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CPLR 3001: Action for Declaratory Relief Is a Procedurally Proper Means of Obtaining Collateral Review of an Interlocutory Criminal Court Order

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precedent to the maintenance of a civil rights action in state court, notwithstanding that a notice of claim need not be filed to maintain such an action in federal court.

In the area of appellate practice, two important developments are explored in *The Survey*. In *Morgenthau v. Erlbaum*, the Court approved the District Attorney's use of the declaratory judgment action as a means of appealing an unfavorable interlocutory ruling by a lower criminal court. On the civil side, the Court of Appeals, in *Hecht v. City of New York*, held that the Appellate Division has no authority under CPLR 5522 to grant relief to a party who fails to undertake an appeal, absent a united and inseverable interest with the successful appellant. It is hoped that the discussion of these cases in *The Survey* will prove to be of interest to the New York bench and bar.

CIVIL PRACTICE LAW AND RULES

Article 30—Remedies and Pleadings

CPLR 3001: Action for declaratory relief is a procedurally proper means of obtaining collateral review of an interlocutory criminal court order

Section 3001 of the CPLR provides that a court "may render a declaratory judgment" to resolve "the rights and other legal relations of the parties to a justiciable controversy."[1] Although the statute is broad in scope,[2] some courts have exercised the granted

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[1] CPLR 3001 (1974). Section 3001 of the CPLR provides:

> The supreme court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed. If the court declines to render such a judgment it shall state its grounds.

Id. Section 3017(b), which sets requirements for a party seeking a declaratory judgment, provides:

> In an action for a declaratory judgment, the demand for relief in the complaint shall specify the rights and other legal relations on which a declaration is requested and state whether further or consequential relief is or could be claimed and the nature and extent of any such relief which is claimed.

Id. 3017(b).

[2] *See* James v. Alderton Dock Yards, Ltd., 256 N.Y. 298, 305, 176 N.E. 401, 404 (1931); 3 WK&M ¶ 3001.06, at 30-28 to 29 (1982). There is no inherent limitation on the type of declaratory relief available under the Declaratory Judgment Act, CPLR 3001. Maguire v. Monaghan, 206 Misc. 550, 555, 134 N.Y.S.2d 320, 326 (Sup. Ct. N.Y. County 1954), *aff'd mem.*, 285 App. Div. 926, 139 N.Y.S.2d 883 (1st Dep't 1955); *see also* Posner, *Declaratory Judgments in New York*, 1 ST. JOHN'S L. REV. 129, 130 (1927) (broad scope of declaratory judgment statute intended to allow courts unfettered discretion). Since there must be a

discretion to restrict the availability of declaratory relief.[3] This has

"justiciable controversy" between the parties for declaratory relief to be granted, CPLR 3001 (1974), the courts do not have the power to render advisory opinions. Self-Insurers' Ass'n v. State Indus. Comm'n, 224 N.Y. 13, 16, 119 N.E. 1027, 1028 (1918). To present a "justiciable controversy," the plaintiff must possess a "legally protectible interest," 3 WK&M ¶ 3001.04, at 30-15 (1982), or "a substantial interest in the determination of the controversy," Brechner v. Incorporated Village of Lake Success, 23 Misc. 2d 159, 160, 201 N.Y.S.2d 254, 256 (Sup. Ct. Nassau County 1960). In other words, the plaintiff's rights must be in danger of infringement by the defendant. Maguire v. Monaghan, 206 Misc. 550, 553, 134 N.Y.S.2d 320, 324 (Sup. Ct. N.Y. County 1954) (quoting 1 W. ANDERSON, ACTIONS FOR DECLARATORY JUDGMENTS 58 (2d ed. 1951)). If the action is brought to determine the validity of a statute, the plaintiff must show a legally protected interest not shared by all citizens of the state. *See* Bull v. Stichman, 273 App. Div. 311, 316, 78 N.Y.S.2d 279, 283 (3d Dep't), *aff'd mem.*, 298 N.Y. 516, 80 N.E.2d 661 (1948).

An additional element of "justiciability" is the presence of an actual controversy. *Monaghan*, 206 Misc. at 554, 134 N.Y.S.2d at 325. *See generally* 3 WK&M ¶ 3001.05, at 30-23 (1982) (necessity of a controversy between adverse legal interests). This controversy must not be moot. *See, e.g.*, Knauff v. Board of Educ., 57 Misc. 2d 456, 458, 293 N.Y.S.2d 133, 135 (Sup. Ct. Suffolk County 1968). It must be definite, substantial, and ripe for final determination. Park Ave. Clinical Hosp. v. Kramer, 26 App. Div. 2d 613, 614, 271 N.Y.S.2d 747, 750 (4th Dep't 1966) (quoting 1 W. ANDERSON, *supra*, at 51), *aff'd mem.*, 19 N.Y.2d 958, 228 N.E.2d 411, 281 N.Y.S.2d 359 (1967). A controversy is ripe if the parties have adverse interests that have collided and resulted in harm, or else threaten to do so. *See Monaghan*, 206 Misc. at 554, 134 N.Y.S.2d at 325. Declaratory relief is unique, however, because neither an actual infringement of rights nor alternate coercive relief are necessary. *See, e.g.*, Town of Ramapo v. Village of Spring Valley, 40 Misc. 2d 589, 591, 243 N.Y.S.2d 569, 571-72 (Sup. Ct. Rockland County 1962) (declaratory relief available to test validity of contract although it had not been breached), *appeal dismissed*, 13 N.Y.2d 918, 193 N.E.2d 892, 244 N.Y.S.2d 67 (1963).

[3] *See* Board of Educ. v. Nyquist, 50 N.Y.2d 889, 891, 408 N.E.2d 673, 675, 430 N.Y.S.2d 266, 267 (1980). Although justiciability is the sole requirement of CPLR 3001, declaratory relief is discretionary in character. *Id.*; Posner, *supra* note 2, at 133. *See generally* 3 WK&M ¶ 3001.07, at 30-68.3 (1982) (discretionary nature of the CPLR 3001 remedy emphasized by use of the words "may render" instead of "shall have the power"). The court must exercise this discretion with care, James v. Alderton Dock Yards Ltd., 256 N.Y. 298, 305, 176 N.E. 401, 403 (1931), and may not act arbitrarily or capriciously, 3 WK&M ¶ 3001.08, at 30-72 (1982); Posner, *supra* note 2, at 133. The statutory requirement that the court state the grounds for the denial of declaratory relief helps ensure the proper exercise of discretion. 3 WK&M ¶ 3001.08, at 30-73 (1982). Courts have construed this discretion provision as permitting a declaratory judgment action to be entertained only when it will serve some necessary and useful purpose. Davis Constr. Corp. v. County of Suffolk, 112 Misc. 2d 652, 656, 447 N.Y.S.2d 355, 359 (Sup. Ct. Suffolk County 1982), *aff'd mem.*, 95 App. Div. 2d 819, 464 N.Y.S.2d 519 (2d Dep't 1983); National Sur. Corp. v. Peccechio, 48 Misc. 2d 77, 77, 264 N.Y.S.2d 177, 178 (Sup. Ct. Albany County 1965); Seaboard Sur. Co. v. Massachusetts Binding & Ins. Co., 42 Misc. 2d 435, 436-37, 248 N.Y.S.2d 302, 304 (Sup. Ct. N.Y. County 1964); *cf.* Westchester Mortgage Co. v. Grand Rapids & I.R.R., 246 N.Y. 194, 202, 158 N.E. 70, 73 (1927) (action for declaratory relief does not lie where only effect of judgment would be to remove to New York courts issue which could properly be determined in pending Rhode Island action). For example, declaratory relief will not be allowed where it would produce a multiplicity of suits, fail to terminate the dispute, or result in a fragmented determination. 3 WK&M ¶ 3001.09d, at 30-83 (1982). Where another action, involving the same issues, is

resulted in inconsistent decisions regarding the availability of a declaratory action to obtain review of a prior adjudication.[4] Recently,

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pending between the same parties, courts have consistently exercised their discretion to deny declaratory relief. *Id.* ¶ 3001.09q, at 30-73 to -74; *see, e.g.*, Stevens v. Medina, 63 App. Div. 2d 925, 925, 406 N.Y.S.2d 99, 100 (1st Dep't 1978); *see also* Kelly's Rental, Inc. v. City of New York, 44 N.Y.2d 700, 702, 376 N.E.2d 915, 916, 405 N.Y.S.2d 443, 444 (1978) (per curiam); Stuyvesant Ins. Co. of New York v. Perfetto, 37 Misc. 2d 739, 741, 236 N.Y.S.2d 301, 303 (Sup. Ct. Queens County 1962), *aff'd mem.*, 20 App. Div. 2d 676, 247 N.Y.S.2d 1010 (2d Dep't 1964). Absent identity of issues, however, another pending action does not, in and of itself, mandate dismissal of the action for declaratory relief. *Davis Constr. Corp.*, 112 Misc. 2d at 656, 447 N.Y.S.2d at 359.

[4] *Compare* Burnham v. Bennett, 141 Misc. 514, 518, 252 N.Y.S. 788, 793 (Sup. Ct. Albany County 1931) (allowing a determination of a party's rights arising from a separate action), *aff'd mem.*, 235 App. Div. 751, 256 N.Y.S. 938 (3d Dep't), *aff'd mem.*, 259 N.Y. 655, 182 N.E. 222 (1932), *with* Kings County Trust Co. v. Melville, 127 Misc. 374, 375, 216 N.Y.S. 278, 279 (Sup. Ct. Kings County 1926) (disallowing review of a determination of a court of co-ordinate jurisdiction), *aff'd mem.*, 223 App. Div. 770, 227 N.Y.S. 805 (2d Dep't 1928). In *Burnham*, the plaintiff recovered a judgment in the Court of Claims for the taking of her property by the state. 141 Misc. at 514, 252 N.Y.S. at 789-90. She did not have the judgment entered since the state had indicated doubt as to its validity and because interest would cease to accrue 30 days after the entry. *Id.* at 514-15, 252 N.Y.S. at 790. The court reasoned that since the state's position would probably lead to time-consuming litigation, the plaintiff was in danger of losing her interest on the judgment, and therefore was entitled to a declaration of her rights. *Id.* at 517-18, 252 N.Y.S. at 793. This holding directly conflicts with *Melville*, where an action was brought to determine the validity of a lease that had been approved by court order. *Melville*, 127 Misc. at 375, 216 N.Y.S. at 279. The *Melville* court reasoned that an attempt to review the validity of the judgment of a court of coordinate jurisdiction is entirely beyond the purpose and scope of declaratory relief. *Id.*; *see, e.g.*, Knauff v. Board of Educ., 57 Misc. 2d at 460, 293 N.Y.S.2d at 137 (Special Term refused to issue declaration allocating costs to state and county where family court had already denied such relief); Greenbaum v. New York City Hous. Auth., 4 Misc. 2d 781, 783, 147 N.Y.S.2d 315, 317 (Sup. Ct. N.Y. County 1955) (plaintiff could not obtain review of final order issued by municipal court where issues were or should have been adjudicated in prior action); Lane-Marvey Corp. v. McCaffrey, 204 Misc. 166, 167, 119 N.Y.S.2d 830, 832-33 (Sup. Ct. N.Y. County) (action for declaratory judgment unavailable to plaintiff who had been found guilty and has appeal pending), *aff'd mem.*, 282 App. Div. 1013, 126 N.Y.S.2d 197 (1st Dep't 1953).

In other states, declaratory relief generally has been held to be an improper means of reviewing prior judgments. *See, e.g.*, Bryarly v. State, 232 Ind. 47, 50, 111 N.E.2d 277, 280 (1953) (where appellants' rights were finally and effectively determined in criminal action declaratory judgment may not be used as substitute for appeal); Back's Guardian v. Bardo, 234 Ky. 211, 214, 27 S.W.2d 960, 963 (1930) (Declaratory Judgment Act was never intended to be a "substitute for trial"); Koenig v. Koenig, 191 S.W.2d 269, 271-72 (Mo. Ct. App. 1945) (purpose of declaratory relief was to obtain declaration of rights not previously determined and not to determine whether other rights of same parties had been properly adjudicated in prior action). Federal courts also have denied review. *See, e.g.*, Travelers Ins. Co. v. Wechsler, 34 F. Supp. 721, 723 (S.D. Fla. 1940). In *Travelers*, the court found that where the same parties previously had been involved in litigation concerning the same subject matter, and had had their rights determined in a New York State court, declaratory relief was not available. *Id.* The court reasoned that the plaintiff was actually seeking to relitigate their parties' rights, whereas the Declaratory Judgment Act was designed to allow parties to obtain a

in *Morgenthau v. Erlbaum*,[5] the Court of Appeals held that an action for declaratory relief may be a proper means of obtaining review of a criminal court's order declaring a statute unconstitutional.[6]

In *People v. Link*,[7] Judge William M. Erlbaum of the Criminal Court of the City of New York ruled unconstitutional subdivision 2 of CPL 340.40, which directs that crimes imposing a maximun sentence of less than 6 months shall be tried before a judge without a jury.[8] To contest this ruling, District Attorney Morgenthau commenced an action under Article 78 of the CPLR, which was later converted to an action for declaratory relief.[9] Special Term entertained the action and declared section 340.40 constitutional.[10] The Appellate Division, First Department, affirmed.[11]

On appeal, the Court of Appeals held that a declaratory judgment action may be a proper means for obtaining review of a criminal court's interlocutory order.[12] Chief Judge Cooke, writing for a unanimous Court, reviewed the historical availability of the writ of prohibition as the procedurally proper means of obtaining such review.[13] The Court then identified the policies underlying the aban-

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declaration of rights that would otherwise escape adjudication. *Id.*; *see* 28 U.S.C. § 2201 (Supp. II 1978) (current version of the Declaratory Judgment Act).

[5] 59 N.Y.2d 143, 451 N.E.2d 150, 464 N.Y.S.2d 392 (1983).

[6] *Id.* at 151-52, 451 N.E.2d at 155, 464 N.Y.S.2d at 397.

[7] 107 Misc. 2d 973, 436 N.Y.S.2d 581 (N.Y.C. Crim. Ct. N.Y. County 1981).

[8] *Id.* at 973 & n.2, 436 N.Y.S.2d at 581 & n.2. Judge Erlbaum reasoned that despite the relatively short maximum sentence of 3 months, prostitution is a serious offense, warranting a jury trial. *Id.* at 979, 436 N.Y.S.2d at 586-87.

[9] 59 N.Y.2d at 146, 451 N.E.2d at 152, 464 N.Y.S.2d at 394.

[10] Morgenthau v. Erlbaum, 112 Misc. 2d 30, 35, 445 N.Y.S.2d 997, 1000 (Sup. Ct. N.Y. County 1981). Special Term entertained the action for a declaratory judgment against both the original criminal defendants and Judge Erlbaum. *Id.* at 30, 445 N.Y.S.2d at 998. The court declared that since the statute was constitutional, the defendants in the criminal proceeding were not entitled to jury trials. *Id.* at 35, 445 N.Y.S.2d at 1000.

[11] Morgenthau v. Erlbaum, 89 App. Div. 2d 1062, 454 N.Y.S.2d 487 (1st Dep't 1982) (mem.).

[12] 59 N.Y.2d at 145-46, 451 N.E.2d at 151, 464 N.Y.S.2d at 393.

[13] *Id.* at 149, 451 N.E.2d at 153-54, 464 N.Y.S.2d at 395-96. The writ of prohibition long had been recognized as the appropriate means of blocking the enforcement of a criminal court order in cases where no other remedy was available, and where there was a possibility of a miscarriage of justice. People *ex rel.* Lemon v. Supreme Court, 245 N.Y. 24, 35, 156 N.E. 84, 87 (1927). The writ was subsequently abandoned as the proper means of obtaining collateral review. State v. King, 36 N.Y.2d 59, 62-63, 324 N.E.2d 351, 353-54, 364 N.Y.S.2d 879, 882 (1975). A recent Court of Appeals case, Gold v. Gartenstein, 54 N.Y.2d 627, 425 N.E.2d 892, 442 N.Y.S.2d 504 (1981) (mem.), has held that a writ of prohibition is not available to challenge a criminal court ruling. *Id.* at 629, 425 N.E.2d at 892, 442 N.Y.S.2d at 504. *Gartenstein* dealt with criminal court Judge Gartenstein's declaration in *People v. Darry P.*

donment of the writ of prohibition in such cases as both the potential for a proliferation of collateral appeals and the avoidance of the litigation of factual issues in a non-criminal proceeding.[14] After examining the declaratory judgment action in light of these policies, the Court found that they were not violated in cases where the declaration sought involved the "validity of a statute, the determination of which does not require the resolution of any factual disputes" and where the action does not constitute an immediate attempt to interfere with the ongoing criminal proceeding.[15] The Court also observed that the jurisdictional impediments to the use of a writ of prohibition do not apply to the declaratory action since, unlike the writ, declaratory relief is an ordinary remedy.[16] Chief Judge Cooke noted that declaratory relief is often used to determine the validity of penal statutes, although its availability to make factual determinations is more restricted.[17] Lastly, the Court

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that section 340.40(7) of the CPL was unconstitutional as applied to juvenile offenders. *See* People v. Darry P., 96 Misc. 2d 12, 32, 408 N.Y.S.2d 880, 893 (N.Y.C. Crim. Ct. Kings County 1978). The district attorney brought an action for a writ to prohibit enforcement of the criminal court's order granting a jury trial to the juveniles. *See Gartenstein*, 54 N.Y.2d at 628, 425 N.E.2d at 892, 442 N.Y.S.2d at 504. The Court of Appeals held that the writ was not available because the criminal court had not acted without authority. *Id.*

The extraordinary remedy of prohibition is appropriate only in situations where a court acts or threatens to act without jurisdiction. Nigrone v. Murtagh, 36 N.Y.2d 421, 423-24, 330 N.E.2d 45, 46, 369 N.Y.S.2d 75, 77 (1975). Since determination of the validity of a statute is a proper exercise of a court's jurisdiction, *see* Smith v. Hartman, 208 Misc. 880, 886, 144 N.Y.S.2d 13, 18 (Sup. Ct. Ontario County 1955), an alleged error in such a ruling is not an adequate basis for the use of a writ of prohibition, *see, e.g.*, State v. King, 36 N.Y.2d at 62, 324 N.E.2d at 353, 364 N.Y.S.2d at 882 (involving alleged error of law); *Murtagh*, 36 N.Y.2d at 426, 330 N.E.2d at 47, 369 N.Y.S.2d at 79 (involving prosecutorial misconduct). This is true even when the error alleged in a particular case is not appealable, State v. King, 36 N.Y.2d at 62, 324 N.E.2d at 353, 364 N.Y.S.2d at 882, or when failure to resolve an issue raised in an underlying criminal proceeding would be disadvantageous to both the defendant and the prosecution, *Nigrone*, 36 N.Y.2d at 426, 330 N.E.2d at 47, 369 N.Y.S.2d at 79.

[14] 59 N.Y.2d at 151, 451 N.E.2d at 155, 464 N.Y.S.2d at 397.

[15] *Id.* at 151-52, 451 N.E.2d at 155, 464 N.Y.S.2d at 397. In permitting the declaratory action, the Court held that such action would not lie against the original criminal defendants. *Id.* at 152, 451 N.E.2d at 155, 464 N.Y.S.2d at 397.

[16] *Id.* at 147, 451 N.E.2d at 152, 464 N.Y.S.2d at 394. The *Erlbaum* Court distinguished writs of prohibition from declaratory actions on two grounds. First, prohibition is limited to review of judicial acts of a public nature, whereas declaratory relief is also available as a private remedy in a broader range of circumstances. *Id.* at 147-48, 451 N.E.2d at 153, 464 N.Y.S.2d at 395. Second, although the extraordinary writ of prohibition is not available where an ordinary remedy can be obtained, declaratory relief may be granted even if other adequate remedies exist. *Id.* at 148, 451 N.E.2d at 153, 464 N.Y.S.2d at 395.

[17] *Id.* at 150, 451 N.E.2d at 154, 464 N.Y.S.2d at 396. The Court noted that although a determination of the constitutionality of a penal statute would not interfere with the orderly administration of criminal law, a declaration of the applicability of such a statute to a given

indicated that for a ruling to be subject to declaratory relief, it must be of such a nature that it probably would be decided the same way in subsequent prosecutions and that the issue involved would likely arise often enough for such rulings to burden unduly the administration of justice.[18] Upon finding that Judge Erlbaum's ruling on the constitutionality of the statute was of this nature, the Court reached the merits of the case and held CPL section 340.40 constitutional.[19]

It is submitted that the *Erlbaum* Court's expansion of the concept of declaratory relief, though unprecedented, is necessary, pragmatic, and proper.[20] The criminal court ruling as to the consti-

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set of circumstances would. *Id.*

[18] *Id.* at 152, 451 N.E.2d at 155, 464 N.Y.S.2d at 397. The Court declined, however, to limit the circumstances under which a declaratory action could be brought. *Id.* The Court stated that the ruling as to the right to a jury trial would be likely to have a significant effect on future prosecutions, given that jury trials would be demanded with greater frequency in prostitution cases than they had in the past. *Id.* at 152-53, 45 N.E.2d at 155, 464 N.Y.S.2d at 397. The result would inevitably be "unmanageable delays" in prosecution. *Id.* at 153, 451 N.E.2d at 156, 464 N.Y.S.2d at 398. The Court also indicated that only an application for relief by the People would be considered, since defendants already have a right to appeal in criminal proceedings. *Id.* at 152, 451 N.E.2d at 155, 464 N.Y.S.2d at 397.

[19] *Id.* at 154, 451 N.E.2d at 156, 464 N.Y.S.2d at 398. The Court reasoned that to determine the seriousness of the offense of prostitution based on its "legal, moral, and psychological implications" would require a new determination by each judge faced with a request for a jury trial in a prostitution case. *Id.* at 153, 451 N.E.2d at 156, 464 N.Y.S.2d at 398. Since under current Supreme Court decisions only offenses carrying a sentence of more than 6 months or more are classified as serious crimes, the Court concluded that prostitution is a "petty offense" within the meaning of the sixth amendment and consequently, defendants accused of this offense have no constitutional right to a jury trial. *Id.* at 154, 451 N.E.2d at 156, 464 N.Y.S.2d at 398.

[20] Although earlier decisions may have paved the way for the *Erlbaum* Court's issuance of a declaratory judgment to determine the validity of an interlocutory criminal court order, none have gone as far. *See, e.g.*, New York Foreign Trade Zone Operators, Inc. v. State Liquor Auth., 285 N.Y. 272, 275, 34 N.E.2d 316, 318 (1941); Finkelstein, Mauriello, Kaplan & Levine, P.C. v. McGuirk, 90 Misc. 2d 649, 652, 395 N.Y.S.2d 377, 379 (Sup. Ct. Orange County 1977); Burnham v. Bennett, 141 Misc. 514, 518, 252 N.Y.S. 788, 793 (Sup. Ct. Albany County 1931), *aff'd mem.*, 235 App. Div. 751, 256 N.Y.S. 938 (3d Dep't), *aff'd mem.*, 259 N.Y. 655, 182 N.E. 222 (1932). For example, in *New York Operators*, the Court of Appeals permitted declaratory relief to be used to determine the applicability of a penal statute to a plaintiff under threat of criminal prosecution. 285 N.Y. at 278, 34 N.E.2d at 319-20. The Court sanctioned this interference with criminal law because a refusal to consider the issue would have left jural relations unstable and interfered with the plaintiff's right to conduct his business. *Id.*, 34 N.E.2d at 319. In *Finkelstein*, the supreme court allowed an action for declaratory relief where a criminal proceeding technically had been commenced, but the petitioner had not yet come under the jurisdiction of the court. 90 Misc. 2d at 651-52, 395 N.Y.S.2d at 379. The *Finkelstein* court reasoned that enjoining further criminal proceedings did not constitute an intervention in an ongoing criminal court proceeding because the relief requested was a declaration of the validity of the applicable statute. *Id.* The *Burnham* case

tutionality of section 340.40 of the CPL was not reviewable on appeal;[21] this absence of a conclusive determination results in an uncertainty in the law that impedes both the prosecutor's performance of his duties and the administration of justice.[22] Our system of criminal justice has long been plagued by the uncertainty created by such non-reviewable lower court decisions.[23] Moreover, the courts and legislative bodies of the states have been unable as of yet to arrive at an adequate procedure for obtaining such review.[24] Since declaratory relief was designed to be used in

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involved the use of declaratory relief to review a judgment rendered in a non-criminal proceeding. 141 Misc. at 514, 252 N.Y.S. at 789; *see supra* note 4.

[21] *See* State v. King, 36 N.Y.2d 59, 63, 324 N.E.2d 351, 354, 364 N.Y.S.2d 879, 882 (1975). Statutes have been long recognized as the exclusive grounds for appellate jurisdiction in criminal cases. *E.g.*, People v. Zerillo, 200 N.Y. 443, 446, 93 N.E. 1108, 1109 (1911). In New York, availability of appeal from a criminal court ruling is governed by Article 450 of the CPL. *See* CPL § 450 (1971 & Supp. 1983-1984). The People may take an appeal only from the following rulings: a sentence other than death, CPL § 450.50(4) (1982); an order vacating or setting aside a death sentence, *id.* § 450.80; an order of dismissal, *id.* § 450.20(1), (2); an order setting aside a verdict, *id.* § 450.20(3), or a sentence, *id.* § 450.20(6); an order denying the People's motion to set aside a sentence, *id.* § 450.20(4); an order vacating a judgment, *id.* § 450.20(5); or a pretrial suppression order, *id.* § 450.20(8).

[22] *See* Miller, *Appeals by the State in Criminal Cases*, 36 YALE L.J. 486, 505 (1926-1927); Note, *Criminal Procedure—Moot Appeal by the State—Movement for State Appeal*, 17 NEB. L. BULL. 207, 207 (1938) [hereinafter cited as Note, *Criminal Procedure*]. Since under such a system there may be no other procedure for correcting errors of law, there appears to be a need for some means of acquiring an authoritative statement of law from an appellate court. Miller, *supra*, at 508; Note, *Appeals by the State in Criminal Cases*, 19 MICH. L. REV. 79, 80 (1920) [hereinafter cited as Note, *Appeals by the State*]; *see* Note, *Criminal Procedure*, *supra*, at 209.

[23] *See supra* note 22; *infra* note 24 and accompanying text.

[24] *See* Note, *Criminal Procedure*, *supra* note 22, at 210. Some jurisdictions authorize statutory post-acquittal appeal by the state for the sole purpose of laying down the law for future cases. R. MORELAND, MODERN CRIMINAL PROCEDURE 274 (1959). Such an appeal deals only with a pure question. *Id.* The judgment of the lower court cannot be reversed on review, and the case is treated as if it were moot. *Id.* The Supreme Court has criticized this approach, however, for presenting the issues in a non-adversarial context, which purportedly prevents a full exposition of the facts and correct resolution of the question presented. United States v. Evans, 213 U.S. 297, 300 (1909). In *Evans*, the Court held unconstitutional a District of Columbia provision that granted a limited right of appeal to the prosecution in criminal cases. *Id.* at 301. The Court believed that parties litigating similar matters in the future should have the opportunity to be heard and should not be bound "by decisions made in what are practically 'moot' cases, where opposing views have not been presented." *Id.* at 300 (quoting United States v. Evans, 30 App. D.C. 58, 61 (1907)). Another frequent criticism of this type of state appeal is that a contrary determination would effectively stigmatize the defendant in the initial criminal proceeding as a party who escaped punishment due to a technicality. Miller, *supra* note 22, at 505; Note, *Criminal Procedure*, *supra* note 22, at 214.

New York courts are also familiar with the dilemma of non-reviewable lower court decisions. *See, e.g.*, Gold v. Gartenstein, 54 N.Y.2d 627, 629, 425 N.E.2d 892, 892, 442 N.Y.S.2d

instances where no other remedy would be adequate,[25] it is submitted that the issuance of a declaratory judgment in *Erlbaum* was appropriate.[26]

It similarly is suggested that the Court's holding does not contravene the rationale underlying the rule that declaratory relief may not be used to review the validity of a previous adjudication.[27] At least one lower court has held that a declaration may issue if there exists a substantial controversy regarding the validity of the antecedent judgment, particularly when that judgment is of great import to the plaintiff.[28] Moreover, New York cases which have denied review have not presented as compelling a situation for declaratory relief as that confronted by the *Erlbaum* Court.[29] Indeed,

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504, 504 (1981) (mem.); People *ex rel.* Lemon v. Supreme Court, 245 N.Y. 24, 35, 156 N.E. 84, 87 (1927). For some time, review of such questions was available through the use of the writ of prohibition. *See supra* note 13. This method was abandoned as procedurally improper in *Gartenstein*, leaving New York prosecutors without a mechanism for obtaining review. *See* 54 N.Y.2d at 629, 425 N.E.2d at 892, 442 N.Y.S.2d at 504; *supra* note 13.

[25] *See* SIEGEL § 436, at 578; *see also* James v. Alderton Dock Yards Ltd., 256 N.Y. 298, 305, 176 N.E. 401, 403-04 (1931). The general purpose of a declaratory judgment is to serve some pragmatic end in stabilizing an uncertain jural relation. 3 WK&M ¶ 3001.03, at 30-12 to -13; *see* New York Pub. Interest Research Group, Inc. v. Carey, 42 N.Y.2d 527, 530, 369 N.E.2d 1155, 1157, 399 N.Y.S.2d 621, 623 (1977) (courts should not perform useless or futile acts and should refrain from resolving legal questions lacking an immediate practical effect); Harry M. Stevens, Inc. v. Medina, 63 App. Div. 2d 925, 925, 406 N.Y.S.2d 99, 100 (1st Dep't 1978) (declaratory relief should not be employed when unnecessary).

[26] Courts in New York State have recognized that when a constitutional question is presented, and no question of fact is involved, declaratory relief is both appropriate and necessary. Fenster v. Leary, 20 N.Y.2d 309, 313, 229 N.E.2d 426, 430, 282 N.Y.S.2d 739, 743 (1967); Dun & Bradstreet v. City of New York, 276 N.Y. 198, 206-07, 11 N.E.2d 728, 732 (1937). The constitutional validity of a penal statute also has been recognized as a proper subject for declaratory relief. Reed v. Littleton, 275 N.Y. 150, 156, 9 N.E.2d 814, 817 (1937); 3 WK&M ¶ 3001.06g, at 30-49 to -54 (1982).

[27] One reason often advanced to justify refusal to declare the validity of a prior judgment is that, having already been decided, the controversy is now moot. *See, e.g.*, New York Foreign Trade Zone Operators, Inc. v. State Liquor Auth., 285 N.Y. 272, 276, 34 N.E.2d 316, 319 (1941). For example, in Greenbaum v. New York City Hous. Auth., 4 Misc. 2d 781, 147 N.Y.S.2d 315 (Sup. Ct. N.Y. County 1956), the court held that a final order issued in municipal court was not subject to collateral attack by an action seeking a declaration that the applicable statute was unconstitutional. *Id.* at 783, 147 N.Y.S.2d at 318. The court reasoned that a declaratory judgment could not be used to review previously adjudicated and stabilized legal relations, as such review would serve no useful purpose. *Id.* at 784, 147 N.Y.S.2d at 318. It is submitted, however, that the *Erlbaum* controversy was not moot; indeed, the prior ruling served to create the controversy rather than to settle it.

[28] Burnham v. Bennett, 141 Misc. 514, 517-18, 252 N.Y.S. 788, 793 (Sup. Ct. Albany County 1931); *see supra* note 4.

[29] *See* 59 N.Y.2d at 145-46, 451 N.E.2d at 151, 464 N.Y.S.2d at 393. The decision in People v. Link gave rise to uncertainty in the law. *Id.* at 154-55, 451 N.E.2d at 156-57, 464 N.Y.S.2d at 398-99. The importance of uniformity in the law is evidenced by Court of Ap-

the far-reaching effects which the lower court's ruling would have had distinguished *Erlbaum* from those cases in which review was denied.[30]

It is further suggested that the Court's decision is consonant with the policies behind the exclusively statutory nature of criminal appeals.[31] Two major concerns underlie this limited appealability: fear of creating a delay-causing proliferation of appeals,[32] and a hesitancy to interfere with criminal trials, which are designed to dispose of all issues in a single action.[33] By defining the boundaries of the applicability of declaratory relief, the *Erlbaum* Court dispels the fear of delay due to prolific appeals.[34] Additionally, the Court's refusal to entertain the action against the original criminal defen-

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peals decisions allowing direct appellate review of issues which have become abstract or academic due to lapse of time, but which, if left alone, would leave the law in an uncertain state due to inconsistent decisions. J.B. Lyon Co. v. Morris, 261 N.Y. 497, 499, 185 N.E. 711, 711 (1933); Norton v. Sutphin, 158 N.Y. 130, 131, 52 N.E. 723, 723 (1899). The Court has recognized, however, that such an appeal is only available in exceptional situations where the "urgency of establishing a rule of future conduct is imperative and manifest." J.B. Lyon Co. v. Morris, 266 N.Y. at 499, 185 N.E. at 711. Where questions left unsettled would affect only the petitioner, review on appeal may not be granted. *See id.* at 498-99, 185 N.E. at 711. But in situations where the decision would have far-reaching effects on the entire state, and where numerous other transactions of a similar character are likely to arise frequently, the appeal should be heard. *Id.* The *Erlbaum* case, it is suggested, satisfies these factors in favor of hearing the case.

[30] *See supra* notes 18-19 and accompanying text. Courts have recognized the propriety of declaratory relief in other situations having far-reaching social ramifications. *See* Finkelstein, Mauriello, Kaplan & Levine, P.C. v. McGuirk, 90 Misc. 2d 649, 653, 395 N.Y.S.2d 377, 380 (Sup. Ct. Orange County 1977) (far-reaching implications of needlessly subjecting public officers to criminal prosecution). *See generally* 3 WK&M ¶ 3001.05, at 30-28 (1982) (case not moot if controversy is type likely to recur between parties not before the court).

When one of the parties in an action for declaratory relief adequately represents the public interest, the policy favoring the prompt resolution of public issues becomes a persuasive consideration in determining whether to entertain an action for declaratory relief. *Developments in the Law—Declaratory Judgments—1941-1949*, 62 HARV. L. REV. 787, 808 (1949). Similarly, when the facts of a case invoke the public's interest in efficient government, a court is more likely to render a declaratory judgment. *Id.* at 875. A miscarriage of justice caused by a Court's refusal to review a judgment also may militate in favor of granting declaratory relief. People *ex rel.* Lemon v. Supreme Court, 245 N.Y. 24, 35, 156 N.E. 84, 87 (1927); *cf.* New York Foreign Trade Zone Operators v. State Liquor Auth., 285 N.Y. 272, 277-78, 34 N.E.2d 316, 319 (1941) (federal policy to expedite foreign commerce a factor in determining whether to grant relief).

[31] *See supra* note 21 and accompanying text.

[32] 59 N.Y.2d at 151, 451 N.E.2d at 155, 464 N.Y.S.2d at 397; *see* State v. King, 36 N.Y.2d 59, 63, 324 N.E.2d 351, 354, 364 N.Y.S.2d 879, 882-83 (1975).

[33] 59 N.Y.2d at 151-52, 451 N.E.2d at 155, 464 N.Y.S.2d at 397; *see* Nigrone v. Murtagh, 36 N.Y.2d 421, 426, 330 N.E.2d 45, 47, 369 N.Y.S.2d 75, 79 (1975).

[34] *See supra* notes 15 & 18 and accompanying text.

dants avoids conflict with the policy of noninterference.[35] It is submitted, however, that in view of the delicacy of the balance struck by the Court in harmonizing declaratory relief with these policies, the Court's refusal to address the propriety of reopening the criminal court judgment[36] is problematic. It is submitted that the Court should have answered this issue in the negative, since such reopening would pose a dangerous risk of violating the policies against delay in criminal trials and review of prior adjudications. It is hoped that, when a future declaratory judgment is rendered under the *Erlbaum* rule, the Court will allow the judgment to be reopened only in the most limited circumstances so as not to render inappropriate an otherwise innovative and valid solution to a pressing problem.

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CIVIL PRACTICE LAW AND RULES

Article 55—Appeals Generally

CPLR 5522: Appellate division lacks discretion to grant relief to a defendant failing to take timely appeal, absent a united and inseverable interest with a successful appellant

CPLR 5522 provides appellate courts with broad discretion to fashion relief appropriate to the particular equities of a case before them.[37] This discretion is limited by the general rule that an appel-

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[35] *See supra* note 15 and accompanying text. The *Erlbaum* Court expressly stated that any declaration issued will not be determinative of the ongoing criminal proceeding. 59 N.Y.2d at 155, 451 N.E.2d at 157, 464 N.Y.S.2d at 399. Therefore, the criminal trial will not be interfered with even if the ruling is found to have been incorrect. *Id.*

[36] 59 N.Y.2d at 152 n.3, 451 N.E.2d at 155 n.3, 464 N.Y.S.2d at 397 n.3.

[37] *See* CPLR 5522 (1978). CPLR 5522 provides in pertinent part that "[a] court to which an appeal is taken may reverse, affirm, or modify, wholly or in part, any judgment, or order before it, as to any party." *Id.* This rule is derived from subdivision 1 of CPA section 584, Civil Practice Act, ch. 925, § 584, [1920] N.Y. Laws 205, and is identical to article VI, section 8 of the New York Constitution. 7 WK&M ¶ 5522.02 (1982); *see* CPLR 5522, commentary at 221 (1978). The purpose of the rule is to allow appellate courts to "render whatever decree the justice of the case requires." SECOND REP. at 339, 340; CPLR 5522, commentary at 222 (1978); *see, e.g.*, Ferrari v. Johnson & Johnson, 42 App. Div. 2d 940, 940, 348 N.Y.S.2d 139, 139-40 (1st Dep't 1973) (reviewing court could require plaintiff's attorney to pay costs to defendants for causing delay); Copp v. Bowser, 22 App. Div. 2d 105, 109, 254 N.Y.S.2d 200, 203 (3d Dep't 1964) (concept of fairness mandated new trial as to jury verdict against motorist when lower court incorrectly held accident victim had no claim against truck driver); SIEGEL § 543, at 759; 7 WK&M ¶ 5522.02, at 55-183 (1982). Generally, the