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## The Life and Legacy of Chief Judge Lawrence H. Cooke: "Truly an Exemplary Life. A Life Well Lived"

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## ARTICLES

### THE LIFE AND LEGACY OF CHIEF JUDGE LAWRENCE H. COOKE: “TRULY AN EXEMPLARY LIFE. A LIFE WELL LIVED”<sup>1</sup>

*Jay C. Carlisle II*\*†  
*Anthony DiPietro*\*\*

#### INTRODUCTION

It is an appropriate tribute to the late Chief Judge of New York, Lawrence H. Cooke, that this article be devoted to a man who many leaders of the bench, bar, and academia consider to be the greatest

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† Chief Judge of New York Lawrence H. Cooke was my friend, mentor, and colleague for twenty-five years. I was a member of his Task Force on Women and the Courts and one of the drafters of the Task Force final report, which was featured on the front page of the *New York Times*. After Chief Judge Cooke retired from the Court of Appeals in 1984, he practiced law until Pace Law School hired him in 1989 as a distinguished professor of law. “Professor” Cooke was on our faculty until 1992 and was consistently rated by our students as a superb teacher.

The Chief was a member of the Court of Appeals for ten years. He made his mark both as a jurist and administrator. The Chief was a diligent defender of human rights, writing many opinions demonstrating his concern for the constitutional rights of defendants, free speech, and the protection of persons against discrimination. His proudest success was bringing court backlogs under control, disposing of 2.4 million cases in 1983, an increase of 500,000 from 1979. Chief Judge Cooke always followed the high road and did so with incredible charm, humor, and decency. He passed away on August 17, 2000, at the age of 85, in Monticello, New York. I continue to miss him and am grateful to the *Albany Law Review* for publishing this article.

\*\* Anthony DiPietro, Esq., is a criminal defense attorney representing individuals in complex federal and state post-conviction litigation. Mr. DiPietro graduated from Pace University School of Law, *magna cum laude*. His law office is located in White Plains, New York. The authors wish to thank several former law students of Professor Carlisle’s Advanced Civil Procedure course at Pace University School of Law (Spring 2013): Agatha Rudz, Susan Carmichael, Britney Edwards, Janice Castro, and Jessica Yanefski, for their help and contributions to this article.

<sup>1</sup> Judith S. Kaye, *In Memoriam: Lawrence H. Cooke: 1914-2000*, 72 N.Y. ST. B. ASS’N J. 50, 51 (2000).

jurist to ever serve on New York State's highest court. Chief Judge Cooke, better known as Larry, served with honor and distinction as an associate judge of the Court of Appeals, and later as Chief Judge.<sup>2</sup>

Lawrence H. Cooke was a man “motivated by love—for his family, for the law, for people and life in general.”<sup>3</sup> He led a full and meaningful life that exemplified fundamental virtues of peace, integrity, and fairness.<sup>4</sup> While growing up in Monticello, New York, a town on the foothills of the Catskill Mountains, his parents taught him that dedication and hard work was required in order to be successful.<sup>5</sup> His father, a former District Attorney for Sullivan County, showed him that public servants must always “take the high road”<sup>6</sup> in their affairs and never be obligated to anyone.<sup>7</sup>

Chief Judge Cooke once wrote that he considered his father “the personification of virtue. He was a man of common sense and logic—with his feet always solidly on the ground.”<sup>8</sup> Chief Judge Cooke’s father’s teachings influenced his work ethic, which resulted in him working up to eighteen hours per day to fulfill his judicial duties.<sup>9</sup> Chief Judge Cooke recognized that his time on the court was a “sacred mission” in order to provide litigants a full and fair process.<sup>10</sup>

In 1981, during a keynote address, Chief Judge Cooke stated: “Justice is the great commodity.”<sup>11</sup> He explained that leaders should always be guided by principles of justice and equality. In this regard, Chief Judge Cooke explained that great historical leaders appreciated this concept, noting as an example that Abraham Lincoln understood “the . . . important idea that the law represented . . . the idea of fairness;” Thomas Jefferson “exalted the

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<sup>2</sup> *Id.* at 50.

<sup>3</sup> Laurie Stuart, Editorial, *Goodbye Judge Cooke*, RIVER REP. (Aug. 24, 2000), <http://www.riverreporter.com/issues/00-08-24/editorial.htm>.

<sup>4</sup> Chief Judge Cooke sought justice throughout his judicial career in its purest form. See, e.g., Anthony Kane et al., *Tribute to Former Chief Judge Lawrence H. Cooke*, 70 N.Y. ST. B. J. 46, 46 (1998).

<sup>5</sup> See Kane et al., *supra* note 4, at 46.

<sup>6</sup> Martha Middleton, *Mr. Chief Activist, Cooke Is on a ‘Sacred Mission,’* 69 A.B.A. J. 431, 431 (1983).

<sup>7</sup> *Id.* (“Justice [is] always the great virtue: all of us have a great duty to render justice and fairness to our neighbors in everyday affairs.”).

<sup>8</sup> Lawrence H. Cooke, *Waste Not, Wait Not—A Consideration of Federal and State Jurisdiction*, 49 FORDHAM L. REV. 895, 895 (1981).

<sup>9</sup> See Middleton, *supra* note 6, at 431.

<sup>10</sup> See *id.* (“When I lay down my head at night time or finally, I want to say I’ve done everything I can.”).

<sup>11</sup> Lawrence H. Cooke, *Remarks of the Chief Judge of the State of New York*, 2 PACE L. REV. 231, 243 (1982).

concept of ‘equal and exact justice to all;’” and Frederick Douglass observed that “[t]he lesson which the American people must learn . . . is that equal manhood means equal rights.”<sup>12</sup> Following this approach himself, Chief Judge Cooke left a legacy defending equal justice and fundamental fairness for all people.

## I. BACKGROUND

At the age of twenty, Chief Judge Cooke graduated *cum laude* from Georgetown University,<sup>13</sup> and later received the John Carroll Award.<sup>14</sup> Upon graduating from Georgetown, Chief Judge Cooke was accepted into Harvard Law School, where he began his legal education.<sup>15</sup> He later transferred and graduated from Albany Law School.<sup>16</sup> Chief Judge Cooke also received honorary LLB or LLD degrees from Albany Law School, Union University, Siena College, Brooklyn Law School, New York University, Pace University, and Syracuse University.<sup>17</sup>

After graduating from Albany Law School, the Chief worked at the law office of John Lyons, a well-known Sullivan County trial lawyer.<sup>18</sup> In 1947, he became the Chairman of the Sullivan County Board of Supervisors.<sup>19</sup> After working for John Lyons, Chief Judge Cooke went into private practice and in 1953, ran for County Court Judge.<sup>20</sup> A year later, Cooke was elected as Sullivan County Judge, Surrogate and Children’s Court Judge.<sup>21</sup> In 1961, Cooke was named to the New York State Supreme Court, followed by an appointment to the Appellate Division, Third Department, in 1969.<sup>22</sup> He was elected to the Court of Appeals as an associate judge in 1974,<sup>23</sup> and in 1979, was appointed Chief Judge.<sup>24</sup> Chief Judge Cooke served on New York’s highest court with novel admiration from his colleagues, and is remembered as one of the most influential and celebrated

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<sup>12</sup> *Id.* at 243–44.

<sup>13</sup> Kane et al., *supra* note 4, at 46.

<sup>14</sup> Hon. Lawrence H. Cooke, TIMES HERALD-REC. (Aug. 19, 2000), <http://choicesmhc.com/files/monticello/history/cookethr.htm>.

<sup>15</sup> Kane et al., *supra* note 4, at 46.

<sup>16</sup> *See id.*

<sup>17</sup> Hon. Lawrence H. Cooke, *supra* note 14.

<sup>18</sup> Kane et al., *supra* note 4, at 46.

<sup>19</sup> Hon. Lawrence H. Cooke, *supra* note 14.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> Kane et al., *supra* note 4, at 47.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

jurists.<sup>25</sup>

During his tenure on the bench, Chief Judge Cooke wrote many instructive opinions on criminal law and procedure,<sup>26</sup> New York Practice, the right to free press, guardianship, and victim rights.<sup>27</sup> The Chief authored significant opinions relating to the development of the state's independence and the progression of New York's Constitution.<sup>28</sup> Chief Judge Cooke's recognition of the state's judicial sovereignty allowed the state court to independently control fundamental issues, including searches and seizures and procedural due process rights.<sup>29</sup> He was regarded as "a giant who helped ensure that, while the United States Supreme Court changed directions and its role, the New York Court of Appeals would continue to be an independent force and a national leader in safeguarding our rights and liberties."<sup>30</sup>

According to Chief Judge Cooke, each decision he authored was designed to provide sufficient notice and guidance to future litigants. He explained that his rulings were:

[A] yardstick that you can use for conduct in the future, so that when you pronounce a decision in a case, you can take that yardstick and measure it into a future case, so people know what they can do and what they have a right to do and

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<sup>25</sup> See, e.g., *A Dedication to Chief Judge Lawrence H. Cooke*, 53 FORDHAM L. REV. 145, 145, 154 (1984) (providing a dedication from the editors themselves, as well as from others in the legal community); see generally Hon. William J. Brennan, Jr., *A Tribute of Chief Judge Charles S. Desmond*, 36 BUFF. L. REV. 1, 3 (1987) (recognizing the New York Court of Appeals as a leader in state constitutionalism).

<sup>26</sup> *A Dedication to Chief Judge Lawrence H. Cooke*, *supra* note 25, at 154 ("Perhaps the area of the law where Chief Judge Cooke's voice speaks most distinctly and compellingly is that of the constitutional requirements in the criminal justice process.").

<sup>27</sup> *Id.* at 155 ("To list all the topics on which he has contributed authoritatively to the growth of the law would be virtually to recapitulate the syllabus of [the legal] profession.").

<sup>28</sup> See, e.g., *People v. P. J. Video Inc.*, 501 N.E.2d 556, 559–60 (N.Y. 1986) ("State courts are bound by the decisions of the Supreme Court when reviewing federal statutes or applying the federal Constitution. Under established principles of federalism, however, the states also have sovereign powers. When their courts interpret state statutes or the state Constitution the decisions of these courts are conclusive if not violative of federal law. Although state courts may not circumscribe rights guaranteed by the federal Constitution, they may interpret their own law to supplement or expand them.").

<sup>29</sup> See, e.g., *People v. Skinner*, 417 N.E.2d 501, 502 (N.Y. 1980) (holding that the right to counsel attaches in a noncustodial setting once counsel has instructed the police not to question the defendant in his absence); *People v. Rogers*, 397 N.E.2d 709, 710 (N.Y. 1979) (holding that once an attorney has entered the proceeding, a defendant in custody may not be questioned further in the absence of counsel); *People v. Settles*, 385 N.E.2d 612, 614 (N.Y. 1978) (holding that a defendant under indictment and in custody may not waive the right to counsel unless the waiver is made in the presence of the defendant's attorney).

<sup>30</sup> Vincent Martin Bonventre, *Judges on Judges: The New York State Court of Appeals Judges' Own Favorites in Court History*, 71 ALB. L. REV. 1051, 1051 (2008).

what they shouldn't do.<sup>31</sup>

Distinguished Professor Vincent M. Bonventre of Albany Law School explained that Chief Judge Cooke was a judicial giant, who “led his colleagues on the court, and held the way for state supreme courts throughout the nation to take their constitutional guarantees seriously. Indeed, the body of his opinions is a veritable call to arms to enforce fundamental law of the state in service of fundamental freedoms.”<sup>32</sup>

While Chief Judge, Cooke also “served as Chairman of the Conference of Chief Judges and became President of the National Center for State Courts in 1982.”<sup>33</sup> In 1986, President Reagan appointed the Chief to chair the State Justice Institute.<sup>34</sup> In 1987, Chief Judge Cooke received the Distinguished Service Award from the National Center for State Courts.<sup>35</sup> In appreciation of his service, the Sullivan County Courthouse was renamed the Lawrence H. Cooke Sullivan County Courthouse.<sup>36</sup> In the latter part of his career, the Chief was also “of counsel to the Albany law firm of Couch, White, Brenner and Feigenbaum[,] and served as a member of the Board of Directors of the First National Bank of Jeffersonville.”<sup>37</sup>

Chief Judge Cooke also utilized his status within the legal community to advocate for reform and protection of women's rights.<sup>38</sup> Notably, he advocated for changes to protect the rights of rape victims, whom he had felt “[we]re outside the effective protection of the law.”<sup>39</sup> In addition, Chief Judge Cooke put into effect a rule that prohibited reimbursement for expenses of business transacted in facilities that discriminated on the grounds of gender and race.<sup>40</sup> While acting as Chief Judge, he also appointed a twenty-three member panel, the Women in Law Task Force,<sup>41</sup> to

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<sup>31</sup> Kathy Schofield Zdeb, *The Chief*, ALB. L. SCH. UNION U. MAG., Spring 1995, at 8.

<sup>32</sup> *Id.* at 8–9.

<sup>33</sup> See *Hon. Lawrence H. Cooke*, *sup-ra* note 14.

<sup>34</sup> See Joyce Adolfsen & Lou Adolfsen, *Lawrence Henry Cooke*, HIST. SOC'Y N.Y. CTS., <http://www.nycourts.gov/history/legal-history-new-york/history-legal-bench-courtappeals.html?http://www.nycourts.gov/history/legal-history-new-york/luminaries-court-appeals/cooke-lawrence.html> (last visited Apr. 13, 2017).

<sup>35</sup> See *Lawrence Henry Cooke: Lawyer, State Chief Judge*, PRABOOK, <http://prabook.com/web/person-view.html?profileId=59287#> (last visited Mar. 28, 2017).

<sup>36</sup> Kane et al., *supra* note 4, at 48.

<sup>37</sup> *Hon. Lawrence H. Cooke*, *supra* note 14.

<sup>38</sup> Adolfsen & Adolfsen, *supra* note 34.

<sup>39</sup> *Id.*

<sup>40</sup> Robert B. McKay, *Six Short Tears of Meritorious Service as Chief Judge*, in *A Dedication to Chief Judge Lawrence H. Cooke*, *supra* note 25, at 153.

<sup>41</sup> At the time, a report by a special state task force that studied the courts for almost two

research gender inequalities<sup>42</sup> in the court system.<sup>43</sup> In 1982, Chief Judge Cooke was the only man to have ever been admitted as an honorary member of the New York State Women's Bar Association.<sup>44</sup>

During his professional career, Chief Judge Cooke was also active within his community. He served as President of the Monticello Fire Department, Sullivan County Volunteer Firefighters Association, and the Hudson Valley Volunteer Firefighters Association.<sup>45</sup> The Firemen's Association of the State of New York presented him with the Golden Trumpet Award.<sup>46</sup> Chief Judge Cooke was a member of St. Peter's Roman Catholic Church, and praised by many religious organizations for his outreach to the community—receiving the Golda Meir Memorial Award from the Jewish Lawyers Guild and the Torch of Liberty by B'nai B'rith.<sup>47</sup> Chief Judge Cooke was also honored as the keynote speaker for the International Jewish Jurists and Lawyers Convention in Jerusalem.<sup>48</sup>

## II. PROFESSOR OF LAW

Chief Judge Cooke will be remembered for his many contributions to several law schools located in New York. Among his many

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years concluded that bias against women in the New York State court system was so pervasive that women were often denied equal justice. See Jeffrey Schmalz, *Pervasive Sex Bias Found in Courts*, N.Y. TIMES (Apr. 20, 1986), <http://www.nytimes.com/1986/04/20/nyregion/pervasive-sex-bias-found-in-courts.html> ("The [twenty-three]-member panel—set up in May 1984 by Lawrence H. Cooke, then the state's Chief Judge—concluded that female lawyers were 'routinely' demeaned and treated patronizingly by male judges and attorneys. The panel also found that the credibility of female witnesses was sometimes questioned because women were viewed by some judges as emotional and untrustworthy. Calling the situation grave, the panel said some judges did not understand the nature of family violence and blamed the victims for it.").

<sup>42</sup> *Report of the New York Task Force on Women in the Courts*, 15 FORDHAM URB. L.J. 15, 15 (1987) [hereinafter *Women in the Courts Task Force*] ("The New York Task Force on Women in the Courts has concluded that gender bias against women litigants, attorneys and court employees is a pervasive problem with grave consequences. Women are often denied equal justice, equal treatment[,] and equal opportunity.").

<sup>43</sup> UNIFIED COURT SYS. OFFICE OF COURT ADMIN., SUMMARY REPORT: NEW YORK TASK FORCE ON WOMEN IN THE COURTS 1 (Mar. 1986), <http://www.nycourts.gov/ip/womeninthecourts/pdfs/ny-task-force-on-women-in-the-courts-summary.pdf> (including information relating to the Task Force's objective, investigation, and findings); *Women in the Courts Task Force*, *supra* note 42.

<sup>44</sup> Tom Rue, *Chief Judge Lawrence H. Cooke—"Justice is a Very Fragile Commodity,"* River Rep., April 24, 1995.

<sup>45</sup> *Hon. Lawrence H. Cooke*, *supra* note 14.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

contributions, the Chief served as a founding board member of two publications produced by Albany Law School<sup>49</sup> and taught at Pace University School of Law from 1988 to 1991.<sup>50</sup>

During this time, he served as a mentor to law students and was influential throughout their studies.<sup>51</sup> Former Pace students recalled that it was an honor to have the former Chief Judge of the New York Court of Appeals as a professor: “Judge Cooke enhanced Pace Law School’s reputation and enriched the lives of all who had the privilege to have him as their teacher.”<sup>52</sup>

Likewise, many students at Albany Law were instructed by Chief Judge Cooke’s guest lectures.<sup>53</sup> He would routinely lecture classes on various subjects, seeking to take an active and positive role in the development and direction of law students.<sup>54</sup>

He spoke with the students, sharing his thoughts and feelings, his vision and convictions, his hopes and expectations for them and their chosen profession. He would call upon them to “search for justice, to render justice, the ennobling feature” of a career in the law—“to help the community and rectify the wrongs that come your way and to support those that need your help.”<sup>55</sup>

Despite his distinguished resume, students were most amazed by Chief Judge Cooke’s humble approach. He reminded students that he was just a “man.” The Chief taught students that they should respect members of the bench, but never be afraid to speak and advocate for their clients.<sup>56</sup> One former student stated that Chief Judge Cooke “was a truly humble man and humanized himself, and gave us a different perspective as to who a Judge is. Every day, when I am advocating a case at trial, or upon a motion/appeal, I

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<sup>49</sup> Vincent Martin Bonventre, *Tribute to Chief Judge Lawrence H. Cooke*, 64 ALB. L. REV. 1, 2 (2000) (noting that Chief Judge Cooke helped the *Albany Law Review* plan and inaugurate its *State Constitutional Commentary* issue, and helped create the *Government Law & Policy Journal*).

<sup>50</sup> Rue, *supra* note 44.

<sup>51</sup> In addition to teaching at Pace, Chief Judge Cooke also visited other law schools to speak with students about law, life, and ethics. See Vincent Martin Bonventre, *Professional Responsibility*, 43 SYRACUSE L. REV. 505, 521 (1992). Cooke was lauded as a model of professional responsibility and recognized for his teaching that a lawyer should always remember: “When in doubt take the high road.” *Id.* at 522.

<sup>52</sup> Letter from Jacqueline Hatter, Esq., to Jay Carlisle, II, Professor of Law, Pace Law Sch. (Aug. 29, 2012) (on file with author) (“Judge Cooke was a brilliant jurist and teacher, as well as a kind and good-hearted person.”).

<sup>53</sup> Bonventre, *supra* note 49, at 2.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> Interview with Anthony Pirrotti, Jr., Esq. (2012).



remember the life lesson he gave us.”<sup>57</sup> Another former student recalls Judge Cooke telling his class: “You must argue with a fire in your belly!” when advocating for what is fair and just.<sup>58</sup>

Chief Judge Cooke always tried to influence his students to take an active role in the legal community and to strive for self-betterment as a legal practitioner.<sup>59</sup> He instructed his students to always be ethical and passionate about their work. He also offered the advice that lawyers should avoid ethical problems and “when in doubt take the high road.”<sup>60</sup> Former students of Chief Judge Cooke recounted that their “best memories of the class, however, relate[d] not to Lawrence Cooke the jurist, but Lawrence Cooke the man.”<sup>61</sup>

Chief Judge Cooke’s admiration was so widespread that many students at Pace even petitioned the dean of the law school upon notice that he was retiring from teaching. The students sent several hundred letters to the dean of the law school demanding that all efforts be employed to keep Chief Judge Cooke.<sup>62</sup> To his students, his presence became an integral part to their legal education and life.<sup>63</sup>

### III. NEW YORK COURT REFORM

In the 1970s and 1980s, New York’s court system was considered one of the most active and expensive systems in the world.<sup>64</sup> By 1981, New York City’s Supreme Court had 22,796 indictments and over 173,288 criminal defendants were arraigned on misdemeanor charges, requiring 331,580 courtroom appearances to process felony

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<sup>57</sup> *Id.*

<sup>58</sup> Letter from Steven Habiague, Esq., to Jay Carlisle, II, Professor of Law, Pace Law Sch. (Sept. 2, 2012) (on file with author).

<sup>59</sup> Interview with Joseph Ruhl, Esq. (2012) (“Judge Cooke’s photograph, which is a replica of his portrait on display in the New York State Court of Appeals, is on the wall in my office at Wilson Elser, with a personal handwritten note from Chief Judge Cooke. When I look at it, I am reminded of the amazing person, who inspired me to strive to be an excellent lawyer and colleague, and to be involved in activities for the betterment of the legal profession.”).

<sup>60</sup> Bonventre, *supra* note 49, at 3.

<sup>61</sup> Interview with Joseph Ruhl, Esq. (2012) (“Before the course began, I—as well as other members of the seminar—received a large package in the student mail. The package was from Chief Judge Cooke and contained the course book that he had purchased for the students of the class at his own expense. It was a simple and generous gesture that has stayed with me since that time. It was indicative of the type of person Judge Cooke was—selfless and generous. I still have the course book in my reference library.”).

<sup>62</sup> Bonventre, *supra* note 49, at 2.

<sup>63</sup> Letter from Richard Baum, Esq., to Jay Carlisle, II, Professor of Law, Pace Law Sch. (Aug. 16, 2012) (on file with author) (“He was a very scholarly [and] honorable man. He truly believed in ethics and the honor and value of our profession.”).

<sup>64</sup> Robert B. McKay, *Six Short Years of Meritorious Service as Chief Judge*, 53 FORDHAM L. REV. 151, 152 (1984).

defendants and 673,685 appearances to handle misdemeanors.<sup>65</sup> In 1983, New York State handled more than 2,300,000 actions and proceedings, and approximately 2,400,000 dispositions.<sup>66</sup>

Chief Judge Cooke found that the organization of the New York court system was “a nightmare for court managers, [an] inconvenience to judges, and much expense to the taxpayer. Most importantly, the senseless hodgepodge is inefficient and causes court delay.”<sup>67</sup> Chief Judge Cooke also found that the instability of the court led to sentencing disparities throughout the state, including disparate sanctions,<sup>68</sup> divergent outcomes,<sup>69</sup> and controlling feudal “duchies.”<sup>70</sup> He saw “that complacency and indifference had undermined the effectiveness and fairness of the state judicial system.”<sup>71</sup> The large backlog of cases, the judges coming to work late and leaving early, and the discrimination against women and minorities in the courthouses were cries for help from the judicial system that Chief Judge Cooke answered with hard-hitting reforms.<sup>72</sup>

Chief Judge Cooke believed that a strong central administration with uniform rules would provide the proper structure for an effective court system. He expressed:

[T]he administrative function involves management of the court system—equipping a court with all that is necessary and helpful that it might perform its acts of adjudication well. . . . It is not an arbitrary . . . exercise; rather it is use of power authorized by the people to make courts more efficient in satisfying society’s needs.<sup>73</sup>

In 1981, Chief Judge Cooke proposed a judicial rotation plan, which would be “a concerted movement designed to achieve improvement in the judicial structures and methods.”<sup>74</sup> Using section 26 and section 28 of Article VI of the New York State

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<sup>65</sup> Nicolas Pileggi, *Judges at War*, NEW YORKER, Apr. 19, 1982, at 19.

<sup>66</sup> McKay, *supra* note 64, at 152.

<sup>67</sup> Lawrence H. Cooke, *Structural Reform of the Judicial System*, in NEW YORK STATE TODAY: POLITICS, GOVERNMENT, PUBLIC POLICY 161, 167 (Peter W. Colby ed., 1985).

<sup>68</sup> See Cooke, *supra* note 11, at 245.

<sup>69</sup> See *id.*

<sup>70</sup> Cooke, *supra* note 67, at 163.

<sup>71</sup> Sullivan County Historical Society History Maker Award 1998: The Hon. Lawrence H. Cooke, SULLIVAN COUNTY HIST. SOC’Y (June 1, 1998), [http://www.sullivancountyhistory.org/index.php?option=com\\_content&view=article&id=61:lawrence-h-cooke&catid=47:history-makers&Itemid=59](http://www.sullivancountyhistory.org/index.php?option=com_content&view=article&id=61:lawrence-h-cooke&catid=47:history-makers&Itemid=59) [hereinafter *Sullivan County Award*].

<sup>72</sup> See Vincent Martin Bonventre, *Tribute to Chief Judge Lawrence H. Cooke 1914-2000*, 64 ALB. L. REV. 1, 1 (2000).

<sup>73</sup> Cooke, *supra* note 67, at 168.

<sup>74</sup> *Id.* at 162.

Constitution (the “Administration Supervision of the Courts”), Chief Judge Cooke designed a judicial rotation plan that assigned lower court judges as temporary judges in supreme court throughout New York.<sup>75</sup> He believed that the availability of more judges would alleviate the pressure of everyday court business and balance the workload.<sup>76</sup>

In addition, Chief Judge Cooke announced that a new two-step system would be instituted, requiring “all New York City Civil and Criminal Court Judges . . . to be screened by a select committee . . . to determine their qualification to sit as acting supreme court justices.”<sup>77</sup> Following the screening, “assignment to the higher judicial posts would be made on a rotation basis from the lower court judges recommended by the committee.”<sup>78</sup>

On September 21, 1981, the Office of Court Administration announced that a new plan for the operation of the temporary assignment to supreme court would be forthcoming in New York City.<sup>79</sup> In January 1982, Chief Judge Cooke’s plan went into effect, and it initially faced criticism. Many critics felt that the reforms implemented by Cooke were an extreme abuse of power, working to reduce the judiciary’s independence and undermine the appointment of qualified judges.<sup>80</sup>

On January 14, 1982, New York City District Attorney Robert Morgenthau challenged Cooke’s plan and moved to enjoin him from making any temporary judicial assignments to New York City’s Supreme Court. Chief Judge Cooke defended his position, stating:

The citizens have voted and made up their minds. They chose central administration and continue to support it. The mandate is clear. The People want effective leadership. The People want modern methods and techniques and were not satisfied with the way things were. They want speedy trials. . . . They don’t want one single case adjourned 113 times, or the average number of appearances per criminal case in New York City to be 15.2 times.<sup>81</sup>

The supreme court dismissed Morgenthau’s claim that

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<sup>75</sup> See *Morgenthau v. Cooke*, 436 N.E.2d 467, 468 (N.Y. 1982).

<sup>76</sup> See Cooke, *supra* note 67, at 164–65.

<sup>77</sup> *Morgenthau*, 436 N.E.2d at 468.

<sup>78</sup> *Id.*

<sup>79</sup> See *id.*

<sup>80</sup> See Marcia Chamber, *Bar Criticizes Plans to Rotate Acting Justices*, N.Y. TIMES (Nov. 8, 1981), <http://www.nytimes.com/1981/11/08/nyregion/bar-criticizes-plans-to-rotate-acting-justices.html>.

<sup>81</sup> Cooke, *supra* note 67, at 168.

administrative regulations had not been followed by Chief Judge Cooke in making temporary assignments.<sup>82</sup> The court noted that the “respondent [Cooke] possessed the requisite authority to place [his] announced plan into operation.”<sup>83</sup>

Thereafter, Morgenthau successfully appealed the decision.<sup>84</sup> The appellate division ruled that the Chief Judge could not arbitrarily truncate certain administrative policies regulating temporary assignments.<sup>85</sup> The court held that “there was no compliance therewith prior to promulgation of the plan or at any time, and therefore that plan of temporary assignment is without effect and void in respect of the manner of promulgation.”<sup>86</sup> The court observed: “The history of constitutional enactments in America teaches that every grant of power should ideally be hedged about by checks and balances to protect the body politic from absolute power.”<sup>87</sup> Thus, the court required that Cooke’s plan be adopted only after proper protocol, in which the Chief Judge, the Administrative Board of the Courts, and the Court of Appeals, agree and approve.<sup>88</sup>

Thereafter, Chief Judge Cooke appealed the appellate division’s decision to the New York Court of Appeals, but was unsuccessful in obtaining a favorable outcome.<sup>89</sup> Despite his unsuccessful appeal, Chief Judge Cooke’s envisioned reformation of the judiciary was still influential. While the Court of Appeals may have rebuked the Chief for not following the proper procedures to implement reform, they did not hold the procedures he proposed substantively unconstitutional.<sup>90</sup> Instead, the court boosted the morale of reformers and implicitly promoted their cause to seek change by outlining the process needed for the proposed reform to be enacted.<sup>91</sup>

Following the *Morgenthau* case, Chief Judge Cooke continued his efforts to push reforms that would improve the judiciary and expand

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<sup>82</sup> *Morgenthau ex rel People v. Cooke*, 448 N.Y.S.2d 480, 482 (App. Div. 1982).

<sup>83</sup> *Id.*

<sup>84</sup> *See id.* at 481–82.

<sup>85</sup> *Id.* at 486 (“[T]he new rotation plan of temporary assignment of judges of the courts of the City of New York requires, as prerequisite to promulgation, the adoption of a standard and administrative policy in respect of the same, as well as consultation theretofore by the Chief Judge with the Administrative Board of the Courts and approval by the Court of Appeals[.]”).

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 484.

<sup>88</sup> *See id.* at 486.

<sup>89</sup> *See Morgenthau v. Cooke*, 436 N.E.2d 467, 476 (N.Y. 1982).

<sup>90</sup> *See id.*

<sup>91</sup> *See id.*

“the areas of personal freedom and offered protection to those too powerless to defend themselves.”<sup>92</sup> He pushed for openness, fairness, and efficiency within the court, noting that a Chief Judge must be “somebody who will never forget that the courts belong to the people . . . [and] who will be anxious to improve the court system.”<sup>93</sup>

Chief Judge Cooke created equal opportunity offices to prevent discrimination against women and minorities in the staffing of the judicial system, as well as a Court Facilities Task Force that assessed the conditions of the courthouses and instituted the use of computers to facilitate recordkeeping.<sup>94</sup> By the time Chief Judge Cooke left office in 1984, the New York State court system had the most advanced computer technology in the country.<sup>95</sup> Chief Judge Cooke was able to establish uniform court hours and vacations that provided efficient time management for court personnel.<sup>96</sup> He transferred more than two hundred upstate judges who had lighter workloads to New York City.<sup>97</sup> Further, he was able to bring in retired judges to aid in ruling on pretrial criminal motions, and he established arbitration panels and community dispute resolution centers to help resolve civil disputes.<sup>98</sup> Under Chief Judge Cooke’s leadership, the court system stabilized.<sup>99</sup> His reforms resulted in a twenty-one percent reduction in the backlog of cases,<sup>100</sup> and he continued to quell the backlogs over time—disposing of 2.4 million cases in 1983 alone.<sup>101</sup>

Chief Judge Cooke also worked tirelessly with Judge Herbert B. Evans and Judge Robert J. Sise, both of whom were chief administrative judges for the Office of Court Administration, “to put in place other judicial administration reforms.”<sup>102</sup> Together, they implemented:

[M]erit screening[s] of criminal and civil court judges in New York City for temporary designation as acting supreme court

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<sup>92</sup> *Sullivan County Award*, *supra* note 71.

<sup>93</sup> Geoffrey Taylor, *Chief Judge Reforms Huge State Court System*, *POUGHKEEPSIE J.*, July 11, 1984, at 6.

<sup>94</sup> *See, e.g.*, Kane et al., *supra* note 4, at 47.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *A Tribute to Chief Judge Lawrence H. Cooke*, 58 ALB. L. REV. 1, 3 (1994).

<sup>98</sup> *See* W. Ward Reynoldson, *To Chief Judge Cooke: Leader in Innovative Judicial Administration*, 53 FORDHAM L. REV. 149, 150 (1984).

<sup>99</sup> *See* McKay, *supra* note 64, at 152.

<sup>100</sup> *A Tribute to Chief Judge Lawrence H. Cooke*, *supra* note 97, at 3.

<sup>101</sup> McKay, *supra* note 64, at 152.

<sup>102</sup> *Id.*

justices; . . . reform[s] of the sheriff's jury panel; utilization of retired judges; significant improvement and broadening of judicial education; and establishment of the nation's first state-court supervised mediation program.<sup>103</sup>

Remarkably, Chief Judge Cooke's quest for court reform remained with his successors after his retirement. His longtime friend, neighbor, and distinguished colleague, Chief Judge Judith Kaye, followed Chief Judge Cooke's promotion of court reform. In a symposium, entitled: "Judges on Judges: The New York State Court of Appeals Judges' Own Favorites in Court History," Judge Kaye chose to honor Chief Judge Cooke because of his efforts "[c]ommitted . . . to fairness in life[] and . . . jurisprudence."<sup>104</sup>

#### IV. REPRESENTATIVE OPINIONS

##### A. *Criminal Law and Procedure*

Chief Judge Cooke wrote many leading opinions on criminal law and procedure as both Chief Judge and associate judge for the New York Court of Appeals.<sup>105</sup> He was a zealous advocate of state constitutionalism and was committed to protecting New York's judicial independence.<sup>106</sup> His judicial opinions sought to ensure judicial independence in the wake of an encroaching federal system.<sup>107</sup> Of significance, Chief Judge Cooke ensured that the protections afforded to criminal defendants under New York's Constitution would stand independent of those provided by the United States Constitution.<sup>108</sup>

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<sup>103</sup> *Id.*; see also *Sullivan County Award*, *supra* note 71 ("There was increased reliance on mediation and arbitration to cut down on the number of court cases and judges who had to retire because of age were enabled to continue service to the state as hearing officers.") ("Sheriff juries, notorious for allowing people with 'clout' to avoid jury service, were done away with to increase the pool of potential jurors. A management program was instituted to secure better treatment of jurors.").

<sup>104</sup> Judith S. Kaye, *Judges on Judges: The New York State Court of Appeals Judges' Own Favorites in Court History: Chief Judge Lawrence H. Cooke*, 71 ALB. L. REV. 1055, 1057 (2008).

<sup>105</sup> See *A Dedication to Chief Judge Lawrence H. Cooke*, *supra* note 25, at 154.

<sup>106</sup> See, e.g., *id.* at 155.

<sup>107</sup> See *id.*

<sup>108</sup> See, e.g., *People v. Skinner*, 417 N.E.2d 501, 502 (N.Y. 1980) (holding that a defendant's statements should be suppressed, despite a valid *Miranda* warning and subsequent waiver, when the waiver was derived by police in a noncustodial interview of the defendant who obtained counsel specifically on the matter under investigation and whose lawyer had instructed the police not to question the defendant in his absence); *People v. Cunningham*, 400 N.E.2d 360, 361 (N.Y. 1980) ("[O]nce a suspect in custody requests the assistance of counsel, he may not be questioned further in the absence of an attorney. . . . [A]n uncounseled waiver of a constitutional right will not be deemed voluntary if it is made after the right to

In addition, Chief Judge Cooke's opinions were consistent and evenhanded.<sup>109</sup> He remained steadfast in his commitment to protecting core principles, noting: "A defendant charged with the most heinous of crimes is still entitled to the fundamental fairness we conceive under the notion of due process."<sup>110</sup> He routinely directed that overreaching government activity was not to be tolerated, because "if not checked, [it was] certain to encourage lawlessness and destroy cherished freedoms."<sup>111</sup>

On several occasions, Chief Judge Cooke authored decisions directing that a criminal defendant's conviction be overturned based upon a finding that the trial proceeding was unfair. For instance, in *People v. Whalen*,<sup>112</sup> the defendant was convicted of rape in the first degree following a jury trial, at which he "proceeded on a 'mistaken identification' defense, and sought to establish an alibi."<sup>113</sup> Chief Judge Cooke reversed the defendant's conviction as a result of the prosecution's improper conduct during its summation, where the prosecutor had impermissibly sought to undermine the defendant's alibi evidence by characterizing it as a concoction that was recently fabricated to ruse the jury.<sup>114</sup> The prosecutor also misrepresented to the jury that no notice of the defendant's alibi was ever received by the prosecution before trial, although the defendant had properly served the prosecutor with notice of his alibi defense eight months beforehand.<sup>115</sup>

Chief Judge Cooke observed that the prosecutor not only violated ethical mandates when falsely representing what had occurred regarding the defendant's alibi notice, but also that the prosecutor's action "in itself violated the [Government's] obligation to seek justice, rather than conviction."<sup>116</sup> Chief Judge Cooke explained

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counsel has been invoked."); *People v. Settles*, 385 N.E.2d 612, 613 (N.Y. 1978) (holding that identification of a criminal defendant made during a pre-arraignment corporeal viewing should have been excluded where the defendant, in absence of counsel but after receipt of *Miranda* warnings, orally waived his right to have an attorney present at the lineup).

<sup>109</sup> See, e.g., *People v. Isaacson*, 378 N.E.2d 78, 85 (N.Y. 1978) ("No matter what the defendant's past record and present inclinations to criminality, or the depths to which he has sunk in the estimation of society, certain police conduct to ensnare him into further crime is not to be tolerated by an advanced society." (quoting *Sherman v. United States*, 356 U.S. 369, 382-83 (1958) (Frankfurter, J., concurring))).

<sup>110</sup> *Isaacson*, 378 N.E.2d at 85.

<sup>111</sup> *Id.*; see also *id.* at 84 ("[The] court would be paying mere lip service to the principle of due process if it sanctioned the continuance of a prosecution in the face of [improper and reprehensible police conduct].").

<sup>112</sup> *People v. Whalen*, 451 N.E.2d 212 (N.Y. 1983).

<sup>113</sup> *Id.* at 213.

<sup>114</sup> *Id.* at 214.

<sup>115</sup> *Id.* at 213, 215.

<sup>116</sup> *Id.* at 215.

that the prosecutor “made himself a witness before the jury, expressly and falsely denying that notice had been given.”<sup>117</sup> He concluded that such behavior “was completely unjustified, going far beyond any bounds of proper advocacy[,]”<sup>118</sup> and that “[t]he prosecutor’s conduct during summation was [so] improper and prejudicial to defendant”<sup>119</sup> that a new trial was required in the interest of justice.<sup>120</sup>

In *People v. Blyden*,<sup>121</sup> Chief Judge Cooke also decided that a new trial was warranted when the trial court had denied a defendant’s for-cause challenge on a juror who voiced hostility to racial minorities during voir dire.<sup>122</sup> He explained that the juror’s general statements, claiming that he could put aside his feelings and remain impartial towards the defendant, were insufficient to ensure that defendant received a fair trial.<sup>123</sup> Chief Judge Cooke observed: “The costs to society and the criminal justice system of discharging the juror are comparatively slight, while the costs in fairness to the defendant and the general perception of fairness of not discharging such a juror are great.”<sup>124</sup> He emphasized that a juror must convey an absolute ability to render an impartial verdict, and a “hollow incantation, made without assurance or certitude, is not enough.”<sup>125</sup> He explained: “Where there remain[ed] . . . doubt in the wake of such statements, when considered in the context of the juror’s overall responses, the prospective juror should be discharged for cause.”<sup>126</sup> Chief Judge Cooke emphasized that a court cannot simply turn away from a juror’s “hostility to racial minorities that cast serious doubt on his ability to render an impartial verdict,” especially when someone’s life and liberty are at stake.<sup>127</sup>

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<sup>117</sup> *Id.* at 215–16.

<sup>118</sup> *Id.* at 216.

<sup>119</sup> *Id.* at 215.

<sup>120</sup> *See id.* at 216.

<sup>121</sup> *People v. Blyden*, 432 N.E.2d 758 (N.Y. 1982).

<sup>122</sup> *Id.* at 758. Chief Judge Cooke noted:

In determining whether the trial court erred in refusing to discharge the challenged juror for cause, it is necessary to look first to CPL 270.20 (subd 1, par [b]), which authorizes a challenge for cause where the juror “has a state of mind that is likely to preclude him from rendering an impartial verdict based upon the evidence adduced at the trial.”

*Id.* at 759.

<sup>123</sup> *See id.* at 760–61.

<sup>124</sup> *Id.* at 760.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *See id.* at 761.



*B. Due Process Clause of The New York State Constitution*

Chief Judge Cooke emphasized the court system's duty to address due process claims under the New York Constitution.<sup>128</sup> He sought to utilize New York's Constitution in order to expand upon rights afforded to both criminal defendants and civil litigants under the U.S. Constitution.<sup>129</sup> Chief Judge Cooke's rulings have influenced the decisions of his court successors, as explained in further detail below.<sup>130</sup>

Chief Judge Cooke advanced the development of New York's due process clause when the court decided *People v. Isaacson*, a case in which the police facilitated the cooperation of an informant by physical abuse and deception.<sup>131</sup> The police also instructed the informant to request that the defendant bring drugs into New York by claiming that the informant desperately needed money as a result of financial difficulties.<sup>132</sup> The informant was also instructed to tell the defendant to bring more than one ounce of cocaine.<sup>133</sup>

Chief Judge Cooke reversed the defendant's conviction, finding that the police's conduct was not tenable in a system constitutionally bound to accord defendants due process. Chief Judge Cooke constructed a four-factor test in addressing claims involving such police misconduct:

- (1) [W]hether the police manufactured a crime which otherwise would not likely have occurred, or merely involved themselves in an ongoing criminal activity;
- (2) whether the police themselves engaged in criminal or improper conduct repugnant to a sense of justice;
- (3) whether the defendant's reluctance to commit the crime is overcome by appeals to humanitarian instincts such as sympathy or past friendship, by temptation of exorbitant gain, or by persistent solicitation

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<sup>128</sup> See *People v. Gokey*, 457 N.E.2d 723, 724–25 (N.Y. 1983) (holding that the New York State Constitution affords individuals a greater right of privacy than does the United States Constitution).

<sup>129</sup> See, e.g., *People v. Ferber*, 441 N.E.2d 1100, 1101 (N.Y. 1982).

<sup>130</sup> See, e.g., *People v. Davis*, 553 N.E.2d 1008, 1010–11 (N.Y. 1990) (“In New York, the right to counsel is grounded on this state’s constitutional and statutory guarantees of the privilege against self-incrimination, [and] the right to the assistance of counsel and due process of law. . . . It extends well beyond the right to counsel afforded by the Sixth Amendment of the United States Constitution and other state Constitutions.”).

<sup>131</sup> *People v. Isaacson*, 378 N.E.2d 78, 80, 81 (N.Y. 1978). The police had beaten and deceived its informant into thinking that he was facing a stiff prison sentence, which caused him to seek out the defendant. *Id.* at 81.

<sup>132</sup> See *id.* at 80 (showing that the court found that police instructed the informant to tell the defendant he was in trouble with the police and needed money to secure a lawyer).

<sup>133</sup> See *id.*

in the face of unwillingness; and (4) whether the record reveals simply a desire to obtain a conviction with no reading that the police motive is to prevent further crime or protect the populace.<sup>134</sup>

Under this approach, Chief Judge Cooke found that the facts in *Isaacson*:

[E]xposes the ugliness of police brutality, upon which was imposed a cunning subterfuge employed to enlist the services of an informant who, deceived into thinking he was facing a stiff prison sentence, desperately sought out any individual he could to satisfy the police thirst for a conviction, even of a resident of another state possessed of no intention to enter our confines.<sup>135</sup>

Chief Judge Cooke directed that “[n]o matter what the defendant’s past record and present inclinations to criminality, or the depths to which he has sunk in the estimation of society, certain police conduct to ensnare him into further crime is not to be tolerated by an advanced society.”<sup>136</sup> He further held that the police actions were so outrageous that a dismissal of the indictment was warranted.<sup>137</sup> In doing so, Chief Judge Cooke commanded that the state’s due process clause guarantee respect for personal immunities that were “so rooted in the traditions and conscience of our people as to be ranked as fundamental.”<sup>138</sup> Chief Judge Cooke observed that he had a duty to foster “fundamental fairness . . . to the very concept of justice,”<sup>139</sup> and that the “court would be paying mere lip service to the principle of due process if it sanctioned the continuance of a prosecution in the face of the revelations of this record.”<sup>140</sup> Many other courts in the United States, including the supreme courts of Florida and Minnesota, adopted the Chief Judge’s four-factor approach in *Isaacson* when faced with similar allegations of outrageous government conduct.<sup>141</sup>

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<sup>134</sup> See *id.* at 83.

<sup>135</sup> See *id.* at 84.

<sup>136</sup> See *id.* at 85. Chief Judge Cooke further expressed:

Those who fear that dismissal of convictions on due process grounds may portend an unmanageable subjectivity. Such apprehension is unjustified for courts by their very nature are constantly called upon to make judgments and, though differences of opinion often surround human institutions, this is the nature of the judicial process.

*Id.*

<sup>137</sup> *Id.* at 85.

<sup>138</sup> *Id.* at 82 (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).

<sup>139</sup> *Isaacson*, 378 N.E.2d at 82 (quoting *People v. Leyra*, 98 N.E.2d 553, 559 (1997)).

<sup>140</sup> *Isaacson*, 378 N.E.2d at 84.

<sup>141</sup> See, e.g., *State v. Hunter*, 586 So. 2d 319, 326 (Fla. 1991) (“[T]he majority opinion

In *People ex rel. McGee v. Walters*,<sup>142</sup> Chief Judge Cooke also found that the due process clause of the New York State Constitution mandates that the accused be allowed to confront adverse witnesses in parole hearings.<sup>143</sup> Cooke observed that a parolee must be extended the same amenities as other citizens when seeking to impeach adverse statements offered at a parole revocation hearing, and such due process protections should not be narrowly tailored based upon the adversarial setting.<sup>144</sup> He explained that “[a]ny determination that dispenses with the need for confrontation requires consideration of the rights’ favored status, the nature of the evidence at issue, the potential utility of cross-examination in the fact-finding process, and the state’s burden in being required to produce the declarant.”<sup>145</sup>

Twenty-seven years later, New York courts continued to follow the Chief Judge’s rationale. In 2011, the New York Appellate Division, Second Department, relied extensively upon his decision in *McGee*, holding that a parolee’s due process rights were violated when he was not afforded an opportunity to cross-examine his parole officer, who prepared a report and possessed personal knowledge of the alleged violations, during his revocation hearing.<sup>146</sup> The appellate division reaffirmed Chief Judge Cooke’s finding that “a parolee has due process and statutory rights to confront adverse witnesses whose statements are offered at a parole

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issued today is in general harmony with the principles announced by the New York court. Clearly, Florida’s own due process, objective entrapment defense would prohibit similar conduct on the part of police and their informants in this state.”); *State v. Jensen*, No. T9-02-4518, 2004 WL 193133, at \*2 (Minn. Ct. App. 2004) (“When a defendant raises a due[ ]process issue on appeal relating to a drug crime, this court applies the four-factor test in *People v. Isaacson*.”); *State v. Theis*, No. Co-93-1990, 1994 WL 396359, at \*3 (Minn. Ct. App. 1994) (“In making this determination of [police] outrageousness, this court depends on *People v. Isaacson*.”).

<sup>142</sup> *People ex rel. McGee v. Walters*, 465 N.E.2d 342 (N.Y. 1984).

<sup>143</sup> *See id.* at 343. In *People ex rel. McGee*, Chief Judge Cooke affirmed the lower court’s decision that found that an impingement upon a parolee’s right to cross-examine the author of status reports was violative of his due process rights, and such a violation could not be excused by entering the report as a business record. *See id.* at 343–44; *see also Isaacson*, 378 N.E.2d at 82 (“[D]ue process,’ unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. It embraces fundamental rights and immutable principles of justice and use of the term is but another way of saying that every person’s right to life, liberty and property is to be accorded the shield of inherent and fundamental principles of justice.”).

<sup>144</sup> *See Walters*, 65 N.E.2d at 343.

<sup>145</sup> *Id.*

<sup>146</sup> *See People ex rel. Rosenfield v. Sposato*, 928 N.Y.S.2d 350, 351–52 (App. Div. 2011). In *Sposato*, the court granted a writ of habeas corpus, finding that the petitioner’s due process rights were violated when he was afforded no opportunity to cross-examine a parole officer who prepared a report and who possessed personal knowledge of the alleged violations during his parole hearing.

revocation hearing.”<sup>147</sup>

Furthermore, in *Matter of Quinton A.*,<sup>148</sup> Chief Judge Cooke addressed legislative enactments that provided mandatory placements on juvenile offenders under the state’s due process clause.<sup>149</sup> The petitioner, a juvenile delinquent, argued that the mandatory nature of his restrictive placement denied him due process and equal protection of the law.<sup>150</sup> Specifically, the defendant challenged sections 743, 746, and 753 of the Family Court Act, which allowed restrictive placements for those juveniles found to have committed a designated felony act.<sup>151</sup> Chief Judge Cooke rejected the defendant’s claim that mandatory placement in itself was unconstitutional, noting that “[t]he essence of procedural due process is that a person must be afforded notice and an opportunity to be heard before government may deprive him of liberty or a recognized property interest.”<sup>152</sup> Chief Judge Cooke recognized that “restrictive placement is a deprivation of liberty which the state may not accomplish without first affording appellant due process of law.”<sup>153</sup> However, he explained that “[s]ince family court may not order restrictive placement until after it affords a juvenile a statutorily required dispositional hearing on notice, the statute fully comport[ed] with procedural due process strictures.”<sup>154</sup>

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<sup>147</sup> *Id.* (quoting *Walters*, 465 N.E.2d at 343).

<sup>148</sup> *In re Quinton A.*, 402 N.E.2d 126 (N.Y. 1980).

<sup>149</sup> *See id.* at 129. In *Matter of Quinton A.*, the petitioner was a juvenile delinquent who was found to have committed acts, which if committed by an adult, would have constituted felony crimes. *Id.* On appeal, the petitioner maintained that the mandatory nature of his restrictive placement denied him due process and equal protection of the law. *Id.* Chief Judge Cooke reversed and remitted the matter for a new hearing, holding that the Family Court Act “which provides for mandatory restrictive placement of the state’s most violent juvenile offenders, is constitutional.” *Id.* at 128. However, the court concluded that it was reversible error for the family court to admit inculpatory statements made by petitioner and his alleged accomplice expressly stating that the accomplice’s detailed statement could be used to supply critical details absent from petitioner’s statement. *See id.* at 132.

<sup>150</sup> *See id.* at 129.

<sup>151</sup> *Id.* at 130 n.1.

<sup>152</sup> *Id.* Nevertheless, Chief Judge Cooke remanded the matter for a new hearing. He concluded that it was error for the family court to have admitted certain inculpatory statements. *See id.* at 132.

<sup>153</sup> *Id.* at 130.

<sup>154</sup> *Id.* at 130 n.1. Chief Judge Cooke noted:

[R]estrictive placement is a deprivation of liberty which the state may not accomplish without first affording appellant due process of law. But given a finding beyond a reasonable doubt, that appellant committed acts which would have been felonious if committed by an adult, appellant’s liberty interest has been diminished to the point where utilization of a rehabilitative program requiring restrictive placement is not violative of due process unless the selection of that program lacks a rational basis or its application constitutes cruel and unusual punishment. Thus, the notion that, in the

Chief Judge Cooke also rendered significant opinions relating to property rights under the due process clause of the New York State Constitution.<sup>155</sup> He issued a seminal opinion in *Sharrock v. Dell Buick-Cadillac*, holding that sections of New York's Lien Law, which authorized a garageman to foreclose his possessory lien for repairs and storage charges, were violative of New York's Constitution.<sup>156</sup> Chief Judge Cooke commanded that the state's due process clause required that a person be given notice and an opportunity to be heard before the state can allow the deprivation of a significant property interest.<sup>157</sup> He observed that "'when no more than private gain is directly at stake,' the opportunity to be heard is an indispensable bulwark against an arbitrary, and final, deprivation of property."<sup>158</sup> He declared that the purpose of the due process clause in the New York Constitution is to ensure that:

[N]o member of the state [is] disfranchised, or deprived of any of his rights and privileges, unless the matter be adjudged against him upon trial and according to the course of the common law. It must be ascertained judicially that he has forfeited his privileges, or that some one [sic] else has a superior title to the property he possesses, before either of them can be taken from him.<sup>159</sup>

Chief Judge Cooke rested his decision solely upon the due process clause of the New York State Constitution, given that the federal Constitution did not require such protections.<sup>160</sup> He observed that the "historical differences between the federal and state due process clauses make clear that they were adopted to combat entirely different evils."<sup>161</sup> He explained that prior to the Fourteenth Amendment, the federal due process clause offered "virtually no protections of individual liberties," while "state Constitutions in general, and the New York Constitution in particular, have long safeguarded any threat to individual liberties."<sup>162</sup> He noted that

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post[-]adjudicative stage, therapeutic treatment in the least restrictive setting is the cornerstone for an adjudication of juvenile delinquency is rejected.

*Id.* at 130 (internal citations omitted).

<sup>155</sup> See, e.g., *Sharrock v. Dell Buick-Cadillac, Inc.*, 379 N.E.2d 1169, 1178 (N.Y. 1978).

<sup>156</sup> See *id.* at 1171, 1177-78.

<sup>157</sup> *Id.* at 1176.

<sup>158</sup> *Id.* at 1178 (holding that sections of New York's Lien Law, which authorized a garageman to foreclose his possessory lien for repairs and storage charges, violated New York's Constitution).

<sup>159</sup> *Id.* at 1174.

<sup>160</sup> See *id.* at 1173 n.2.

<sup>161</sup> *Id.* at 1174.

<sup>162</sup> *Id.*; see also *People v. Settles*, 385 N.E.2d 612, 615 (N.Y. 1978) (expressing that the New

“independent construction finds its genesis specifically in the unique language of the due process clause of the New York Constitution, as well as the long history of due process protections afforded the citizens of this state and, more generally, in fundamental principles of federalism.”<sup>163</sup>

Chief Judge Cooke explained the inherent differences between the due process clause of the federal Constitution and the due process clause in New York’s Constitution, noting: “Conspicuously absent from the state Constitution is any language requiring state action before an individual may find refuge in its protections.”<sup>164</sup> He proposed that the absence of an expressive direction, however, was held not to eliminate the necessity of state involvement but “[to] provide a basis to apply a more flexible state involvement requirement than is currently being imposed by the Supreme Court with respect to the federal provision.”<sup>165</sup> Chief Judge Cooke

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York State Constitution provided a basis for the right to counsel well before the Supreme Court recognized comparable rights federally); *People v. Staley*, 41 364 N.E.2d 1111, 1113 (N.Y. 1977) (“[The New York courts] recognized that unreasonable delay in prosecuting a defendant constitutes a denial of due process of law.” (citing *People v. Winfrey*, 228 N.E.2d 808, 812 (N.Y. 1967); *People v. Wilson*, 171 N.E.2d 310, 312–13 (N.Y. 1960))).

<sup>163</sup> *Sharrock*, 379 N.E.2d at 1173. As a result, the Second Department held that the very provision of the Uniform Commercial Code that had been upheld as constitutional by the U.S. Supreme Court in *Flagg Bros. v. Brooks* was unconstitutional under the provisions of the New York State Constitution. See *Svendsen v. Smith’s Moving & Trucking Co.*, 431 N.Y.S.2d 94, 95, 96 (App. Div. 1980). The court found that the provision violated the due process clause of the state Constitution as it was construed and applied in *Sharrock*. See *id.* In rendering its *per curiam* decision, the Second Department said: “As in *Sharrock* . . . , the state’s authorization of *ex parte* foreclosure of the warehouseman’s lien is violative of state due process as it deprives debtors of a significant property interest without a prior opportunity to be heard.” *Id.* at 96.

<sup>164</sup> *Sharrock*, 379 N.E.2d at 1173. Chief Judge Cooke’s well-reasoned approach “did not leave the barn door unlocked” in the face of three dissenting judges who advanced that the provisions of the state and federal due process clause should be held co-extensive. See, e.g., *id.* at 1179–80, 1181 (Jasen, J., dissenting).

<sup>165</sup> *Id.* at 1174; see also *People v. P.J. Video, Inc.*, 501 N.E.2d 556, 560 (N.Y. 1986) (“One basis for relying on the state Constitution arises from an interpretive review of its provisions. If the language of the state Constitution differs from that of its federal counterpart, then the court may conclude that there is a basis for a different interpretation of it. Such an analysis considers whether the textual language of the state Constitution specifically recognizes rights not enumerated in the federal Constitution; whether language in the state Constitution is sufficiently unique to support a broader interpretation of the individual right under state law; whether the history of the adoption of the text reveals an intention to make the state provision coextensive with, or broader than, the parallel federal provision; and whether the very structure and purpose of the state Constitution serves to expressly affirm certain rights rather than merely restrain the sovereign power of the state. To contrast, noninterpretive review proceeds from a judicial perception of sound policy, justice and fundamental fairness. A noninterpretive analysis attempts to discover, for example, any preexisting state statutory or common law defining the scope of the individual right in question; the history and traditions of the state in its protection of the individual right; any identification of the right in the state Constitution as being one of peculiar state or local concern; and any distinctive attitudes of the state citizenry toward the definition, scope or protection of the individual

explained that although certain acts may not constitute state action under the federal Constitution for purposes of establishing a due process violation, it could nevertheless constitute state action under the New York State Constitution.<sup>166</sup>

Chief Judge Cooke's opinion in *Sharrock* significantly impacted the courts' subsequent decisions regarding state constitutionalism.<sup>167</sup> For example, the U.S. Supreme Court in *Jones v. United States*<sup>168</sup> held that "the Eighth Amendment does not require that the jurors be instructed as to the consequence of their failure to agree."<sup>169</sup> Relying upon Chief Judge Cooke's instruction in *Sharrock*, the New York Court of Appeals rejected the Supreme Court's approach and reaffirmed that the due process clause of the New York Constitution required a higher standard of fairness than the federal Constitution.<sup>170</sup> The court explained: "[O]n innumerable occasions this court has given [the] state Constitution an independent construction, affording the rights and liberties of the citizens of this state even more protection than may be secured under the United States Constitution."<sup>171</sup> Following this rationale, the court found, irrespective of the holding in *Jones*, that a trial court's failure to give a proper deadlock instruction in the course of a capital proceeding violated New York's due process clause.<sup>172</sup>

### C. Right to Counsel

Chief Judge Cooke wrote many significant judicial opinions relating to a criminal defendant's right to counsel. His opinions stressed the importance of protecting a criminal defendant's right to counsel at all stages of a criminal matter, and the court's duty to advance state law when questions arose concerning the nature and scope of the attorney-client relationship.<sup>173</sup>

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right.").

<sup>166</sup> *Sharrock*, 379 N.E.2d at 1173.

<sup>167</sup> See, e.g., *P.J. Video, Inc.*, 501 N.E.2d at 561 ("In the past we have frequently applied the state Constitution, in both civil and criminal matters, to define a broader scope of protection than that accorded by the federal Constitution in cases concerning individual rights and liberties.").

<sup>168</sup> *Jones v. United States*, 527 U.S. 373 (1999).

<sup>169</sup> *Id.* at 381.

<sup>170</sup> See *People v. LaValle*, 817 N.E.2d 341, 366 (N.Y. 2004).

<sup>171</sup> *Sharrock*, 379 N.E.2d at 1173. "[H]istorical differences between the federal and state due process clauses make clear that they were adopted to combat entirely different evils." *LaValle*, 817 N.E.2d at 366 (citing *Sharrock*, 379 N.E.2d at 1173).

<sup>172</sup> *LaValle*, 817 N.E.2d at 366.

<sup>173</sup> See, e.g., *People v. Settles*, 385 N.E.2d 612, 615 (N.Y. 1978) ("[S]o valued is the right to counsel in this state, it has developed independent of its federal counterpart.").

In this context, Chief Judge Cooke routinely observed that protecting the right to counsel was of crucial importance to maintaining fundamental fairness in criminal proceedings, and he understood counsel's role as an important part to balance the playing field in an adversarial settings in which the state is a party.<sup>174</sup> In this regard, Chief Judge Cooke explained:

[A] special solicitude for this fundamental right [to counsel] is based upon our belief that the presence of an attorney is the most effective means [the court has] of minimizing the disadvantage at which an accused is placed when he is directly confronted with the awesome law enforcement machinery possessed by the state.<sup>175</sup>

Chief Judge Cooke's opinions also established broader protections for a criminal defendant's right to counsel when such individuals were first subjected to law enforcement questioning and requested to waive their right to counsel.<sup>176</sup> He found that the protections offered by *Miranda* warnings might not always be sufficient to:

[E]nsure that an accused will not "waive" an important constitutional right out of ignorance, confusion or fear, [so the Court has held] that, in certain situations, the right to counsel in New York includes the right of an accused to have an attorney present while he is considering whether to waive his rights.<sup>177</sup>

In this context, Chief Judge Cooke found that both an explicit and implicit request for counsel by a defendant should not be narrowly construed by law enforcement.<sup>178</sup> For example, in *People v. Buxton*,

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<sup>174</sup> See, e.g., *People v. Skinner*, 417 N.E.2d 501, 503 (N.Y. 1980). In *Skinner*, Chief Judge Cooke noted that an effective waiver of the right to counsel in the absence of a suspect's attorney "simply recognizes the right and need of an individual to have a competent advocate at his or her side in dealing with the State." *Id.*

<sup>175</sup> *People v. Cunningham*, 400 N.E.2d 360, 363 (N.Y. 1980).

<sup>176</sup> See, e.g., *People v. Buxton*, 374 N.E.2d 384, 387 (N.Y. 1978). In *Buxton*, Chief Judge Cooke focused on the period of time that lapsed from the point in which the defendant was apprehended and when the police sought a waiver from the defendant. Because the defendant requested counsel "at the time of his arrest," the court held that upon returning to police headquarters, "the police may not immediately and actively seek a waiver of this right and then proceed to interrogate [a defendant] in the absence of counsel." *Id.*

<sup>177</sup> *Cunningham*, 400 N.E.2d at 363.

<sup>178</sup> *People v. Kazmarick*, 420 N.E.2d 45, 50 (N.Y. 1981) (Cooke, J., dissenting) ("[C]ommencement of the criminal proceeding is the equivalent of actual representation by counsel . . . [and] 'where an indictment has been returned, [the court] equate[s] the indictment with the entry of a lawyer into the proceedings and invoke[s] the requirement of counsel's presence to effectuate a valid waiver.'"); *Settles*, 385 N.E.2d at 617 ("The right to counsel is not dependent upon the speed with which an attorney can be retained nor does it pivot on the length of police delay in arraigning an indigent defendant so that counsel may be appointed.").



Cooke demanded that a defendant's indirect request for counsel was sufficient to require counsel's presence during police questioning.<sup>179</sup> Chief Judge Cooke rejected the state's contention that a "specific and clear request to interrogating officers that [the] defendant did not wish to speak with them" was required for the attachment of counsel.<sup>180</sup> He expressed that such a narrow tailoring of one's right to counsel would violate the defendant's constitutional rights<sup>181</sup> and pervert the notion of fundamental fairness.<sup>182</sup>

In *People v. Rogers*, Chief Judge Cooke also found that law enforcement officials may not purposely disregard counsel's "instruct[ion] . . . to cease further questioning," even if counsel is retained by the defendant on an unrelated charge.<sup>183</sup> He expressed

<sup>179</sup> See, e.g., *Buxton*, 374 N.E.2d at 386–87. In *Buxton*, the defendant had requested that a third party obtain a lawyer for him while police apprehended him from his place of employment. *Id.* at 386. The defendant was taken to police headquarters where he was read his *Miranda* rights and notified of the charges brought against him. *Id.* The defendant was held in police custody for approximately two hours before witnesses were brought to the station to view the defendant, during which time he repeatedly requested assistance of counsel. *Id.* Subsequently, the defendant was questioned by the police and offered statements regarding the crimes with which he was charged. *Id.* The state argued that because the request was made to a third party, it was not a sufficiently "specific and clear request to interrogating officers that [the] defendant did not wish to speak with them until he had consulted with an attorney." *Id.*; see also *People v. Bevilacqua*, 382 N.E.2d 1326, 1329 (N.Y. 1978) (concluding that a violation of the right to counsel occurred in light of a bad-faith failure by police to notify the mother of an eighteen-year-old suspect who requested her mom's assistance, and subsequently concealed the defendant's location from her and the attorney she retained).

<sup>180</sup> *Buxton*, 374 N.E.2d at 386. The court noted that "it would be an absurd formality" to conclude that the defendant's request for representation was not valid because although made in the presence of the police, the request was directed at a third-party. *Id.*

<sup>181</sup> *Id.* at 386–87. Chief Judge Cooke noted that a statement "freely and voluntarily" given by the defendant to the police "without any compelling influence is . . . admissible in evidence." *Id.* at 387. However, a defendant, after asserting the right to remain silent, may subsequently be questioned and those statements admitted into evidence as long as additional *Miranda* warnings are given and "the subsequent statement is not the product of 'continued importunity or coercive interrogation in the guise of a request for reconsideration.'" *Id.* (quoting *People v. Gary*, 286 N.E.2d 263, 264 (N.Y. 1972)). Although a defendant's specific request for counsel renders further police interrogation improper, a statement made by the defendant may nonetheless be admitted in evidence if the statement is "a spontaneous admission or [the defendant] simply change[s] his mind and voluntarily make[s] a statement." *Buxton*, 374 N.E.2d at 387.

<sup>182</sup> See *Buxton*, 374 N.E.2d at 386.

<sup>183</sup> *People v. Rogers*, 397 N.E.2d 709, 711, 713 (N.Y. 1979). In *Rogers*, the defendant was taken to police headquarters upon an arrest for a robbery. *Id.* at 711. During his arrest, the defendant was twice read his *Miranda* rights—once at the time of arrest and again prior to questioning at the police station. *Id.* During custodial questioning, the defendant alerted the police that he was represented by counsel, but agreed to interrogation without his attorney present. *Id.* At this time, the defendant's attorney had contacted police headquarters and demanded that the questioning of his client cease. *Id.* Ignoring this request, the officers continued the interrogation, claiming that the defendant waived his right to have counsel present. *Id.*

that a waiver of the defendant's right to counsel in the absence of his attorney is not a constitutionally valid waiver,<sup>184</sup> and the state's failure to adhere to this approach would present severe ramifications.<sup>185</sup>

In *Rogers*, the defendant had been taken to police headquarters after being arrested for robbery.<sup>186</sup> At the time of his arrest, the defendant was twice read his *Miranda* rights.<sup>187</sup> During custodial questioning, the defendant alerted the police that he was represented by counsel, but agreed to interrogation without his attorney present.<sup>188</sup> At this time, the defendant's attorney had contacted police headquarters asking that the defendant not be questioned.<sup>189</sup> The officers ignored counsel's request, and continued the interrogation, asking about unrelated activities, relying upon the defendant's prior waiver.<sup>190</sup>

Chief Judge Cooke rejected the government's contention that the defendant's waiver was sufficient.<sup>191</sup> He explained that "it is the role of defendant's attorney, not the state, to determine whether a particular matter will or will not touch upon the extant charge."<sup>192</sup> He also emphasized:

[I]t would be to ignore reality to deny the role of counsel when the particular episode of questioning does not concern the pending charge[, and it] cannot be assumed that an attorney would abandon his client merely because the police represent that they seek to question on a matter unrelated to the charge on which the attorney has been retained or assigned.<sup>193</sup>

Chief Judge Cooke's opinion in *Rogers* has remained influential and is controlling authority.<sup>194</sup> For over three decades, "[it] has

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<sup>184</sup> See *id.* at 713.

<sup>185</sup> See *id.* at 710–11 (noting that a violation of counsel's command to police that questioning cease could lead to an exclusion of statements and/or a new trial if improperly admitted).

<sup>186</sup> See *id.* at 711.

<sup>187</sup> See *id.*

<sup>188</sup> See *id.*

<sup>189</sup> See *id.*

<sup>190</sup> See *id.*

<sup>191</sup> See *id.* at 711–12.

<sup>192</sup> *Id.* at 713; *People v. Lopez*, 947 N.E.2d 1155, 1160 (N.Y. 2011) ("The *Rogers* rule is eminently straightforward: when an attorney undertakes representation in a matter for which the defendant is in custody, all questioning is barred unless the police obtain a counseled waiver. *Rogers* therefore requires inquiry on three objectively verifiable elements—custody, representation[, and entry.]).

<sup>193</sup> *Rogers*, 397 N.E.2d at 713.

<sup>194</sup> See *Lopez*, 947 N.E.2d at 1158–59.

stood as a workable, comprehensible, bright line rule, providing effective guidance to law enforcement while ensuring that it is defendant's attorney, not the police, who determines which matters are related and unrelated to the subject of the representation."<sup>195</sup> To date, the courts have expressed the utmost praise for Chief Judge Cooke's approach in *Rogers*,<sup>196</sup> and have continuously disapproved of any attempt to undercut its application.<sup>197</sup> In 2011, the New York Court of Appeals continued to expressively adopt the holding of *Rogers*.<sup>198</sup>

Chief Judge Cooke also held in *People v. Settles* that "[t]he filing of an indictment constitutes the commencement of a formal judicial action against the defendant and is equated with the entry of an attorney into the proceeding."<sup>199</sup> In *Settles*, the police had issued a

<sup>195</sup> *Id.* at 1160 (citing *People v. Burdo*, 690 N.E.2d 854, 856 (N.Y. 1997)). In *Lopez*, the police interrogated the defendant relating to a murder case while he was already incarcerated in Pennsylvania on other charges, upon which counsel was attained. See *Lopez*, 947 N.E.2d at 1157. An informant had told the New York police that the defendant was involved in the robbery and was the individual who shot the victim. See *id.* at 1156. Acting on this tip, a New York police officer visited the defendant at the Pennsylvania prison to continue the investigation. *Id.* at 1157. Upon arrival at the prison, the detective read the defendant his *Miranda* rights, but did not inquire as to whether the defendant was represented by counsel. *Id.* Rather than directly asking the defendant whether he had representation, the police officer sought to obtain the defendant's consent to continue, asking only whether the defendant would like to speak with an attorney before proceeding with his interrogation. See *id.* During the course of questioning, the defendant confessed to being involved in the crime, but denied that he was the shooter. See *id.* Finding a violation of the defendant's indelible right to counsel, the court relied upon the holding in *Rogers*, finding that "the indelible right to counsel activates the moment that an attorney becomes involved." *Id.* at 1159.

<sup>196</sup> See generally *Rogers*, 397 N.E.2d at 713 (showing the standard). In this regard, New York's jurisprudence "has continuously evolved with the ultimate goal of 'achieving a balance between the competing interests of society in the protection of cherished individual rights, on the one hand, and in effective law enforcement and investigation of crime, on the other.'" *People v. Grice*, 794 N.E.2d 9, 12 (N.Y. 2003) (quoting *People v. Waterman*, 175 N.E.2d 445, 447 (N.Y. 1961)). Consequently, the parameters of the indelible right to counsel are defined "through the adoption of 'pragmatic and . . . simple[] test[s]' grounded on 'common sense and fairness'" in order to "provid[e] an objective measure to guide law enforcement officials and the courts." See *Grice*, 794 N.E.2d at 12; *People v. Robles*, 533 N.E.2d 240, 245 (N.Y. 1988).

<sup>197</sup> See, e.g., *Lopez*, 947 N.E.2d at 1160 ("Permitting a police officer to remain deliberately indifferent—avoiding any inquiry on the subject notwithstanding the nature of the custodial charges and the likelihood that a lawyer has entered the matter—in order to circumvent the protection afforded by *Rogers* is not only fundamentally unfair to the rights of the accused, it further undermines the preexisting attorney-client relationship that serves as the foundation of the *Rogers* rule.").

<sup>198</sup> See *id.* at 1156 (holding that an interrogator—who suspects that an attorney may have entered the custodial matter—has an obligation to inquire regarding the defendant's representational status, and the interrogator will be charged with the knowledge that such an inquiry likely would have revealed).

<sup>199</sup> *People v. Settles*, 385 N.E.2d 612, 613–14 (N.Y. 1978) ("[A] defendant in a postindictment, prearraignment custodial setting, even though not then represented by an attorney, may not in the absence of counsel waive his right to have counsel appear at a corporeal identification.").

warrant for the defendant's arrest for robbery and other charges.<sup>200</sup> The defendant was apprehended by police in Georgia and transferred to New York, where he was subject to indictment.<sup>201</sup> New York police officers read the defendant his *Miranda* rights, but failed to inform him that he was under indictment for the robbery.<sup>202</sup> After the defendant was given his rights, he agreed to be in a lineup and was subsequently identified by two individuals as the perpetrator in the charged offenses.<sup>203</sup> Chief Judge Cooke observed that an official indictment against a defendant shifts "the character of the police function . . . from investigatory to accusatory" because the defendant "cannot make any arrangement with the police which is not subject to the ultimate approval of the court."<sup>204</sup> Consequently, *Miranda* warnings become insufficient to "satisfy the higher standard with respect to a waiver of the right to counsel."<sup>205</sup>

In *People v. Skinner*, Chief Judge Cooke remained devoted to protecting the attorney-client privilege.<sup>206</sup> There, the circumstances at issue involved the police's pre-arrest investigation and repeated attempts to question the defendant regarding an unsolved murder.<sup>207</sup> During the midst of these contacts, the defendant retained an attorney to assist in the matter.<sup>208</sup> The attorney contacted the police to inform them that he was retained, and would handle all matters relating to the investigation as far as it dealt with defendant.<sup>209</sup> Shortly thereafter, the police confronted the defendant, without counsel's knowledge, to serve him with legal papers seeking to compel his appearance at a corporeal lineup.<sup>210</sup> During this contact, the defendant made damaging admissions to the police regarding the murder.<sup>211</sup> Chief Judge Cooke observed that when an individual "obtain[s] counsel specifically on [a] matter

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<sup>200</sup> *See id.* at 614.

<sup>201</sup> *See id.*

<sup>202</sup> *See id.*

<sup>203</sup> *See id.*

<sup>204</sup> *Id.* at 616.

<sup>205</sup> *Id.* at 616, 617 ("[N]o knowing and intelligent waiver of counsel may be said to have occurred without the essential presence of counsel."). Moreover, the court noted that "assistance of counsel after indictment at a lineup is an indispensable correlative to a fair trial. Nice distinctions between the need for counsel at various stages of the proceedings are irrelevant once the right to counsel has indelibly attached." *Id.* at 617–18. Further, "the [indelible] right to counsel attaches" upon defendant's request for an attorney, or "after . . . arraignment . . . [or] upon the filing of an accusatory instrument." *Id.* at 615.

<sup>206</sup> *See People v. Skinner*, 417 N.E.2d 501, 502 (N.Y. 1980).

<sup>207</sup> *See id.*

<sup>208</sup> *See id.*

<sup>209</sup> *See id.*

<sup>210</sup> *See id.*

<sup>211</sup> *See id.*

under investigation,” the individual cannot be questioned by law enforcement officers “in a *noncustodial setting* after [counsel] . . . instruct[s] the police not to question [the] defendant in [counsel’s] absence.”<sup>212</sup>

Although the defendant consented to questioning at police headquarters, Chief Judge Cooke found that the defendant’s right to counsel was violated because law enforcement officers knew that the defendant was represented in the matter under investigation and questioned him without counsel present.<sup>213</sup> He explained: “Whether a person is in custody at the time of interrogation is not controlling when an attorney represents that person on the matter about which he or she is questioned.”<sup>214</sup> Chief Judge Cooke emphasized that police actions infringing upon the central protections within the attorney-client relationship cannot be ignored.<sup>215</sup>

In *People v. Cunningham*, Chief Judge Cooke also held in no uncertain terms that “an uncounseled waiver of a constitutional right will not be deemed voluntary if it is made after the right to counsel has been invoked.”<sup>216</sup> In *Cunningham*, the defendant was taken to police headquarters for questioning, where he was read his *Miranda* rights.<sup>217</sup> At that time, the defendant agreed to speak with police, but made no incriminating statements.<sup>218</sup> Later that evening, the officers formally informed the defendant that he was officially under arrest and reiterated the defendant’s *Miranda* rights.<sup>219</sup> At this juncture, the defendant refused to waive his right to counsel.<sup>220</sup> In response, the police told the defendant that he would have the opportunity to speak with an attorney after arraignment; however, the police made no effort to arrange for such

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<sup>212</sup> *Id.* (emphasis added).

<sup>213</sup> *See id.* at 503.

<sup>214</sup> *Id.* at 504. Chief Judge Cooke also observed: “This court’s vigilance in protecting the right to counsel finds additional support even in the ethical responsibility of attorneys in civil matters not to communicate on the subject of the representation with an individual known to be represented by an attorney on the matter.” *Id.* at 503–04.

<sup>215</sup> *See, e.g.,* *People v. Claudio*, 629 N.E.2d 384, 387 (N.Y. 1993) (“[*People v. Skinner*] reserv[es] the integrity of an accused’s choice to communicate with police only through counsel.”); *People v. Bell*, 535 N.E.2d 1294, 1297 (N.Y. 1989) (“Our ruling [in *People v. Skinner*] was designed to prevent the police from rendering the right to counsel ineffective by questioning the defendant about matters relating to the subject of the representation in the absence of counsel retained on the matter.”).

<sup>216</sup> *People v. Cunningham*, 400 N.E.2d 360, 361 (N.Y. 1980).

<sup>217</sup> *See id.* at 362 (citing *Miranda v. Arizona*, 384 U.S. 436, 444–45 (1966)).

<sup>218</sup> *See Cunningham*, 400 N.E.2d at 362.

<sup>219</sup> *See id.*

<sup>220</sup> *See id.*

communications.<sup>221</sup> Several hours later, the defendant informed police officers that he wanted to make a statement. Once again, *Miranda* warnings were given.<sup>222</sup> Although the defendant was asked to sign the waiver, he reiterated that he would like to speak with counsel.<sup>223</sup> Despite repeatedly changing his mind about whether he would consent to questioning without an attorney, he ultimately waived his right and gave incriminating statements to the police.<sup>224</sup>

Chief Judge Cooke instructed that “[o]nce an individual expresses the need for counsel[,] he or she stands in the same position as one who has obtained the aid of an attorney.”<sup>225</sup> He declared that a defendant has not waived his or her right to counsel, after being assigned counsel, merely because the defendant does “not want the lawyer assigned to represent him.”<sup>226</sup> Declaring a bright-line rule, Chief Judge Cooke stated that the right to counsel attaches in two distinct situations: (1) “upon the commencement of formal adversary proceedings,” and (2) in “cases in which formal adversary proceedings have not yet been commenced, but [involves] . . . suspects in custody who ha[ve] already retained or been assigned counsel to represent them on the specific charge for which they were being held.”<sup>227</sup> Chief Judge Cooke explained “that a waiver of a constitutional right will not be deemed ‘voluntary’ unless the police have ‘scrupulously honored’ the suspect’s prior assertion of his rights.”<sup>228</sup>

Although recognizing a need to protect the attorney-client relationship throughout his time of the bench, Chief Judge Cooke also observed that such protection could not to become a sprawling and elastic trap to impede police investigations. For example, in *People v. Mealer*,<sup>229</sup> Chief Judge Cooke demonstrated a fair and

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<sup>221</sup> *See id.*

<sup>222</sup> *See id.*

<sup>223</sup> *See id.*

<sup>224</sup> *See id.*

<sup>225</sup> *People v. Skinner*, 417 N.E.2d 501, 503 (N.Y. 1980) (citing *Cunningham*, 400 N.E. 2d at 364).

<sup>226</sup> *People v. Grimaldi*, 422 N.E.2d 493, 495 n.\* (N.Y. 1981).

<sup>227</sup> *Cunningham*, 400 N.E. 2d at 363, 364.

<sup>228</sup> *Id.* at 362–63 (citing *People v. Dean*, 393 N.E.2d 1030, 1031 (N.Y. 1979); *People v. Clark*, 380 N.E.2d 290, 295 (N.Y. 1978); *People v. Munlin*, 380 N.E.2d 288, 290 (N.Y. 1978); *People v. Buxton*, 44 N.Y.2d 33, 386–87 (N.Y. 1978)); *see also Cunningham*, 400 N.E.2d at 361 (“[A]n uncounseled waiver of a constitutional right [to counsel] will not be deemed voluntary if it is made after the right to counsel has been invoked.”).

<sup>229</sup> *People v. Mealer*, 441 N.E.2d 1080 (N.Y. 1982). In *Mealer*, the defendant was indicted for murder and subsequently suspected of perjury. *See id.* at 1082. The defendant bribed a witness for the state to offer perjured testimony. *See id.* at 1081. Although the “defendant’s

logical balance between the rights of state actors and those of the accused.<sup>230</sup> He explained that “[t]he right to counsel may not be used as ‘a shield . . .’ to immunize one represented by an attorney against investigative techniques that capture a new crime in progress,” a crime that is independent of the charge for which a defendant is indicted.<sup>231</sup>

Similarly, in *People v. Ferrara*, Cooke directed that under the federal and New York State Constitutions, “retention of counsel in connection with a grand jury inquiry [does not] preclude[] investigative techniques that elicit in a noncustodial setting not a confession, but a plan to commit a new crime of the type then under scrutiny.”<sup>232</sup>

### D. New York Practice

Chief Judge Cooke also made significant contributions to the development of New York Civil Practice and Procedure. He wrote a number of important opinions concerning the interpretation and application of state rules governing civil litigation, jurisdiction, res judicata, and statute of limitation defenses.

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right to counsel had attached with respect to the murder charge . . . [and] the witness was acting as a police agent when he met with [the] defendant with the knowledge and encouragement of the police . . . [the d]efendant’s right to counsel nevertheless was not violated.” *Id.* at 1082 (internal citations omitted).

<sup>230</sup> See *id.* at 1082. In *Mirenda*, Chief Judge Cooke ruled that a defendant does not have a state or federal constitutional right “to the assistance of a lawyer while conducting a *pro se* defense.” *People v. Mirenda*, 442 N.E.2d 49, 50 (N.Y. 1982). The defendant moved to appear *pro se*, but requested that he be “appointed counsel ‘to act only as an advisor.’” *Id.* Chief Judge Cooke rejected the defendant’s request, noting that “[t]he assignment of standby counsel . . . is a matter of trial management. As such, it is a subject for the discretion of the trial judge, whose decision will not be disturbed by [the New York Court of Appeals] unless the judge abuses that discretion.” *Id.* at 51.

<sup>231</sup> *Mealer*, 441 N.E.2d at 1082 (quoting *People v. Ferrara*, 430 N.E.2d 1275, 1279 (N.Y. 1981)) (citing *People v. Middleton*, 430 N.E.2d 1264, 1267 (N.Y. 1981)). The questioning of the defendant in relation to the new crime “was not used as a pretext for circumventing defendant’s rights.” *Mealer*, 441 N.E.2d at 1082.

<sup>232</sup> *People v. Ferrara*, 430 N.E.2d 1275, 1277 (N.Y. 1981). In *Ferrara*, the defendant testified twice before a grand jury. *Id.* at 1276. At the second grand jury hearing, the prosecutor informed the defendant and his attorney that the government believed that the defendant had committed perjury during his uncounseled testimony at the first grand jury hearing. *Id.* Despite this accusation, the defendant took the stand and denied paying kickbacks to a nursing home operator. *Id.* Subsequent to this counseled interaction, a police informant set up a meeting with the defendant and recorded the conversation in which the defendant offered to pay a kickback. *Id.* at 1276–77. Although unaware that his meeting with the informant had been recorded, the defendant denied paying kickbacks after being subpoenaed for a third grand jury hearing. *Id.* at 1277. The defendant was subsequently indicted for perjury. *Id.*

In *George Reiner & Co. v. Schwartz*,<sup>233</sup> Chief Judge Cooke recognized that New York courts enjoy a liberal reign of jurisdiction over nonresidents pursuant to CPLR 302(a)(1).<sup>234</sup> In determining whether jurisdiction is proper under CPLR 302(a)(1), he noted that while a nonresident's activities must be viewed collectively, there are also instances where a single act by a nondomiciliary defendant may be sufficient under the "transacting business" standard, without any further requirements, to establish personal jurisdiction.<sup>235</sup> In *Schwartz*, the defendant, a Massachusetts resident, entered into New York to execute an agreement with a New York corporation for work to be performed outside the state as an out-of-state salesman.<sup>236</sup> Years later, the corporation filed suit against the defendant for violating the terms of the agreement.<sup>237</sup> The defendant moved to dismiss the action based upon the court's lack of subject matter and personal jurisdiction.<sup>238</sup> The defendant claimed that he had not transacted business within the State of New York, as he had only entered the state on a single occasion to execute an out-of-state employment agreement.<sup>239</sup>

Chief Judge Cooke rejected the defendant's jurisdictional defense, noting that he had purposefully entered into New York to execute an agreement with one of its residents and, by doing so, established a continuing relationship with a New York employer.<sup>240</sup> He observed that the court's exercise of jurisdiction was constitutional because the "defendant ha[d] purposefully availed himself of the privilege of conducting activities in our jurisdiction, thus invoking the benefits and protection of our laws."<sup>241</sup> He concluded that the nature and quality of the defendant's actions were significant, and the execution of the contract was an obligatory commitment that created a continuing relationship with a resident of the state that developed for years after.<sup>242</sup> Chief Judge Cooke explained that the

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<sup>233</sup> *George Reiner & Co. v. Schwartz*, 363 N.E.2d 551 (N.Y. 1977).

<sup>234</sup> *See id.* at 553.

<sup>235</sup> *Id.*

<sup>236</sup> *Id.* at 551–52.

<sup>237</sup> *Id.* at 552. The corporation alleged that the defendant had "knowingly, willfully[,] and fraudulently violated the terms of the contract," and it sought recovery for purported overdrawn commissions. *Id.*

<sup>238</sup> *Id.* The Special Term granted the defendant's motion, holding that plaintiff lacked personal jurisdiction under CPLR 302(a)(1). *Id.* at 551, 553. However, a divided appellate division reversed and reinstated the complaint. *Id.* at 551.

<sup>239</sup> *Id.* at 554–55 (quoting *Hi Fashion Wigs, Inc. v. Peter Hammond Adv., Inc.*, 300 N.E.2d 421, 423 (N.Y. 1973)).

<sup>240</sup> *Schwartz*, 363 N.E.2d at 555.

<sup>241</sup> *Id.* at 554.

<sup>242</sup> *See id.* at 554–55.



nature and quality of the contact is determinative, and not the quantity or professed isolation of a nonresident's interaction with its residents.<sup>243</sup>

Chief Judge Cooke concluded that the signing of the contract, although an isolated incident in time, triggered an ongoing relationship between the defendant and a corporation of the state that allowed the court to properly exercise its jurisdiction over the defendant under CPLR 302(a)(1).<sup>244</sup> He explained that the defendant's activities "cannot be reasonably viewed as merely the 'last act marking the formal execution of the contract.'"<sup>245</sup> When analyzing the nature of the defendant's contact, Chief Judge Cooke noted that this was more than a mere and casual attempt directed towards New York, as the purposeful activity of interviewing, negotiating and contracting "[required] no longer or more extensive negotiations or more detailed agreement . . . necessary to establish an employer-employee relationship."<sup>246</sup>

In *O'Brien v. City of Syracuse*,<sup>247</sup> Chief Judge Cooke determined that the doctrine of res judicata bars "[a] property owner who unsuccessfully asserts against a governmental entity a claim for *de facto* appropriation . . . [from] later bring[ing] another action for trespass in an attempt to recover damages for the same acts as those on which the first lawsuit was grounded."<sup>248</sup> The plaintiffs owned property in an area that state officials had sought to restore.<sup>249</sup> In 1973, the plaintiffs commenced an article 78 proceeding contending that state actors had seriously interfered with their property rights during the rehabilitation process, which they contended amounted to a *de facto* appropriation by the city.<sup>250</sup> In a nonjury trial, the claim "was dismissed for failure to establish a *de facto* taking."<sup>251</sup> Following judgment, the plaintiffs filed another complaint, generally reasserting the allegations of the prior petition, and adding a claim of averment by which the city had taken the property by tax deed on June 1, 1977.<sup>252</sup> The "[d]efendants moved to dismiss the complaint on the ground of res

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<sup>243</sup> *Id.* at 555.

<sup>244</sup> *See id.* at 554, 555.

<sup>245</sup> *Id.* at 554.

<sup>246</sup> *Id.*

<sup>247</sup> *O'Brien v. City of Syracuse*, 429 N.E.2d 1158 (N.Y. 1981).

<sup>248</sup> *Id.* at 1159.

<sup>249</sup> *Id.*

<sup>250</sup> *Id.*

<sup>251</sup> *Id.*

<sup>252</sup> *Id.*

judicata, which . . . was granted with leave to amend.”<sup>253</sup> Thereafter, the plaintiffs filed an amended complaint with the same claims, “and adding . . . statements that [the] defendants [had] ‘wrongfully, unlawfully and willfully’ trespassed” and damaged their “property at various times during the period 1967 to 1978.”<sup>254</sup> The defendants “moved to dismiss on the grounds of *res judicata*, statute of limitations, and failure to serve timely a notice of claim.”<sup>255</sup> The state supreme court denied the motion on all grounds, and “concluded that no bar existed because there were involved materially different elements of proof for the two theories of recovery.”<sup>256</sup> “The Appellate Division, Fourth Department, reversed on the reasoning that the entire action was barred by the doctrine of *res judicata*.”<sup>257</sup> It dismissed the complaint in its entirety.<sup>258</sup>

Chief Judge Cooke observed that the plaintiff’s current cause of action consisted of: “(1) those concerning activities underlying the 1973 litigation; and (2) those asserting trespass generally.”<sup>259</sup> He noted that “[o]nly the claims encompassed by the first category [we]re definitely barred by *res judicata*.”<sup>260</sup> Conducting a transactional analysis, the Chief Judge determined that all of the claims presented during a prior suit, as the basis for that litigation, were barred since “[t]hat proceeding . . . [was] brought to a final conclusion, [and therefore,] no other claim [could] be predicated upon the same incidents.”<sup>261</sup> He explained that:

When alternative theories are available to recover what is essentially the same relief for harm arising out of the same or related facts such as would constitute a single “factual grouping,” the circumstance that the theories involve materially different elements of proof will not justify presenting the claim by two different actions.<sup>262</sup>

Chief Judge Cooke agreed with the appellate division, observing

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<sup>253</sup> *Id.*

<sup>254</sup> *Id.*

<sup>255</sup> *Id.*

<sup>256</sup> *Id.*

<sup>257</sup> *Id.*

<sup>258</sup> *Id.*

<sup>259</sup> *Id.*

<sup>260</sup> *Id.* Chief Judge Cooke dismissed the complaint due to the plaintiff’s failure to serve timely a notice of claim, although finding that “the second category of allegations—the general trespass allegations—are not barred by *res judicata* to the extent that they describe acts occurring after the 1973 lawsuit.” *Id.* at 1160.

<sup>261</sup> *Id.* at 1159.

<sup>262</sup> *Id.* at 1160.

that “once a claim is brought to a final conclusion, all other claims arising out of the same transaction . . . are barred, even if based upon different theories or if seeking a different remedy.”<sup>263</sup> He observed: “In effect, de facto appropriation may be characterized as an aggravated form of trespass. The pertinent evidence in both actions is the same. The basic distinction lies in the egregiousness of the trespass and whether it is of such intensity as to amount to a taking.”<sup>264</sup>

In *McDermott v. Torre*,<sup>265</sup> Chief Judge Cooke addressed a significant statute of limitation question concerning a medical malpractice action against a physician and laboratory that had misdiagnosed the plaintiff's mole as noncancerous.<sup>266</sup> The treating physician had contacted the laboratory to review a specimen of the plaintiff's mole.<sup>267</sup> After reviewing the specimen, the laboratory informed the physician, who relayed the message to the plaintiff, that the results were negative and nothing further was required.<sup>268</sup> Over the next several years, the physician continued to treat the plaintiff for unrelated and general physical ailments.<sup>269</sup> On occasion, however, the plaintiff complained about a pain in her ankle, which the physician “reassured her that there was no cause for concern.”<sup>270</sup> Thereafter, the plaintiff discovered a lump in her groin, a malignant melanoma from the site where the mole had been removed four years earlier.<sup>271</sup>

Chief Judge Cooke dismissed the plaintiff's cause of action against the laboratory,<sup>272</sup> finding that it was barred by the statute of limitations.<sup>273</sup> He explained that the three-year statute of limitations applied for actions based on acts of continuous medical treatment, rather than the shorter period of CPLR 214-a.<sup>274</sup> He noted that the plaintiff's action against the laboratory was time-barred because there was no evidence of continuing treatment by the laboratory and more than thirty-two months had elapsed

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<sup>263</sup> *Id.* at 1159 (citing *Reilly*, 379 N.E.2d at 176).

<sup>264</sup> *Id.* at 1160.

<sup>265</sup> *McDermott v. Torre*, 437 N.E.2d 1108 (N.Y. 1982).

<sup>266</sup> *See id.* at 1109–10.

<sup>267</sup> *Id.* at 1110.

<sup>268</sup> *Id.*

<sup>269</sup> *Id.*

<sup>270</sup> *Id.*

<sup>271</sup> *Id.*

<sup>272</sup> *Id.* at 1112.

<sup>273</sup> *Id.* at 1109, 1112.

<sup>274</sup> *Id.* at 1109, 1111 (noting that effective July 1, 1975, while plaintiff's treatment was continuing, the period was reduced to 2.5 years under CPLR 214-a).

between plaintiff's last visit and service of summons.<sup>275</sup> As for the physician, Chief Judge Cooke noted that summary judgment was not appropriate, as there were issues of fact regarding whether there had been continuous treatment, thereby triggering the three-year statute of limitations from the last date of treatment.<sup>276</sup>

Notably, Chief Judge Cooke provided an in-depth discussion as to why the claim could not survive against the laboratory under the doctrine of "continuing treatment by the physician."<sup>277</sup> He explained that "[c]ontinuous treatment serves simply as a toll—the action may be brought at any time, but the patient will not be compelled to initiate judicial proceedings so long as the physician continues to treat the injury."<sup>278</sup> Cooke observed that "[i]mplicit in the policy is the recognition that the doctor not only is in a position to identify and correct his or her malpractice, but is best placed to do so."<sup>279</sup> As for the laboratory, however, he noted that these policy considerations did not apply, because the laboratory "does not have the opportunity to discover an error in a report. Instead, it must rely on the treating physician to discover any diagnostic mistake."<sup>280</sup> In this context, Cooke observed: "[T]he inquiry necessarily must be directed to the nature of a laboratory's relationship to the patient."<sup>281</sup> He concluded that, in the absence of evidence showing an agency or other relevant relationship between the laboratory and doctor or some relevant continuing relation between the laboratory and the patient, the laboratories were nothing more than an independent contractor with no continuing relation to plaintiff to allow the continuing treatment to be imputed from the general care provider.<sup>282</sup>

In *Mills v. Monroe County*,<sup>283</sup> Chief Judge Cooke affirmed the appellate division's decision to dismiss an employment discrimination claim as untimely.<sup>284</sup> The plaintiff had failed to timely file a notice of claim against the county.<sup>285</sup> Chief Judge Cooke observed that a time-barred claim may only continue if the action was brought to vindicate a public interest, or with leave of

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<sup>275</sup> See *id.* at 1111.

<sup>276</sup> See *id.*

<sup>277</sup> See *id.* at 1109, 1112.

<sup>278</sup> *Id.* at 1111–12 (citing *Borgia v. New York*, 187 N.E.2d 777, 778 (N.Y. 1962)).

<sup>279</sup> *Id.* at 1112.

<sup>280</sup> *Id.*

<sup>281</sup> *Id.*

<sup>282</sup> See *id.*

<sup>283</sup> *Mills v. Cty. of Monroe*, 451 N.E.2d 456 (1983).

<sup>284</sup> See *id.* at 457.

<sup>285</sup> *Id.* at 456–57.

the court.<sup>286</sup> He explained:

When an employment discrimination action is brought against a county under the state or federal civil rights statutes, the failure to timely file a notice of claim shall be fatal unless the action has been brought to vindicate a public interest or leave to serve late notice has been granted by the court.<sup>287</sup>

Chief Judge Cooke rejected the plaintiff's contention that her cause of action was brought to vindicate a public interest, noting that her allegations were narrowly tailored to personal interest, and "her action seeks relief only for her termination, which she alleges resulted from her opposition to the county's discriminatory practices and her race and national origin."<sup>288</sup> He further rejected the plaintiff's argument that the notice of claim requirement contained in the state's law—section 52 of the County Law—should not apply to either her federal or state civil rights claims.<sup>289</sup> Cooke explained that "[i]f success of the § 1983 action were the only benchmark, there would be no reason at all to look to state law, for the appropriate rule would then always be the one favoring the plaintiff, and its source would be essentially irrelevant."<sup>290</sup> He concluded: "[T]he state's notice requirements are [not] antithetical to the policy underlying the civil rights laws."<sup>291</sup>

In *McDermott v. City of New York*,<sup>292</sup> Chief Judge Cooke reversed a trial court's decision dismissing as untimely a third-party complaint by the city seeking indemnification from the manufacturer of a truck it had purchased.<sup>293</sup> After being sued by one of its employees whose arm was severed by the sanitation truck's hopper mechanism, the city brought a third-party action against the manufacturer alleging that the mechanism was defective.<sup>294</sup> The manufacturer sought to dismiss the indemnification action as untimely, noting that the third-party complaint was commenced in 1975, although the truck was delivered to the city on February 5, 1969.<sup>295</sup> Chief Judge Cooke

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<sup>286</sup> *Id.* at 456.

<sup>287</sup> *Id.*

<sup>288</sup> *Id.* at 458–59 (noting that the plaintiff sought money damages for her loss of wages and damage to her reputation).

<sup>289</sup> *Id.* at 457.

<sup>290</sup> *Id.* (quoting *Bd. of Regents v. Tomanio*, 446 U.S. 478, 488 (1980)).

<sup>291</sup> *Mills*, 451 N.E.2d at 457.

<sup>292</sup> *McDermott v. City of New York*, 406 N.E.2d 460 (N.Y. 1980).

<sup>293</sup> *Id.* at 461.

<sup>294</sup> *Id.*

<sup>295</sup> *Id.*

rejected this argument, explaining that the city's cause for indemnification began accruing upon payment to its worker for his injuries, rather than from date of delivery of the sanitation truck, even though the third-party complaint by the city was based on products liability.<sup>296</sup> He observed: "[G]iven the quasi contractual character of the indemnification action, it was obvious that the contract statute of limitations, now six years, would be held controlling."<sup>297</sup>

In *Fleishman v. Eli Lilly & Co.*,<sup>298</sup> Chief Judge Cooke provided significant input, although in dissent, relating to the issue of when a medical claim "accrues" under the applicable statute of limitations.<sup>299</sup> In *Fleishman*, the plaintiffs sought to recover damages as a result of medical injuries caused by their exposure to the drug Diethylstilbestrol ("DES").<sup>300</sup> The injuries suffered by the plaintiffs arose after the applicable statute of limitations had expired.<sup>301</sup> The trial court granted the defendants motion to dismiss, holding that each complaint was time-barred.<sup>302</sup> The New York Court of Appeals affirmed the trial court's decision, holding that medical malpractice actions began to accrue when the plaintiffs were first exposed to DES and not when the injurious effect of the exposure manifested.<sup>303</sup> The court observed that "[a]ny departure from the policies underlying these well-established precedents is a matter for the legislature and not the courts."<sup>304</sup> The court noted "that a cause of action for personal injuries caused by a toxic substance accrue[s] and the limitations period beg[ins] to run upon exposure to the substance."<sup>305</sup>

Disagreeing with the court's rationale, Chief Judge Cooke observed: "[T]he law is not and should not be so inflexible that it

<sup>296</sup> See *id.* ("The cause of action for indemnification interposed against the manufacturer of an allegedly defective product is independent of the underlying wrong and for the purpose of the statute of limitations accrues when the loss is suffered by the party seeking indemnity. Hence, the dismissal of that part of the third-party complaint seeking indemnity, as barred by the four-year statute of limitations for breach of warranty measured from the date of tender of delivery . . . was unwarranted.")

<sup>297</sup> *Id.* at 462.

<sup>298</sup> *Fleishman v. Lilly & Co.*, 467 N.E.2d 517 (N.Y. 1984), *cert denied* 469 U.S. 1192 (1985), *superseded by statute*, N.Y. C.P.L.R. 214-c (McKinney 2017).

<sup>299</sup> *Fleishman*, 467 N.E.2d at 519 (Cooke, C.J., dissenting).

<sup>300</sup> *Manno v. Levi*, 465 N.Y.S.2d 219, 220 (App. Div. 1983), *aff'd*, 467 N.E.2d 517 (N.Y. 1984), *cert denied* 469 U.S. 1192 (1985), *superseded by statute*, N.Y. C.P.L.R. 214-c.

<sup>301</sup> *Id.*

<sup>302</sup> *Id.* at 221, 222.

<sup>303</sup> See *Fleishman*, 467 N.E.2d at 518.

<sup>304</sup> *Id.* at 518.

<sup>305</sup> *Enright v. Eli Lilly & Co.*, 570 N.E.2d 198, 200–01 (N.Y. 1991) (citing *Fleishman*, 467 N.E.2d at 518).

cannot correct itself from injustice and unfounded concerns espoused in prior decisions.”<sup>306</sup> He explained that the doctrine controlling the dates in which a claim accrues “should not be used as a shield behind which a court may hide as reason for perpetuating unnecessary and profound unfairness, which subjects the law to ridicule.”<sup>307</sup> Chief Judge Cooke rejected the proposition that the application of a statute of limitations is exclusively within the control and interpretation of the legislative body of government.<sup>308</sup> He noted:

That the determination of when a cause of action accrues is not solely a matter for the legislature, [and as] is plainly evident by this court’s determination here and previously, that a cause of action of this type accrues upon injury which is assumed to occur at the time of exposure, ingestion or injection of the cancer-causing foreign substance.<sup>309</sup>

Chief Judge Cooke explained that the court had misinterpreted the policy behind the imposition of statute of limitations.<sup>310</sup> He noted that the limitations run based upon the balancing of interests between the parties, ensuring that both parties’ interests are protected under the law.<sup>311</sup> He concluded that “the balance of policy considerations weighs heavily in favor of plaintiffs and indicates that a discovery rule or, at the very least, a true date of medical-injury rule should be adopted for the accrual of the causes of action.”<sup>312</sup> As a result, he advocated that “[t]hese cases present a compelling argument for adopting a discovery rule.”<sup>313</sup>

Notably, a few years later, the New York Court of Appeals overturned the *Fleishman* decision,<sup>314</sup> as the state legislature

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<sup>306</sup> *Fleishman*, 467 N.E.2d at 518 (citing *Woods v. Lancet*, 102 N.E.2d 691, 694 (N.Y. 1951)).

<sup>307</sup> *Fleishman*, 467 N.E.2d at 518.

<sup>308</sup> *See id.* at 519.

<sup>309</sup> *Id.*

<sup>310</sup> *See id.* at 519–20 (“A statute of limitations serves in part to prevent plaintiffs from sleeping on their rights or waiting to assert stale claims and to ensure that defendants will receive notice of claims as soon as practicable. In these cases, the plaintiffs cannot be said to have purposefully or unreasonably waited to bring suit because no injuries were known by them to occur at the time of their ingestion of or exposure to DES.” (first citing *Urie v. Thompson*, 337 U.S. 163, 170 (1949); then citing *Raymond v. Eli Lilly & Co.* 371 A.2d 170, 174 (N.H. 1977))).

<sup>311</sup> *See Fleishman*, 467 N.E.2d at 519 (quoting *Victorson v. Bock Laundry Mach. Co.*, 335 N.E.2d 275, 279 (N.Y. 1975)).

<sup>312</sup> *Fleishman*, 467 N.E.2d at 519.

<sup>313</sup> *Id.* at 520.

<sup>314</sup> *See Enright v. Eli Lilly & Co.*, 570 N.E.2d 198, 200 (N.Y. 1991) (first citing *Fleishman*, 467 N.Y.2d 198; then citing N.Y. C.P.L.R. 214-c (McKinney 2017)). The court recognized that special rules have been fashioned by the legislature and “are a response to unique procedural

implicitly adopted Chief Judge Cooke's proposition for an equitable discovery rule in unique medical cases, such as those presented by individuals exposed to DES.<sup>315</sup> The state's legislature enacted "a 'discovery' statute of limitations [that] was directed at opening up traditional avenues of recovery by removing a procedural barrier that was unreasonable given the nature of DES injuries."<sup>316</sup> In 1986, the New York State legislature recognized that "claims for injuries caused by exposure to DES and other toxic substances were often time-barred before the harmful effects of the exposure could be discovered, [and] changed the law to provide that the limitations period in exposure cases begins to run upon discovery of the injury."<sup>317</sup> The legislature also "revived for one year previously time-barred causes of action based on exposure to DES and four other toxic substances."<sup>318</sup>

### *E. Privileges*

Chief Judge Cooke's wrote several instructive opinions regarding a party's right not to disclose information that is privileged. In *Matter of Beach v. Shanley*,<sup>319</sup> Chief Judge Cooke established that New York's Shield Law (Civil Rights Law § 79-h) offered a broad and unqualified privilege to journalists who refused to disclose information or sources to state officials.<sup>320</sup> Specifically, Chief Judge Cooke observed that the law created a journalistic privilege against compulsory disclosure of news sources to a grand jury, even if the source's disclosure of information may itself have constituted criminal activity.<sup>321</sup> In *Beach*, a grand jury investigation was conducted on the Rensselaer County sheriff's office: a captain and lieutenant were alleged to be involved in illegal weapon sales.<sup>322</sup> The grand jury failed to indict either suspect, but issued damaging reports recommending their removal from official duty.<sup>323</sup> An unidentified source contacted the defendant, a local television reporter, and offered information about the sealed reports contingent upon the defendant's promise not to release the source's

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barriers and problems of proof peculiar to DES litigation." *Enright*, 570 N.Y.2d at 201–02.

<sup>315</sup> See N.Y. C.P.L.R. 214-c.

<sup>316</sup> *Enright*, 570 N.E.2d at 202.

<sup>317</sup> *Id.* at 201 (citing N.Y. C.P.L.R. 214-c).

<sup>318</sup> *Enright*, 570 N.E.2d at 201 (citation omitted).

<sup>319</sup> *Beach v. Shanley*, 465 N.E.2d 304 (N.Y. 1984).

<sup>320</sup> See *id.* at 310.

<sup>321</sup> See *id.* at 309, 310.

<sup>322</sup> See *id.* at 306.

<sup>323</sup> See *id.*



identity.<sup>324</sup> The defendant agreed, and later reported that the grand jury had recommended the removal of the sheriff.<sup>325</sup> Thereafter, another grand jury convened to investigate the “disclosure of a certain sealed grand jury report.”<sup>326</sup> The defendant was served with a subpoena to appear before the grand jury in an effort to determine “whether the contents of the sealed report were disclosed by a grand juror or a public official or public employee in violation of section 215.70 of the Penal Law.”<sup>327</sup> The defendant moved to quash the subpoena, which was eventually granted by the trial court.<sup>328</sup>

Chief Judge Cooke rejected the district attorney’s contention that Article I of the New York State Constitution invalidated the evidentiary privileges set forth by the Shield Law when relating to grand jury subpoenas.<sup>329</sup> He explained: “The constitutional provision against impairing a grand jury’s power was not intended to prevent the legislature from creating evidentiary privileges or their equivalent that have an incidental impact on investigations into willful misconduct by public officers.”<sup>330</sup> Instead, Chief Judge Cooke thought that “the proposal was advanced solely for the purpose of making certain that the legislature of this state would never be able to . . . take from the grand jury its authority to investigate and indict for alleged criminal acts by public officials.”<sup>331</sup> He concluded that the relevant provisions of Article I targeted only “legislation that directly restricts a grand jury’s right to inquire or that, although facially neutral, would have its primary impact by limiting investigations of public officers.”<sup>332</sup> He stated unequivocally that the Shield Law was not such a statute, since “[i]ts impact on investigations . . . [was] incidental.”<sup>333</sup>

Chief Judge Cooke recognized that “a grand jury’s power to issue subpoenas is unfettered,”<sup>334</sup> but the Shield Law was constructed to protect reporters from contempt, fine, or imprisonment for their

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<sup>324</sup> *See id.*

<sup>325</sup> *See id.*

<sup>326</sup> *Id.*

<sup>327</sup> *Id.*

<sup>328</sup> *See id.* at 307 (noting that after the trial court quashed the subpoena, the appellate division reversed). That court reasoned that the Shield Law was invalid because it “impaired a grand jury’s power to investigate public officials.” *Id.*

<sup>329</sup> *See id.* at 311. Article I, section 6, of the state Constitution proscribes the legislature from enacting any laws that impair or suspend a grand jury’s power to investigate willful misconduct. N.Y. CONST. art. 1, § 6.

<sup>330</sup> *Beach*, 465 N.E.2d at 310.

<sup>331</sup> *Id.* (quoting *In re Wood v. Hughes*, 173 N.E.2d 21, 24 (N.Y. 1961)).

<sup>332</sup> *Beach*, 465 N.E.2d at 311.

<sup>333</sup> *Id.*

<sup>334</sup> *Id.* at 307.

refusal to disclose information “regardless of whether the information is highly relevant to a governmental inquiry and whether the information was solicited or volunteered.”<sup>335</sup> Chief Judge Cooke emphasized the plain language of the statute, which read that “[a]ny information obtained in violation of the . . . [statute] shall be inadmissible in any action or proceeding or hearing before any agency.”<sup>336</sup> He noted that “the Shield Law provides a broad protection to journalists without any qualifying language.”<sup>337</sup> Thus, the protection extended regardless of whether the reporter observed criminal activity or “even when the act of divulging the information was itself criminal conduct.”<sup>338</sup>

In *Matter of Bronx Cty. Grand Jury Investigation*,<sup>339</sup> Chief Judge Cooke rendered an important decision concerning both spousal and attorney-client privileges.<sup>340</sup> The case stemmed from evidence gathered by the district attorney’s office in its investigation of the murder of Clara Vanderbilt.<sup>341</sup> The defendant presumed that he was a target of the investigation.<sup>342</sup> While at work, the defendant made a tape-recorded message addressed to his wife.<sup>343</sup> That evening, the defendant unsuccessfully attempted suicide.<sup>344</sup> The

<sup>335</sup> *Id.* at 309.

<sup>336</sup> *Beach*, 465 N.E.2d at 309 (quoting N.Y. CIV. RIGHTS LAW § 79-h(d) (McKinney 2017)).

<sup>337</sup> *Beach*, 465 N.E.2d at 310. Three years after *Beach*, in *Knight-Ridder Broadcasting, Inc.*, the Court of Appeals readdressed the issue of the existence or nonexistence of a confidentiality requirement in the amended Shield Law. See *Knight-Ridder Broadcasting, Inc. v. Greenberg*, 505 N.Y.S.2d 368, 370 (App. Div. 1986), *aff’d*, 511 N.E.2d 1116 (N.Y. 1987). The appellate division in *Knight-Ridder* declined to interpret Chief Judge Cooke’s language in *Beach* that the Shield Law afforded a “broad protection to journalists without any qualifying language” to nullify the requirement of a confidentiality agreement that the Shield Law originally required for privilege protections. *Id.* at 371 (quoting *Beach*, 465 N.E.2d at 310). Years later, in *Sullivan*, the state supreme court in Queens County suggested that *Beach* overruled judicial interpretations of the Shield Law that maintained a confidentiality requirement throughout its various amendments, while *Knight-Ridder* reinstated the “cloak of confidentiality” to journalistic privilege. See *Sullivan v. Hurley*, 635 N.Y.S.2d 437, 439 (Sup. Ct. 1995) (quoting *Knight-Ridder Broadcasting, Inc.*, 511 N.E.2d at 1118).

<sup>338</sup> *Beach*, 465 N.E.2d at 310. Judge Wachtler wrote a concurring opinion in *Beach*, stating that he would have deemed the quashing proper not just because of the Shield Law privilege but because such protection should be a matter of right under the state constitutional freedom of the press. *Id.* at 311 (Wachtler, J., concurring). Chief Judge Cooke declined to conduct a constitutional analysis, noting that “[c]ourts should not decide constitutional questions when a case can be disposed of on a nonconstitutional ground.” *Id.* (majority opinion). Judge Meyer issued a dissent in *Beach*. *Id.* at 312 (Meyer, J., dissenting). He argued that the majority misinterpreted the scope of Article I, section 6, by erroneously searching for intent beyond the “clarity of the constitutional provision.” See *id.* at 312–13.

<sup>339</sup> *In re Bronx Cty. Grand Jury Investigation*, 439 N.E.2d 378 (N.Y. 1982).

<sup>340</sup> See *id.* at 380.

<sup>341</sup> See *id.*

<sup>342</sup> See *id.*

<sup>343</sup> See *id.*

<sup>344</sup> See *id.*

defendant's wife later discovered the tape.<sup>345</sup> She did not listen to the tape, but instead gave it to her friend, who was an attorney.<sup>346</sup> Thereafter, the defendant's office was searched for additional documents and recordings.<sup>347</sup> A second tape was found in his desk.<sup>348</sup> Both tapes were eventually received and held by the defendant's attorney.<sup>349</sup> Although the defendant was ordered to turn over the tapes, he failed to comply.<sup>350</sup> The defendant argued that the first tape contained information protected by the marital privilege and the second tape was protected by both the attorney-client privilege and his right against self-incrimination.<sup>351</sup>

The trial court quashed the subpoenas, but was reversed on appeal.<sup>352</sup> The appellate division rejected both arguments of privilege.<sup>353</sup> The court observed that the privilege applies only to confidential statements "induced by the marital relation and prompted by the affection, confidence and loyalty engendered by such relationship."<sup>354</sup> The court also ordered a scientific inspection of the first tape to determine whether its content had been altered.<sup>355</sup> As to the first tape, Chief Judge Cooke rejected the appellate division's holding. He found that a communication is made during marriage even if the intention is that the message will be received after death, because such a communication cannot be considered to be made in contemplation of destroying the marriage.<sup>356</sup> He observed that the exception for statements aimed at destroying a marriage concerns the "nature of the statement itself."<sup>357</sup> Chief Judge Cooke explained that a declaration made during a suicide attempt might possibly be the "last attempt to preserve the affection that gave rise to the marriage."<sup>358</sup> In the absence of any other evidence on the record suggesting otherwise, he determined that the messages were indeed induced by the marriage.<sup>359</sup>

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<sup>345</sup> *See id.*

<sup>346</sup> *See id.* at 380–81.

<sup>347</sup> *See id.* at 381.

<sup>348</sup> *See id.*

<sup>349</sup> *See id.*

<sup>350</sup> *See id.*

<sup>351</sup> *See id.*

<sup>352</sup> *Id.*

<sup>353</sup> *Id.*

<sup>354</sup> *Id.* at 382.

<sup>355</sup> *Id.* at 381.

<sup>356</sup> *See id.* at 382.

<sup>357</sup> *Id.*

<sup>358</sup> *Id.*

<sup>359</sup> *Id.*

To satisfy the element of confidentiality, Chief Judge Cooke noted that the defendant delivered it to his wife, outside the presence of the third parties, who then effectively delivered it to the lawyer.<sup>360</sup> He explained that when the lawyer first found the tape, only the two spouses knew of its existence and message.<sup>361</sup> Thus, the delivery of the tape to third parties for safekeeping did not destroy the privilege, because the third parties had “no justifiable interest in becoming privy to the marital privilege.”<sup>362</sup> Chief Judge Cooke further explained that the privilege only fails “when the substance of a communication, and not the mere fact of its occurrence, is revealed to third parties.”<sup>363</sup> Moreover, Chief Judge Cooke did not find a basis for ordering a scientific examination of the tape, since “[o]nce it is determined that the contents of the tape were privileged, it is irrelevant whether there have been erasures or other deletions.”<sup>364</sup>

In regard to the second tape, Chief Judge Cooke declined to accept the defense’s argument that the attorney’s disclosure of the tape would violate the defendant’s Fifth Amendment protection against self-incrimination.<sup>365</sup> He observed that an attorney may not directly assert a protection claim based on a Fifth Amendment right held by his client.<sup>366</sup> The coercive power of the subpoena is directed at the attorney, but production would in no way self-incriminate him to implicate the commands of the Fifth Amendment.<sup>367</sup> Nevertheless, Chief Judge Cooke did accept the defendant’s argument that “[a]n attorney may rely on the attorney-client privilege to prevent discovery of materials that would not have been discoverable if in the client’s hands.”<sup>368</sup> Chief Judge Cooke undertook a two-pronged analysis to determine if an attorney can assert attorney-client privilege to prevent discovery of materials that would not have been discoverable in the client’s possession.<sup>369</sup> The first factor was whether the attorney received the material under circumstances giving rise to the privilege.<sup>370</sup> If so, then the court must consider whether the material would have been protected in the client’s

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<sup>360</sup> *See id.*

<sup>361</sup> *Id.*

<sup>362</sup> *Id.*

<sup>363</sup> *Id.* at 382–83.

<sup>364</sup> *Id.* at 383.

<sup>365</sup> *See id.*

<sup>366</sup> *Id.*

<sup>367</sup> *Id.*

<sup>368</sup> *Id.*

<sup>369</sup> *Id.*

<sup>370</sup> *Id.*

possession.<sup>371</sup>

Chief Judge Cooke explained:

While it is true that the attorney-client privilege does not attach unless there is a “confidential communication” between counsel and his or her client, this does not require that all aspects of the communication, including its topic, must be confidential for the privilege to attach. Rather, the pertinent “confidence” arises from the attorney-client relationship and the privacy of the conversation or communication to the attorney.<sup>372</sup>

Chief Judge Cooke explained that only actual disclosure, and not mere intent, will breach the privilege.<sup>373</sup> Therefore, if no actual disclosure has occurred, the privilege remains intact even if the client had intended to disclose the substance of the material.<sup>374</sup> Ultimately, the Chief held that the attorney-client privilege attached because the tape’s recording was uttered only to the lawyer “by his client who was seeking legal advice and outside the presence of any third party with no intention that it be passed to another.”<sup>375</sup>

Furthermore, Chief Judge Cooke observed that had the tape remained in the defendant’s possession, it would have been protected.<sup>376</sup> He explained that testimonial evidence is “that which communicates the witness’s ideas or thoughts, that exposes the witness’s mental state or thought process.”<sup>377</sup> Both the evidence and the act of production must include “some testimonial quality.”<sup>378</sup> Chief Judge Cooke reasoned that the lawyer’s production of the tape was “testimonial by virtue of his authentication, express or implied, of the tape,” including “the circumstances of its preparation, its accuracy, and the conclusions drawn from it.”<sup>379</sup>

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<sup>371</sup> *Id.*

<sup>372</sup> *Id.* at 384.

<sup>373</sup> *Id.*

<sup>374</sup> *Id.*

<sup>375</sup> *Id.*

<sup>376</sup> *Id.* at 384–85, 386. Judge Jasen authored a partial concurring and dissenting opinion in this case. *Id.* at 386 (Jasen, J., dissenting). He disagreed that the second tape was protected by the attorney-client privilege. *Id.* at 387. Even though the defendant’s wife delivered the tape to the lawyer for the purpose of obtaining legal advice, the lawyer conceded that he never listened to it. *Id.* at 388. Therefore, Judge Jasen reasoned, there was only a disclosure of the existence of the tape, which could hardly be confidential considering the multiple persons who had knowledge of the tape’s existence. *Id.* at 387.

<sup>377</sup> *Id.* at 385 (majority opinion).

<sup>378</sup> *Id.*

<sup>379</sup> *Id.*

*F. Family Law*

Chief Judge Cooke wrote many instructive opinions dealing with family law. His sense of fairness and his desire for justice in judicial proceedings was most evident in his resolve of matters concerning paternity, child custody, and parental rights.

For example, in *Matter of Vicki B. & David H.*,<sup>380</sup> Chief Judge Cooke decided that a paternity proceeding to determine paternity of a child born out of wedlock was not barred by the statute of limitations when the putative father had acknowledged being the father by providing financial support during the child's infancy.<sup>381</sup> He observed that "[w]hen a putative father has acknowledged paternity either in writing or through the furnishing of support payments, the time within which a paternity proceeding must be brought is not restricted by any statutory limitation."<sup>382</sup> He reversed the appellate division and reinstated the family court order finding no time bar.<sup>383</sup>

In *Dickson v. Lascaris*,<sup>384</sup> Chief Judge Cooke reversed the denial of a father's petition to regain custody of his children from a third party.<sup>385</sup> Specifically, the father petitioned the court to reclaim custody of his three children, who he had entrusted to a friend.<sup>386</sup> After his wife's refusal to help with the upbringing of the children, he tried to raise the children himself.<sup>387</sup> However, after realizing he could not manage such task alone, he entrusted the care of his children to a friend of his father.<sup>388</sup> Several years later, after remarrying and establishing regular contact with his children, he sought to regain custody.<sup>389</sup> Granting his request, Chief Judge Cooke explained: "[B]etween a parent and a third person, parental custody of a child may not be displaced absent grievous cause or necessity."<sup>390</sup> He stated: "[A] child is not a piece of property over whom title may be acquired by adverse possession,"<sup>391</sup> and that when deciding who should have custody of the child, the best

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<sup>380</sup> *In re Vicki B. v. David H.*, 442 N.E.2d 1248 (N.Y. 1982).

<sup>381</sup> *Id.* at 1248.

<sup>382</sup> *Id.*

<sup>383</sup> *See id.* at 1249.

<sup>384</sup> *In re Dickson v. Lascaris*, 423 N.E.2d 361 (N.Y. 1981).

<sup>385</sup> *See id.* at 362.

<sup>386</sup> *See id.*

<sup>387</sup> *See id.*

<sup>388</sup> *See id.*

<sup>389</sup> *See id.* at 363.

<sup>390</sup> *Id.*

<sup>391</sup> *Id.* at 364.

interests of that child must always come first.<sup>392</sup>

Similarly, in *Matter of Leon R.R.*,<sup>393</sup> Chief Judge Cooke reversed the family court's granting of a petition to terminate parental rights of a child's natural parents.<sup>394</sup> The child was removed from the custody of his parents when he was a year and a half old because of accusations of neglect.<sup>395</sup> He remained with his foster parents for over eight years, after which time, measures were taken to reintegrate him back with his natural parents.<sup>396</sup> However, efforts by the foster agency seemingly left the natural parent's requests unanswered.<sup>397</sup> The agency alleged that the child was a permanently neglected child, and therefore wanted to terminate the parental rights and award permanent custody to the foster parents.<sup>398</sup>

Chief Judge Cooke rejected the agency's request, noting that they failed to show that the natural parents permanently neglected the child as required by law. He noted that the agency was required to prove that the parents:

[F]ailed for a period of more than one year following the date such child came into the care of an authorized agency substantially and continuously or repeatedly to maintain contact with or plan for the future of the child, although physically and financially able to do so, notwithstanding the agency's diligent efforts to encourage and strengthen the parental relationship when such efforts will not be detrimental to the best interests of the child.<sup>399</sup>

Chief Judge Cooke also found that the record demonstrated that the respondents availed themselves of every opportunity to strengthen the parent-child relationship between them and the child, but that the petitioner had sought to impede these attempts.<sup>400</sup>

In *People ex rel. Sibley v. Sheppard*,<sup>401</sup> Chief Judge Cooke issued an opinion protecting the right of grandparents to remain in contact with a grandchild who was taken from the natural mother after

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<sup>392</sup> See *id.* at 363–64 (citing *Bennett v. Jeffreys*, 356 N.E.2d 277, 283 (N.Y. 1976)).

<sup>393</sup> *In re Leon R.R.*, 397 N.E.2d 374 (N.Y. 1979).

<sup>394</sup> See *id.* at 376.

<sup>395</sup> See *id.*

<sup>396</sup> See *id.*

<sup>397</sup> See *id.* at 377.

<sup>398</sup> See *id.* at 379.

<sup>399</sup> *Id.*

<sup>400</sup> See *id.*

<sup>401</sup> *People ex rel. Sibley v. Sheppard*, 429 N.E.2d 1049 (N.Y. 1981).

neglect proceedings.<sup>402</sup> The petitioner, the child's grandmother, visited the child regularly until his temporary custodians (respondents) adopted him.<sup>403</sup> After adoption, the respondents made it difficult for her to visit, which led to a petition under section 72 of the New York Domestic Relations Law to preserve the visitation rights of the child's natural grandparent.<sup>404</sup> Chief Judge Cooke declared that an adopted child may not be completely isolated from her natural born family, especially when statutory law grants the natural grandparents a visitation right if in the child's best interest.<sup>405</sup> He rejected the respondent's contention that section 117 of the Domestic Relations Law allowed the rights of the natural family of an adopted child to be severed at the time of adoption.<sup>406</sup> Similarly, Chief Judge Cooke rejected the respondent's constitutional challenges (invasion of familial privacy), noting that parents are not free to act in whatever way they wish.<sup>407</sup> He explained that a family is within the scope of regulation if it is for the benefit of public policy, and permitting a natural grandparent to visit with their grandchild does not impede on any constitutional rights to privacy.<sup>408</sup>

In *In re Sheila G.*,<sup>409</sup> Chief Judge Cooke issued an opinion establishing the duty of child-care agencies to facilitate and assist parents in maintaining contact with children held in the agency's temporary care. There, a child was born out of wedlock and voluntarily placed up for adoption by her mother with the New York City Department of Social Services.<sup>410</sup> The child was then placed in foster care with Brookwood Child Care Agency.<sup>411</sup> A month and a half later, her natural born father contacted Brookwood requesting a meeting with agency officials, in which he stated that he wanted to be able to visit with and financially support the child.<sup>412</sup> The agents at Brookwood informed the father that the mother had adamantly refused permission for him to contact his daughter, and

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<sup>402</sup> See *id.* at 1050.

<sup>403</sup> See *id.*

<sup>404</sup> *Id.* New York law recognizes the rights of a natural grandparent and states that "when one or both parents are deceased, a proceeding in habeas corpus may be brought against a person who has 'the care, custody, and control of' the grandchild." *Id.* (quoting N.Y. DOM. REL. LAW § 72(1) (McKinney 2017)).

<sup>405</sup> See *Sheppard*, 429 N.E.2d at 1051–52.

<sup>406</sup> See *id.* at 1050–51.

<sup>407</sup> *Id.* at 1052.

<sup>408</sup> See *id.*

<sup>409</sup> *In re Sheila G.*, 462 N.E.2d 1139 (N.Y. 1984).

<sup>410</sup> *Id.* at 1141.

<sup>411</sup> *Id.*

<sup>412</sup> *Id.*



he was told that until he could formally establish paternity, the agents would be bound by the mother's wishes.<sup>413</sup> Months later, the mother decided to allow visitation rights to the father,<sup>414</sup> who planned to adopt the child in the near future after being able to determine paternity.<sup>415</sup> Later, the agency rejected his request, noting that it took eighteen months total.<sup>416</sup> The agency noted that the lapse of time was indicative of his inability to plan for the child's future.<sup>417</sup> The family court denied the agency's petition for permanent neglect and noted that it had undermined the potential relationship between the father and child.<sup>418</sup> However, the court was reversed by the appellate division, which found that the father's procrastination gave rise to a determination of permanent neglect.<sup>419</sup>

Rejecting the appellate division's finding, Chief Judge Cooke explained:

When a child-care agency has custody of a child and brings a proceeding to terminate parental rights on the ground of permanent neglect, it must affirmatively plead in detail and prove by clear and convincing evidence that it has fulfilled its statutory duty to exercise diligent efforts to strengthen the parent-child relationship and to reunite the family. Only when this duty has been deemed satisfied may a court consider and determine whether the parent has fulfilled his or her duties to maintain contact with and plan for the future of the child.<sup>420</sup>

Chief Judge Cooke explained that only when an agency has tried to assist a parent in meaningful ways, such as: providing counseling with respect to a problem that interferes with the return of the

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<sup>413</sup> *Id.*

<sup>414</sup> *Id.*

<sup>415</sup> *Id.*

<sup>416</sup> *See id.* at 1142.

<sup>417</sup> *See id.* The definition for "permanent neglect" is codified in section 384-b(7) of the New York Social Services law, which provides that a permanently neglected child:

[M]ean[s] a child who is in the care of an authorized agency and whose parent or custodian has failed for a period of more than one year following the date such child came into the care of an authorized agency substantially and continuously or repeatedly to maintain contact with or plan for the future of the child, although physically and financially able to do so, notwithstanding the agency's diligent efforts to encourage and strengthen the parental relationship when such efforts will not be detrimental to the best interests of the child.

*Id.* at 1145.

<sup>418</sup> *See id.* at 1143.

<sup>419</sup> *See id.* at 1144.

<sup>420</sup> *Id.* at 1140–41.

child; assisting in planning for a child's future; aiding in attaining a house; or scheduling regular and meaningful visits between the child and the parent, then the agency will be found to have satisfied its statutory duty.<sup>421</sup>

Chief Judge Cooke noted that the agency made no attempts to assist the father, who presented them with two separate plans to gain custody of his child.<sup>422</sup> In fact, the agency frustrated his attempts and made it difficult for him to regain custody by failing to make suitable arrangements for visits.<sup>423</sup> Chief Judge Cooke held that the agency acted with complete indifference to the father's goals, failing to satisfy its statutory obligations.<sup>424</sup> Chief Judge Cooke noted: "[I]t is doubtful whether it could be found to be in the child's best interest to deny her [parent's] persistent demands for custody simply because it took so long for [him] to obtain it legally."<sup>425</sup>

### CONCLUSION

Chief Judge Cooke was not only an accomplished judge, but also a human being of the finest caliber. He was a leader in all aspects of life, a man of integrity, and a being of moral excellence. Chief Judge Cooke's legacy as a man, judge, and public leader is truly exemplary, because:

However high he rose in public life, however powerful he became, however long the list of his accomplishment, [he] treated everyone, everyone, with kindness and respect. The fact is he changed a lot of things, but some things never changed. His hat size never changed. His concern for people never changed, and he never deviated from his own fundamental values. Always he took the high road.<sup>426</sup>

For his contributions as a judge, Professor Bonventre best explained that Chief Judge Cooke will be most remembered:

[F]or his tenure on the Court of Appeals, as its foremost guardian of individual rights, its most unrelenting opponent of inequity, oppression, and inhumane treatment. For his human dimension to judging. For his sensitivity to individual and community needs, for his commitment to

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<sup>421</sup> See *id.* at 1147, 1148.

<sup>422</sup> *Id.* at 1149.

<sup>423</sup> *Id.* at 1149–50.

<sup>424</sup> *Id.* at 1150.

<sup>425</sup> *Id.* (quoting *In re Sanjivini K.*, 391 N.E.2d 1316, 1320 (N.Y. 1979)).

<sup>426</sup> Judith S. Kaye, *Eulogy for Chief Judge Lawrence H. Cooke*, 64 ALB. L. REV. 5, 7 (2000).

reducing injustice, and elevating the conduct of public officials.<sup>427</sup>

Upon his unfortunate passing on August 17, 2000,<sup>428</sup> it was clear that the New York State judiciary and the legal community had been blessed to be amidst greatness.<sup>429</sup> “He served the state brilliantly to the very last minute, [and] to speak only from the record books would ignore the amazing warmth he always displayed . . . . His mission was to treat everyone equally. Always, he took the high road.”<sup>430</sup>

Chief Judge Lawrence H. Cooke, we cherish your memory and continue to follow your wisdom and unwavering dedication of service to the law, your community, and the State of New York.<sup>431</sup>

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<sup>427</sup> Bonventre, *supra* note 72, at 1.

<sup>428</sup> Adolfsen & Adolfsen, *supra* note 34.

<sup>429</sup> See, e.g., William H. Honan, *Lawrence H. Cooke, 85, New York Chief Judge, Dies*, N.Y. TIMES (Aug. 19, 2000), <http://www.nytimes.com/2000/08/19/nyregion/lawrence-h-cooke-85-new-york-chief-judge-dies.html>.

<sup>430</sup> John Emerson, *County Mourns at Judge Cooke's Funeral*, SULLIVAN COUNTY DEMOCRAT (Aug. 25, 2000), <http://www.sc-democrat.com/archives/2000/news/08August/25/cooke.html>.

<sup>431</sup> As former Chief Judge Kaye expressed, Judge Cooke “wasn’t just born with the love of his community, he earned it every single day.” Kaye, *supra* note 426, at 7.