutionally confer a benefit upon some state residents and not others solely on the basis of established State residency at a past point in time." Id. (citing Zobel v. Williams, 457 U.S. 55, 63-64 (1982)).

120 Id. at 409, 530 N.E.2d at 839, 534 N.Y.S.2d at 131. Judge Alexander found that the result of enforcement of the amendments would be to confer an economic benefit of decreased cost of living on in-state firefighters, "solely because they were state residents on the date that the amendments became effective." Id. Judge Alexander viewed such a result a violation of the Federal and State Constitutions. Id.


122 Id. at 48, 518 N.E.2d at 536, 523 N.Y.S.2d at 782. Petitioner was an unidentified prison inmate serving a term of five and one-half to eleven years for an undisclosed crime at the Auburn Correctional Facility. Id. at 50, 518 N.E.2d at 538, 523 N.Y.S.2d at 783. He was married while in prison on June 6, 1985. Id. In October 1985, as part of the prison's Family Reunion Program, petitioner and his wife qualified for a two-day conjugal visit to be held in a private trailer on the prison grounds. Id. The stated purpose of this program is to "preserve, enhance and strengthen family ties that have been disrupted as a result of incarceration." Id. at 51, 518 N.E.2d at 538, 523 N.Y.S.2d at 783 (citing [1987] 7 N.Y.C.R.R. § 220.1).

In December of 1985, the prisoner was diagnosed as having Acquired Immune Deficiency Syndrome (AIDS) and all subsequent requests for continued participation in the program were denied. Id. Prison authorities stated that the denial was proper under the provisions of [1987] 7 N.Y.C.R.R. § 220.3[a-c], which provide that a diagnosis of infection with a communicable disease was grounds for disqualification. Id. at 56 n.1, 518 N.E.2d at 541 n.1, 523 N.Y.S.2d at 787 n.1.

In challenging the disqualification, petitioners alleged violation of three constitutionally protected rights: the fundamental right to marital privacy; due process; and equal protection." Id. at 52, 518 N.E.2d at 539, 523 N.Y.S.2d at 785 ("[c]onstitutional right to privacy involves the broad, general right to make decisions concerning oneself . . . free of government restraint or interference." (citations omitted).

123 See Coughlin, 71 N.Y.2d at 75, 518 N.E.2d at 554, 523 N.Y.S.2d at 800; see also Jeffrey Schmalz, New York Court Upholds Conjugal-Visit Ban for Inmate with AIDS, N.Y. TIMES, Nov. 25, 1987, at B11 (court sharply divided).
prison life require that an inmate forfeit his right to marital intimacy."\textsuperscript{124} The court noted that although the prisoner had previously been permitted to participate in the Family Reunion Program, it did not create a protected liberty interest in continued participation in the program.\textsuperscript{125} Finally, the court concluded that the petitioners’ equal protection claim failed because equal protection did not require absolute equality,\textsuperscript{126} but only that a classification\textsuperscript{127} which resulted in unequal treatment must have a rational relationship to a legitimate state purpose.\textsuperscript{128} The court found the Prison Commissioner’s determination that AIDS was a communicable disease that could spread to non-prisoners as a result of the Family Reunion Program was not a violation of the petitioners’ equal protection rights because it was rationally related to the legitimate state purpose of preventing the further spread of AIDS, a

\textsuperscript{124} See Coughlin, 71 N.Y.2d at 56, 518 N.E.2d at 541, 523 N.Y.S.2d at 787. The court recognized that "[a]n individual does not automatically forfeit all constitutional rights upon conviction of a crime." \textit{Id.} at 53, 518 N.E.2d at 539, 523 N.Y.S.2d at 785. But as a general rule, he will only retain rights which are consistent with the "penological objections of the corrections system." \textit{Id.} at 53, 518 N.E.2d at 539, 523 N.Y.S.2d at 785-86 (citations omitted). Continuation of intimate marital relations have traditionally been viewed as inconsistent with the goals of removing the prisoner from society as a form of punishment. \textit{Id.} at 53-54, 518 N.E.2d at 540, 523 N.Y.S.2d at 786. Therefore, the "State is under no obligation to establish conjugal visitation programs." \textit{Id.} at 54, 518 N.E.2d at 540, 523 N.Y.S.2d at 786 (citations omitted). But see Thomas M. Bates, \textit{Note, Rethinking Conjugal Visitation in Light of the "AIDS" Crisis,} 15 New Eng. J. on Crim. & Civ. Confinement 121, 140-45 (1989) (arguing for more conjugal visitation programs as means of preventing AIDS in prison).

\textsuperscript{125} Coughlin, 71 N.Y.2d at 55 n.1, 518 N.E.2d at 541 n.1, 523 N.Y.S.2d at 787 n.1. The regulatory scheme behind the Family Reunion Program provided for the consideration and balancing of fifteen individual guidelines and "many of these entail consideration of subjective factors." \textit{Id.} The court found that "the guidelines do not create an entitlement of conjugal visits because the review system is highly discretionary and hold out no more than the possibility of conjugal visits." \textit{Id.} at 56, 518 N.E.2d at 541, 523 N.Y.S.2d at 787. The program did not create a legitimate expectation of a benefit because inmates had to reapply each time they sought a visit and each application was subject to a separate de novo discretionary review. \textit{Id.}

\textsuperscript{126} \textit{Id.}, 71 N.Y.2d at 56, 518 N.E.2d at 541, 523 N.Y.S.2d at 788.

\textsuperscript{127} \textit{Id.} at 57 n.2, 518 N.E.2d at 542 n.2, 523 N.Y.S.2d at 788 n.2 (issue is broader than inmates with HIV or AIDS, and included all inmates diagnosed with communicable diseases).

\textsuperscript{128} \textit{Id.} Chief Judge Wachtler, in his concurrence, stated that while he may have agreed with the result of the majority opinion, he believed that since the decision of the Commissioner was based on the fact that if left alone "a married couple would engage in sexual relations," the decision encroached upon marital privacy and thus raised constitutional concerns requiring a higher level of scrutiny. \textit{Id.} at 62, 518 N.E.2d at 545, 523 N.Y.S.2d at 791 (Wachtler, J, concurring). He nevertheless believed that even at this higher level of scrutiny "the Commissioner's decision has[d] a sufficient basis." \textit{Id.} Since the statute, Correction Law § 70(2)(a), required the Commissioner to act with "the safety and security of the community" in mind, this action by protecting a prison visitor from "being exposed to a concededly fatal infectious disease was proper." \textit{Id.}
deadly disease for which there is no known cure.\textsuperscript{129}

Writing for the dissent, Judge Alexander argued that the Commissioner's decision "invade[d] an area of personal decision making between a married couple embraced by their marital privacy right."\textsuperscript{130} If the husband were not incarcerated, the government would clearly be prohibited from forbidding the couple to engage in sexual relations absent a "compelling government purpose and the most narrowly tailored means to achieve that purpose."\textsuperscript{131} Judge Alexander reasoned that the court was therefore being asked to determine the effect of incarceration on the petitioner's rights.\textsuperscript{132}

Judge Alexander acknowledged that prisoners have no per se rights to conjugal visits,\textsuperscript{133} but argued that merely because enrollment in the Family Reunion Program was not mandated under the New York State Constitution, it did not follow that the Commissioner "may condition petitioner husband's eligibility in any way he sees fit."\textsuperscript{134} He argued that the Commissioner's decision was impermissible because it was based upon sexual conduct, which may or may not occur between a husband and wife during the conjugal visit.\textsuperscript{135} Judge Alexander believed it was clearly an issue of marital privacy.\textsuperscript{136}

Judge Alexander further contended that the level of scrutiny applied to the statute by the majority was incorrect.\textsuperscript{137} Since the fun-

\textsuperscript{129} Id. at 57, 518 N.E.2d at 542, 523 N.Y.S.2d at 788. The court found that the likelihood that "safe sexual practices" could reduce the risk of infection did not render this decision any less rational. Id. at 58, 518 N.E.2d at 542, 523 N.Y.S.2d at 788.

\textsuperscript{130} 71 N.Y.2d 48, 63, 518 N.E.2d 536, 546, 523 N.Y.S.2d 782, 792 (1987) (Alexander, J., dissenting). "Certainly, the decision of a married couple to risk the consequences of sexual intercourse (such as pregnancy, abortion, and infection) falls within the scope of ... matters of marriage that are constitutionally protected." Id. at 64, 518 N.E.2d at 546, 523 N.Y.S.2d at 792.

\textsuperscript{131} Id. at 66, 518 N.E.2d at 546-47, 523 N.Y.S.2d at 793.

\textsuperscript{132} Id.

\textsuperscript{133} Id. at 66, 518 N.E.2d at 548, 523 N.Y.S.2d at 794. Judge Alexander noted that such rights are not created simply because the Commissioner has determined, in his expertise as an administrator, that the establishment of a Family Reunion Program is "consistent with institutional administration and security, and with legitimate penological goals." Id.

\textsuperscript{134} Id. at 67, 518 N.E.2d at 548, 523 N.Y.S.2d at 794.

\textsuperscript{135} See 71 N.E.2d 48, 67, 518 N.E.2d 536, 549, 523 N.Y.S.2d 787, 795 (1987). "For although admission to the program is not by itself a right, the decision to engage in or abstain from sexual relations once admitted to the program implicates an aspect of the fundamental marital right . . . ." Id. at 67, 518 N.E.2d at 548, 523 N.Y.S.2d at 795.

\textsuperscript{136} Id. at 67, 518 N.E.2d at 549, 523 N.Y.S.2d at 795. "The interest of a married couple in being permitted to make for themselves the intimate and personal decision, free of government intrusion — whether to engage in sexual relations — is fundamental and of recognized constitutional dimension." Id.

\textsuperscript{137} Id. at 68, 518 N.E.2d at 549, 523 N.Y.S.2d at 795 (standard does not compel strict
damental constitutional right of privacy was clearly impacted by the regulations at issue, the proper level of scrutiny was not mere “rational basis” as the plurality maintained, but whether the regulation furthered a “legitimate institutional or penological purpose.” The only justification for the policy asserted by the Commissioner was the danger that the AIDS virus would be transmitted to petitioner’s wife. However, Judge Alexander was convinced that “the asserted interest [was] not a penological one.” Moreover, he argued, even if this were a valid goal, the deprivation of all access to the Family Reunion Program represented an “exaggerated response” to petitioner’s medical condition, since existing alternatives to complete banishment from

138 Id.
139 Id. The Supreme Court enunciated a four prong test to determine the reasonableness of those prison regulations that impinge on constitutional rights in Turner v. Safley, 482 U.S. 78 (1987):
First, whether there is a valid logical connection between the prison regulation and the institution’s interest put forward to justify it; second, whether there are alternative means of exercising the right that remain open to prison inmates; third, whether accommodation of the asserted constitutional right will adversely impact on correction employees, on the prison population, and on the allocation of prison resources; fourth, whether there are ready alternatives available to prison authorities to adequately address the concerns advanced.

Id. at 89-91.
140 Coughlin, 71 N.Y.2d at 70, 518 N.E.2d at 551, 523 N.Y.S.2d at 797. The court was bound by the statements of the Commissioner and was not permitted to “hypothesize some penological interest on respondent’s behalf.” Id.
141 See id. at 71, 518 N.E.2d at 551, 523 N.Y.S.2d at 797. The court stated that there was no impact on the prison community). “Respondent has not shown how its policy bears any relationship to the the traditional purposes for incarceration, or how it addresses concerns for institutional security and administration.” Id. (citation omitted). The main opinion stated that preventing the spread of communicable diseases to nonprisoners fell within the Correction Law § 70(2)(a) mandate to establish programs with regard to the “safety and security of the community.” Id. Judge Alexander disagreed and stated that since the Legislature had not delegated to the Department of Corrections the “authority to regulate matters relating to public health,” such purpose is not penological so as to warrant the court’s deference to the agency expertise presumably relied upon in making its determination. Id. at 73, 518 N.E.2d at 553, 523 N.Y.S.2d at 799.
142 Id. at 71, 518 N.E.2d at 552, 523 N.Y.S.2d at 798 (quoting Turner v. Safley, 482 U.S. 78, 90) (1987). Judge Alexander argued that this action could effect other members of the family possibly entitled to participate in the program, but who could not, according to the weight of the medical evidence, be at risk for infection “undermines any purported rationality and highlights the exaggerated nature of [the] response.” Id. at 72, 518 N.E.2d at 552, 523 N.Y.S.2d at 798.

In the months immediately following the diagnosis of the husband’s illness, the couple participated in counseling regarding “safe-sex” so there was no reason to believe that Mrs. Doe’s infection with the AIDS virus was a foregone conclusion. Id. at 70, 518 N.E.2d at 550-51, 523 N.Y.S.2d at 796. Further, Mrs. Doe had been counseled as to the “critical role” her support would play in her husband’s mental health. Id. Judge Alexander saw “obvious, easy alternatives to respondent’s policy that accommodate[d] the substantial interests of the petitioners while imposing de minimis burdens on respondents’ resources.” Id. at 72, 518 N.E.2d at 552, 523 N.Y.S.2d at 798.
the program were never explored.\textsuperscript{143}

Judge Alexander strongly believed that the Commissioner failed to prove that the regulations were reasonably related to a legitimate penological purpose.\textsuperscript{144} Therefore, proscribing the prisoner’s participation in the program, based solely on his having AIDS, was untenable.\textsuperscript{145}

When asked about the decision of the majority, Judge Alexander replied:

I think the driving force was a consideration of the larger community. Of course, my view was there was no demonstrated danger to the large community and it was a presumption to think that the wife would contract AIDS and then go out and violate her marriage vows. I thought we should have focused on the rights of the prisoners.\textsuperscript{146}

\textbf{CONCLUSION}

During his seven years on the New York Court of Appeals, the Honorable Fritz W. Alexander II had the opportunity to write on a broad spectrum of topics. Through his opinions he revealed, not a personal judicial agenda, but a pragmatic dedication to justice on a case by case basis. Judge Alexander underscored this notion of impartiality when he stated, “I never tried to categorize myself. I call them as I see them.”\textsuperscript{147}

Ironically, his decisions show he was both an admirable defender of individual civil rights and a conscientious protector of the community. Judge Alexander’s decisions will undoubtedly influence the lives of New Yorkers for many years to come. And he was keenly aware of the potential impact when he explained:

One thing you must bear in mind, the Court of Appeals is the court of last resort in this State. It is the articulator of the common law of the State. So that every case decided by that court is of importance in the sense that it either affirms the common law, articulates a new rule of law, or interprets a statute which becomes the law of the State.\textsuperscript{148}

\textsuperscript{143} Id. at 71-72, 518 N.E.2d at 552, 523 N.Y.S.2d at 798.
\textsuperscript{144} Id.
\textsuperscript{146} Alexander Interview, supra note 4.
\textsuperscript{147} Id.
\textsuperscript{148} Id.
When Judge Alexander decided to retire from the bench, many were critical of his choice. They saw it as folly, a step in the wrong direction. Naturally, he does not agree. Perhaps his new position as Deputy Mayor of the City of New York will provide even greater opportunity to serve the people of New York. But regardless of the vagaries of the future, he left behind a legacy of service to the Court of Appeals. Perhaps recently confirmed Supreme Court Justice Ruth Bader Ginsburg said it best when she told the Senate Judiciary Committee of the importance of an approach to judging that “is neither liberal nor conservative.”

Justice Ginsburg said: “A judge sworn to decide impartially can offer no forecasts, no hints. To do so would display disdain for the entire judicial process.” Judge Alexander had the utmost respect for the judicial process and for that reason, for him, the middle of the road was clearly higher ground.

_Catherine M. Feehan & Elisa Karnis_

150 _Id._