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JUDGE BERNARD S. MEYER:
FIRST MERIT APPOINTEE TO THE NEW YORK COURT OF
APPEALS

*Vincent R. Johnson**

To Bernard S. Meyer (1916–2005), Judge of the New York Court of Appeals (1979–1986), who, with integrity, keen intellect, and tireless effort, championed the rights of those who needed help most.¹

ARTICLE CONTENTS

I.	THE CHALLENGE OF A LIFETIME AT AGE 63	965
II.	SELECTING LAW CLERKS	971
	A. <i>Treating Law Clerks as Equals</i>	972
	B. <i>The Best State Court in the Nation</i>	974
	C. <i>The Learning Curve</i>	976
III.	TAKING THE OATH IN NEW YORK CITY.....	977
IV.	ARRIVING IN ALBANY IN THE MIDDLE OF THE NIGHT.....	979
V.	PERSISTING IN THE FACE OF POLITICAL ADVERSITY	980
	A. <i>The 1969 Race</i>	980

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¹ SUSAN SAAB FORTNEY & VINCENT R. JOHNSON, *LEGAL MALPRACTICE LAW: PROBLEMS AND PREVENTION* iii (2008) (dedication by the author).

964	Albany Law Review	[Vol. 75.2
	B. <i>The 1972 Race</i>	982
	C. <i>The 1973 and 1978 Openings</i>	985
VI.	PROGRESSIVE REFORMER.....	986
	A. <i>Respect for the Law</i>	986
	B. <i>Civil Libertarian</i>	988
	C. <i>Judicial Activist and Friend of Those in Need</i>	989
	D. <i>Frequent Dissenter</i>	992
VII.	ELOQUENT AUTHOR.....	994
	A. <i>Quotable</i>	995
	B. <i>Precise Sentences</i>	996
	C. <i>Insights from the Academy</i>	998
	D. <i>Attention to Legislative History</i>	999
	E. <i>Fascinating Issues</i>	1000
	F. <i>National Prominence</i>	1001
VIII.	CRUSHING WORKLOAD	1002
	A. <i>The Caseload of the Court</i>	1003
	1. <i>Sessions in Albany</i>	1005
	2. <i>Dividing the Work</i>	1006
	3. <i>The Range of Tasks</i>	1007
	4. <i>Prompt Decisions</i>	1008
	B. <i>Peripatetic Judging</i>	1008
	C. <i>Before Computers</i>	1011
	D. <i>Constantly Moving the Office</i>	1012
	E. <i>Keeping Track of Everything</i>	1013
IX.	MASTERING THE NEW JOB.....	1014
	A. <i>Midtown Manhattan</i>	1014
	B. <i>Temporary Chambers with No Books</i>	1015
	C. <i>Home Chambers in the Bar Building</i>	1016
	D. <i>Secretarial Support</i>	1017
	E. <i>Endless Reading</i>	1017
	F. <i>Long Hours</i>	1020
	G. <i>Mystery and Majesty</i>	1021
	H. <i>Clerks' Mischief</i>	1023
	I. <i>The Pace during Intersessions</i>	1024
	J. <i>Law as Both Vocation and Avocation</i>	1024
	K. <i>The Great Arcania of Court of Appeals Practice</i>	1026
X.	LIFE AFTER THE BENCH.....	1027
	A. <i>ABA Standards on State Judicial Retirement</i>	1029
	B. <i>Intellectual Historian</i>	1031
	C. <i>Legacy</i>	1032

INTRODUCTION

Bernard S. Meyer's great professional ambition was to be a judge on the New York Court of Appeals.² However, when he finally reached that goal, he found being a member of the state's highest tribunal was not quite what he expected. As he humorously explained to the Albany County Bar Association after almost eight months in office, "notwithstanding my long-held aspiration to be on the Court, I really did not know before I got there where I was going"³ This is the story of Judge Meyer's exhilarating, exhausting, and highly productive first year on the New York Court of Appeals.

I. THE CHALLENGE OF A LIFETIME AT AGE 63

A Marylander by birth (June 7, 1916) and education, Bernard S. Meyer received his undergraduate degree at Johns Hopkins University (1936)⁴ and graduated "first in his class"⁵ at the University of Maryland School of Law (1938).⁶ As a boy, he "caught the legal bug by hanging around his uncle's law office in

² See Judith S. Kaye, Chief Judge, New York Court of Appeals, Keynote Address at the Nassau County Supreme Court: Tribute to Hon. Bernard S. Meyer 4 (Sept. 19, 2005) ("As we know, from the age of six or seven, when he abandoned his ambition to be a streetcar conductor, he wanted only to be a lawyer, ultimately a judge, and finally a Judge of the Court of Appeals.") (on file with Albany Law Review); see also Maurice Carroll, *Bernard Meyer, Nassau Democrat, Named by Carey to Appeals Court*, N.Y. TIMES, Apr. 20, 1979, at A1 ("Mr. Meyer told reporters in Albany that his only ambition had been to be a judge and that to sit on the Court of Appeals was 'the highest honor bestowed upon a practicing lawyer.'").

³ Bernard S. Meyer, Address to the Albany County Bar Association 2 (Jan. 10, 1980) (on file with Albany Law Review) [hereinafter Meyer's Address to Albany Cnty. Bar Ass'n]. Meyer illustrated his point with a story, which he credited to Judge Hugh Jones, about Justice Oliver Wendell Holmes, who sat with the United States Supreme Court "until he was well on in years." *Id.* As Meyer explained,

Travel in those days was by train, and the setting of the story is with Mr. Justice Holmes on a train out of Washington during one of the Court's intersessions. When the conductor came by collecting tickets the good Justice, search as he would through his pockets, could not find his. As he continued to search, the conductor, who recognized the justice, said to him "Mr. Justice, please don't bother. I'm sure the railroad would be happy to have you send in the ticket when you find it or a check for the fare, if you don't," to which Holmes rejoined "Young man you just don't understand my problem. I don't know where I'm going."

Id.

⁴ Sal Ferlazzo, *Bernard Stern Meyer, in THE JUDGES OF THE NEW YORK COURT OF APPEALS: A BIOGRAPHICAL HISTORY* 785-86 (Albert M. Rosenblatt ed., 2007).

⁵ Sol Wachtler, Chief Judge, New York Court of Appeals, Remarks at Ceremony Marking Retirement of Senior Associate Judge Bernard S. Meyer (Dec. 16, 1986), *in* 68 N.Y.2d VII, vii (1986) [hereinafter Wachtler Remarks at Meyer Retirement].

⁶ Ferlazzo, *supra* note 4, at 786. For a brief sketch of Meyer's career, see BERNARD S. MEYER ET AL., *THE HISTORY OF THE NEW YORK COURT OF APPEALS, 1932-2003*, at 31 (2006). For a more complete biography, see Ferlazzo, *supra* note 4, at 785-90.

Baltimore.”⁷

Meyer was admitted to the Maryland bar (1938) and, after three years in practice, accepted a position in the office of the General Counsel for the United States Department of the Treasury.⁸ He moved to New York in 1947⁹ following service in the World War II Pacific theatre from 1943 to 1946.¹⁰

Meyer became a member of the New York bar in 1947,¹¹ apparently without needing to take a New York bar examination,¹² because of privileges accorded to veterans.¹³ In New York, Meyer established himself in private practice, handling “commercial, corporate, estate and real estate cases.”¹⁴ He was also active in local politics, serving as the Democratic County Chairman in Nassau County (1957–1958).¹⁵

In 1958, Meyer was elected a Justice of the New York Supreme Court, 10th Judicial District (Nassau County), where he served a full fourteen-year term as a trial judge.¹⁶ Before that term ended at the close of 1972, Meyer had earned a sterling reputation as a jurist,¹⁷ and had come tantalizingly close to winning a seat on the

⁷ Irvin Molotsky, *I Consider Myself a Reformer*—Meyer, N.Y. TIMES, Apr. 29, 1979, at LI10.

⁸ See MEYER ET AL., *supra* note 6, at 31.

⁹ See *id.*; see also *Critic of Attica Inquiry: Bernard Stearn [sic] Meyer*, N.Y. TIMES, Dec. 22, 1975, at 1 [hereinafter *Critic of Attica Inquiry*] (noting the date of Judge Meyer’s move to New York).

¹⁰ *Critic of Attica Inquiry*, *supra* note 9, at 1 (“[Meyer] served in the Navy as an air combat intelligence officer assigned to a torpedo squadron.”).

¹¹ MEYER ET AL., *supra* note 6, at 31.

¹² See Kristin Booth Glen, *Thinking Out of the Bar Exam Box: A Proposal to “MacCrate” Entry to the Profession*, 23 PACE L. REV. 343, 462 n.513 (2003) (listing Meyer among notable lawyers who never took a bar exam).

¹³ *Id.* at 462 (“For many years, in New York and, no doubt, in other states, veterans were exempt from taking the bar exam if they graduated from law school within a certain period of their service.”).

¹⁴ *Critic of Attica Inquiry*, *supra* note 9, at 1.

¹⁵ Ferlazzo, *supra* note 4, at 786; Lesley Oelsner, *Appeals Court Race Lacks Politicking*, N.Y. TIMES, June 10, 1972, at 13 (noting Judge Meyer’s chairmanship).

¹⁶ Ferlazzo, *supra* note 4, at 786. Unlike most other U.S. states, New York calls its trial and intermediate appellate courts the “Supreme Court.” *Introduction to the Courts: Court Structure*, N.Y. ST. UNIFIED CT. SYS., <http://www.courts.state.ny.us/courts/structure.shtml> (last updated Aug. 9, 2004). The highest court in the state is the Court of Appeals. See *id.*; see also DAVID D. SIEGEL, NEW YORK PRACTICE § 10, at 14–17 (5th ed. 2011) (providing an introduction to the structure and nomenclature used in the New York Courts). In New York, the members of the Court of Appeals are titled “Judges,” while those sitting on the bench of the State Supreme Court are titled “Justices.” See SIEGEL, *supra*, §§ 10, 12. Judge Meyer liked puns, and I heard him repeat the quip that this system of judicial nomenclature means “there is no justice at the New York Court of Appeals.”

¹⁷ See, e.g., Ferlazzo, *supra* note 4, at 787–88; Wachtler, *supra* note 5, at vii–viii. Judge Meyer served as Chairman of the National Conference of State Trial Judges (1970–1971), President of the Association of Justices of the Supreme Court of the State of New York (1970–

high court.¹⁸ Indeed, as the end of Meyer's term neared, Governor Nelson Rockefeller, a Republican, took the "unusual" step of issuing a statement praising Meyer, a Democrat.¹⁹ Rockefeller recognized Meyer's "distinguished services to the judicial process" and declared that "[i]t is most important that the judicial system does not lose . . . a man of outstanding ability, who has rendered great service to the people."²⁰

However, Meyer's first two bids for a seat on the New York Court of Appeals had failed in 1969²¹ and 1972.²² Despite an invitation to accept the deanship at Hofstra University School of Law,²³ Meyer returned to private practice in 1973.²⁴

1971), member of the Board of Directors of the National Center for State Courts (1971–1972), and member of the Board of the National College of the Judiciary (1968–1974). *Bernard S. Meyer* (COURT OF APPEALS SERVICE: 1979–1986), NEW YORK ST. UNIFIED CT. SYS., http://www.courts.state.ny.us/history/bios/meyer_bernard.htm (last visited Feb. 10, 2012). For additional information on Judge Meyer's professional experience, see *Bernard S. Meyer—In Memoriam*, MEYER, SUOZZI, ENGLISH & KLEIN, P.C., <http://www.msek.com/profiles/in-memoriam/bernard-s-meyer.php> (last visited Feb. 10, 2012).

¹⁸ See Edward C. Burks, *7 Run Quietly for 3 Seats on State Court of Appeals*, N.Y. TIMES, Oct. 16, 1972, at 1 (stating that Meyer had been "a very strong contender to fill [a] vacancy" on the Court of Appeals in 1969).

¹⁹ William E. Farrell, *Governor Laments Departure of Meyer from Bench Dec. 31*, N.Y. TIMES, Nov. 30, 1972, at 52.

²⁰ *Id.*

²¹ Clayton Knowles, *Gibson Nominated to Appeals Court*, N.Y. TIMES, Sept. 5, 1969, at 1.

²² See Maurice Carroll, *3 Leading Race for Chief Judge*, N.Y. TIMES, Mar. 12, 1973, at 18.

²³ While I was clerking for Judge Meyer, he told me that in the early 1970s (perhaps when he left the supreme court at the end of 1972, but maybe at a different time, such as when he lost his 1969 race for the Court of Appeals), he had been offered the deanship at Hofstra University's School of Law. That law school opened in 1970 and was accredited in 1971. *Hofstra University School of Law*, ADMISSIONSDEAN.COM, http://www.admissionsdean.com/law_schools/hofstra-university-school-of-law (last visited Feb. 10, 2012). Meyer said that he decided to return to law practice because it would take too long for him to re-orient himself to the challenges of legal education and become the type of dean he would want to be. In 1980, Meyer received an honorary doctorate from Hofstra University. *Honorary Degrees*, HOFSTRA U., http://www.hofstra.edu/About/about_hondegrees.html (last visited Feb. 10, 2012). In 1987, Judge Meyer was given the "Hofstra University Presidential Medal." *Bernard S. Meyer—In Memoriam*, *supra* note 17.

Meyer continued to have special interest in legal education. He served as a member of the American Bar Association's Accreditation Committee from 1984 to 1985. See A REVIEW OF LEGAL EDUCATION IN THE UNITED STATES FALL, 1984 LAW SCHOOLS AND BAR ADMISSIONS REQUIREMENTS, A.B.A. SEC. LEGAL EDUC. & ADMISSIONS TO THE B. vi (1985). In that capacity, Judge Meyer attended a meeting of the committee held at the new Sarita Kenedy East Law Library at St. Mary's University in the 1984–85 academic year. During that visit, Judge Meyer met with a group of my students for about an hour on one of the library's large outdoor balconies. Judge Meyer and the students discussed his work as a judge and the role of judicial law clerks.

²⁴ See Rick Brand, *Bernard Meyer, 89, Former Appeals Court Judge*, NEWSDAY, Sept. 7, 2005, at A38 (indicating Judge Meyer's tenure as a New York State Supreme Court Justice from 1959–1972); Anthony J. McNulty, *Remembering Judge Meyer*, N.Y. L.J., Sept. 19, 2005, at 17 (noting Judge Meyer's return to the firm he founded after retiring from the court).

Meyer made other efforts to reach the Court of Appeals during the ensuing years, and in 1975 conceded to the *New York Times*, “I will certainly never lose my interest in the bench.”²⁵ However, up until 1979, he had not succeeded in his quest for the top court. That year he would turn sixty-three. Many persons might have concluded that his chances of sitting on the Court of Appeals were fading. Retirement of judges is mandatory in New York at age seventy.²⁶ However, the cause was not yet hopeless. In Meyer’s era, some men had been even older when they reached the high court: in 1966, Kenneth Keating ascended as he “approached age” sixty-six;²⁷ in 1970, James Gibson was almost sixty-eight years of age.²⁸

Importantly, New York State had recently changed its system of selecting judges for the Court of Appeals. The change was due in part²⁹ to the rancorous³⁰ election race for Chief Judge in 1973

²⁵ *Critic of Attica Inquiry*, *supra* note 9.

²⁶ N.Y. CONST. art. VI, § 25(b) (“Each judge of the court of appeals, justice of the supreme court, judge of the court of claims, judge of the county court, judge of the surrogate’s court, judge of the family court, judge of a court for the city of New York . . . and judge of the district court shall retire on the last day of December in the year in which he or she reaches the age of seventy.”); N.Y. JUD. CT. ACTS LAW § 23 (McKinney 2011) (“No person shall hold the office of judge, justice or surrogate of any court, whether of record or not of record, except a justice of the peace of a town or police justice of a village, longer than until and including the last day of December next after he shall be seventy years of age . . .”). For a discussion of mandatory retirement in New York, see BERNARD S. MEYER, *JUDICIAL RETIREMENT LAWS OF THE FIFTY STATES AND THE DISTRICT OF COLUMBIA* 175–79 (1999).

²⁷ See Edward R. Korman & Abbott A. Leban, *Kenneth Barnard Keating*, in *THE JUDGES OF THE NEW YORK COURT OF APPEALS: A BIOGRAPHICAL HISTORY*, *supra* note 4, at 673, 676.

²⁸ See Robert Barker, *James Gibson*, in *THE JUDGES OF THE NEW YORK COURT OF APPEALS: A BIOGRAPHICAL HISTORY*, *supra* note 4, at 705–06 (noting that Gibson was born on January 21, 1902 and elected to the Court of Appeals in 1969).

²⁹ See BERNARD S. MEYER ET AL., *supra* note 6, at 30 (“In part, because of the stridency of [the] campaign [of Judge Jacob Fuchsberg], the New York State Constitution was amended to provide for the appointment rather than the election of judges to the Court of Appeals.”).

³⁰ See Maurice Carroll, *15 Ex-Heads of Bar Group Say Fuchsberg Slandered Judiciary*, N.Y. TIMES, Nov. 1, 1973, at 38 (indicating that fifteen former presidents of the New York State Bar Association charged that Fuchsberg, whose campaign posters carried a headline reading “Jacob Fuchsberg vs. the Status Quo,” committed a “flagrant misrepresentation” by running an expensive advertising campaign which complained that “hardened criminals walk the streets while criminals rot in jail because judges do not do a day’s work”); Thomas P. Ronan, *Breitel and Fuchsberg in Bitter Clash*, N.Y. TIMES, Nov. 3, 1973, at 60 (discussing accusations of falsity levied by both candidates).

The personal animosity between Breitel and Fuchsberg was accompanied by rivalries among the myriad of bar associations that issued public evaluations of the candidates. At one point, “the president of the New York State Trial Lawyers Association, together with the presidents of several small and obscure bar associations, held a news conference . . . to denounce the former presidents of the New York Bar Association as ‘arrogant’ and ‘parchment-collar lawyers.’” Mary Breasted, *Rivalry Among Bar Groups Marks Chief-Judge Race*, N.Y. TIMES, Nov. 3, 1973, at 60. In general, with respect to judicial selection, the New York State and New York City bar associations, which were largely comprised of “established” lawyers, “favor[ed] the appointment of judges while the trial lawyers favor[ed]

between Charles D. Breitler³¹ (who won) and Jacob D. Fuchsberg³² (who lost the race for Chief Judge, but was elected an Associate Judge in 1974).³³ After decades of filling positions on the Court of Appeals via bipartisan political party agreements,³⁴ New York had experimented briefly in the 1970s with contested partisan elections.³⁵ That experiment, widely judged to be a disaster,³⁶ had come to an end. Instead, as the result of a state constitutional amendment passed in 1977, judges for the Court of Appeals would thereafter be selected by the governor based on “merit,” with the choice made from a list of candidates compiled by the Commission on Judicial Nomination.³⁷

election of judges.” *Id.* Breitler’s victory over Fuchsberg may have been the result of “low voter turnout in New York City” and “the feuds of city Democrats.” Mary Breasted, *Breitler Wins Decisively in Race for Chief Judge*, N.Y. TIMES, Nov. 8, 1973, at 53.

³¹ See MEYER ET AL., *supra* note 6, at 16–17 (offering a brief biographical sketch of Breitler); see also James W. B. Benkart, *Charles David Breitler*, in *The JUDGES OF THE NEW YORK COURT OF APPEALS: A BIOGRAPHICAL HISTORY*, *supra* note 4, at 685–92 (providing a biography of Chief Judge Breitler).

³² See MEYER ET AL., *supra* note 6, at 30 (offering a brief biographical sketch of Fuchsberg); see also Stuart Cohen, *Jacob David Fuchsberg*, in *The JUDGES OF THE NEW YORK COURT OF APPEALS: A BIOGRAPHICAL HISTORY*, *supra* note 4, at 762–66 (providing a biography of Fuchsberg).

³³ Cohen, *supra* note 32, at 764. The controversy surrounding the 1973 race for Chief Judge followed Fuchsberg into his successful election campaign the following year. “The Association of the Bar of the City of New York departed . . . from its usual style of rating judicial candidates in a word or two—preferred, highly qualified, not approved—to issue a strongly worded statement [accompanied by a nine-page summary] criticizing Jacob Fuchsberg and urging the voters to choose from among his three opponents in the Court of Appeals race.” Mary Breasted, *City Bar Unit, in Rare Act, Urges Fuchsberg’s Defeat*, N.Y. TIMES, Oct. 25, 1974, at 1.

³⁴ See Carroll, *supra* note 30, at 38 (“[T]he state’s top judicial job . . . for more than 50 years has been filled by bipartisan agreements rather than by public campaigns.”).

³⁵ See Mary Breasted, *Usual Reserve Lost in Chief Judge Race*, N.Y. TIMES, Oct. 12, 1973, at 1.

³⁶ *Id.* at 1, 49 (describing the 1973 race for chief judge as “possibly the bitterest judicial campaign in the state’s history,” and noting that “[n]ot since 1916 has this state witnessed a chief judge’s race in which a Republican has opposed a Democrat”).

³⁷ See *THE JUDGES OF THE NEW YORK COURT OF APPEALS: A BIOGRAPHICAL HISTORY*, *supra* note 4, at xxxvi (“[I]n 1977, the court went from elected to appointed by virtue of a constitutional amendment creating a Commission on Judicial Nomination, which furnishes a list of candidates from which the governor selects a judge whenever there is a vacancy.”). Article VI, § 2 of the New York State Constitution now provides in relevant part:

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

d. . . . (4) The commission shall consider the qualifications of candidates for appointment to the offices of judge and chief judge of the court of appeals and, whenever a vacancy in those offices occurs, shall prepare a written report and recommend to the governor

As the end of the decade drew near, an opening on the Court of Appeals arose because Chief Judge Breitel was required to retire due to age at the end of 1978.³⁸ Associate Judge Lawrence H. Cooke was then elevated by Governor Hugh Carey to Chief Judge in early 1979.³⁹ Carey therefore had the task of nominating a candidate for the resulting vacancy on the seven-member high court. That person would become the first individual to reach the Court of Appeals as an appointee under the new system.⁴⁰

Based on a reputation for integrity and a record of professional accomplishment, Meyer was chosen as the first merit appointee to the New York Court of Appeals.⁴¹ As future Chief Judge Judith S. Kaye later explained, “Judge Meyer was the first to arrive on the Court of Appeals via the appointment route, though he also had the dubious distinction of being the last to taste the disappointment of the election route”⁴²

Meyer’s nomination was “something of a surprise,” which had been helped by “laudatory newspaper editorials” about him and “a letter of support . . . from several law school deans”⁴³ However, it is difficult to imagine that there was a better candidate to prove the merits of a merit-based system of judicial selection. As Professor Vincent Bonventre of Albany Law School later remarked, Meyer was “an exceptionally capable judge of the court from 1979 to

persons who are well qualified for those judicial offices.

e. The governor shall appoint, with the advice and consent of the senate, from among those recommended by the judicial nominating commission, a person to fill the office of chief judge or associate judge, as the case may be, whenever a vacancy occurs in the court of appeals; provided, however, that no person may be appointed a judge of the court of appeals unless such person is a resident of the state and has been admitted to the practice of law in this state for at least ten years. The governor shall transmit to the senate the written report of the commission on judicial nomination relating to the nominee.

N.Y. CONST. art.VI, § 2; *see also* Richard J. Bartlett, *Courting Court Reform: Looking Back, Moving Forward*, 71 ALB. L. REV. 457, 462–69 (2008) (discussing the law reform efforts that led to the constitutional amendment).

³⁸ *See* Benkart, *supra* note 31, at 685, 691.

³⁹ *See* MEYER ET AL., *supra* note 6, at 17–18 (offering a brief biographical sketch of Cooke); *see also* Joyce Adolfsen & Lou Adolfsen, *Lawrence Henry Cooke*, in *THE JUDGES OF THE NEW YORK COURT OF APPEALS: A BIOGRAPHICAL HISTORY*, *supra* note 4, at 769–82 (providing further biographical information).

⁴⁰ In 1974, the last judges elected by general ballot were Judge Fuchsberg and Judge Cooke. *See* Cohen, *supra* note 32, at 763–64; Adolfsen & Adolfsen, *supra* note 39, at 772.

⁴¹ *See* Carroll, *supra* note 2 (quoting Governor Carey as saying that Meyer “distinguishes himself by his long and respected service in the State Supreme Court and his pre-eminent knowledge of law.”).

⁴² Kaye, *supra* note 2, at 2.

⁴³ Carroll, *supra* note 2, at A1, B5.

2011/2012]

Judge Bernard S. Meyer

971

1986.”⁴⁴

Meyer was unpretentious,⁴⁵ intelligent, open-minded, hardworking, scholarly,⁴⁶ and compassionate.⁴⁷ Respected professionally⁴⁸ and self-effacing,⁴⁹ “he combined a youthful energy and sparkle-eyed sense of humor with the judgment and wisdom of the elder statesman.”⁵⁰ And, at the time of his appointment, there was nothing Meyer was more interested in doing than being a judge on the New York Court of Appeals.

II. SELECTING LAW CLERKS

I had not heard of Bernard S. Meyer until I saw his picture in the *New York Times* on April 20, 1979, announcing his appointment the day earlier.⁵¹ I was finishing my studies at Yale Law School, and my plans for the coming year were unsettled. Armed with the newspaper, I went directly to the library in the Sterling Law Building, looked Meyer up in a large printed volume called the *Martindale-Hubbell Law Directory*, and called Meyer’s office on a WATS line⁵² located in the Yale Law School placement office⁵³ to ask whether he would need a law clerk. A secretary at Meyer’s firm

⁴⁴ Vincent Martin Bonventre, Book Review, 49 AM. J. LEGAL HIST. 497, 498 (2007) (reviewing MEYER ET AL., *supra* note 6).

⁴⁵ See Carroll, *supra* note 2 (quoting Meyer’s partner, John F. English, as saying “Bernie makes the morning coffee for the secretaries and the maintenance man”).

⁴⁶ See Ferlazzo, *supra* note 4, at 790 (listing Meyer’s published writings).

⁴⁷ See Wachtler, *supra* note 5, at viii (“Adjectives come to mind such as: competence, integrity, commitment, and dedication to purpose, but they don’t say nearly enough.”).

⁴⁸ See *Bernard S. Meyer—In Memoriam*, *supra* note 17 (“Judge Meyer was an honorary member of Omicron Delta Kappa, the national leadership fraternity, and received the 1963 award of the Nassau County Lawyers’ Association, the 1964 Fraternity Achievement Citation in Law and Letters of Phi Epsilon Pi, the 1968 Long Island Press Distinguished Service Award, and the 1971 St. John’s Law Society Award.”).

⁴⁹ At his retirement ceremony, Meyer playfully mocked himself by imagining that Chief Judge Wachtler might have phrased his remarks in “that lilted lingo of opinionese—saying something like ‘We cannot say that under the totality of circumstances Bernie Meyer has not been a reasonably good judge even though, inter alia, a poor but terrifyingly insistent punster, conceding, however, as we must, that his puns were always de hors the record.’” Wachtler, *supra* note 5, at ix–x (response of Judge Meyer).

⁵⁰ Peter Bienstock, Letter to the Editor, *Remembering Judge Meyer*, N.Y. L.J., Sept. 8, 2005, at 2.

⁵¹ Carroll, *supra* note 2, at A1.

⁵² *ATIS Telecom Glossary 2011, Wide Area Telephone Service (WATS)*, ATIS.ORG, www.atis.org/glossary/definition.aspx?id=760 (last visited Feb. 10, 2012) (defining WATS as a “toll service” for telecommunications).

⁵³ In 1979, long distance phone calls were very expensive. Yale offered its law students the luxury of making free phone calls for career-related purposes on a WATS line in the placement office, which was conveniently located just one floor below my rooms in the law school residence hall.

told me (even after I had mispronounced the judge's name)⁵⁴ that I could submit a résumé. I mailed a letter of application that same day, and soon after doing so, was invited to Mineola, New York for an interview.

On the appointed date, I took the New Haven Railroad to Grand Central Station and then, after a walk and a quick look from a distance at the United Nations headquarters, transferred to Penn Station for the Long Island Railroad. After about a fifty-minute train ride, I arrived in Mineola. I found somewhere to change into my suit, which I had carried with me because I wanted it to look fresh, then walked to the offices of Meyer, English, Cianciulli & Peirez, P.C.⁵⁵ I had only been to New York State once before, for a visit of less than two days.

I had never known anyone who began what was essentially a new career at age sixty-three. That was what Judge Meyer was about to do. In my family, virtually all of the men had been blue-collar factory workers, mainly in the steel industry. They looked forward to retiring as early as possible, typically at age sixty-two, which is what my father did a decade later.

A. *Treating Law Clerks as Equals*

It was a serious interview. Nothing was superficial. I remember that Judge Meyer and I talked about his work on fair trial-free press issues (he had been “a member of the American Bar Association's Advisory Committee on Fair Trial and Free Press which drafted the ABA standards”);⁵⁶ pattern jury instructions (he had “served as the first chair of the Committee on Pattern Jury Instructions—Civil,”⁵⁷ which produced an influential two-volume work);⁵⁸ and church-state relations (he had authored an important

⁵⁴ Raised Roman Catholic in Latrobe, Pennsylvania, and educated often in Catholic schools, I had known very few Jews. Unfamiliar with the name “Meyer,” I mispronounced it “Mayer” when I called to enquire about a position.

⁵⁵ See Molotsky, *supra* note 7 (noting that Meyer was a partner in that “prosperous” firm).

⁵⁶ *Hirschkop v. Snead*, 594 F.2d 356, 364 (4th Cir. 1979) (discussing Meyer's testimony as an expert witness); see also *Critic of Attica Inquiry*, *supra* note 9, at 34 (“[Meyer] was instrumental in establishing the Fair Trial Free Press Conference.”); Molotsky, *supra* note 7 (“[Meyer] was the founder of the Fair Trial-Free Press Conference”); M. T. Mahon, Starting Hofstra Law School 15 (May 2, 2005) (unpublished manuscript), available at http://law.hofstra.edu/pdf/Media/Malachy_Mahon_first_five_yrs.pdf (“Judge Meyer had been designated to make the floor presentation on the ‘Fair Trial, Free Press’ minimum standards to the [ABA] House of Delegates.”).

⁵⁷ MEYER ET AL., *supra* note 6, at 31 (noting Meyer's service in this capacity for the Association of Justices of the Supreme Court of New York).

⁵⁸ *Critic of Attica Inquiry*, *supra* note 9 (describing the work performed as creating “model

2011/2012]

Judge Bernard S. Meyer

973

opinion as a trial judge on the constitutionality of school prayer in what eventually became a landmark case).⁵⁹ In our conversation, I raised each of those subjects. I had tried to be well prepared because I wanted the position.

Judge Meyer, in turn, made conversation by mentioning two of the persons listed on my resume as references. One of them was a professor at Notre Dame Law School, my J.D. alma mater, former dean Thomas L. Shaffer. Meyer had an interest in that entry because he had known Shaffer's predecessor, a former New York Supreme Court Justice, William B. Lawless, Jr., who served as dean of Notre Dame Law School from 1968 to 1971.⁶⁰ Another of my references was Professor John Simon at Yale Law School. By chance decades earlier, Simon, as a law student at Yale,⁶¹ had edited an article that Meyer published in the *Yale Law Journal*. That work dealt with a highly specialized topic in which I found it difficult to feign interest, "*Recognition of Exchange Controls After the International Monetary Fund Agreement*."⁶² Perhaps the article grew out of expertise that Meyer had developed while working in the U.S. Treasury Department before WWII.⁶³

During the interview, Judge Meyer told me that he intended to treat his "law secretaries" (law clerks) as equals.⁶⁴ Years later, he

jury instructions for different kinds of civil cases").

⁵⁹ In a scholarly opinion, complete with 187 footnotes, Meyer dealt with unsettled questions of constitutional law involving the Establishment Clause and Free Exercise Clause of the First Amendment. See *Engel v. Vitale*, 18 Misc. 2d 659, 191 N.Y.S.2d 453 (Sup. Ct. Nassau County 1959), *aff'd*, 11 A.D.2d 340, 206 N.Y.S.2d 183 (App. Div. 2d Dep't 1960), *aff'd*, 10 N.Y.2d 174, 176 N.E.2d 579, 218 N.Y.S.2d 659 (1961), *rev'd*, 370 U.S. 421 (1962). He ruled that the New York Board of Regents "may adopt a form of prayer so long as it does not adopt the prayer of any sect or a prayer sectarian in concept [sic] and does not make recitation of the adopted form compulsory." *Engel*, 18 Misc. 2d at 699, 191 N.Y.S.2d at 495. Ultimately, the United States Supreme Court reversed the judgment and held that the prescribed Regents' prayer was "inconsistent" with the constitutional prohibition of state establishment of religion. *Engel*, 370 U.S. at 433.

⁶⁰ John Nagy, *Deaths in the Family*, NOTRE DAME MAG., (Summer 2007), <http://magazine.nd.edu/news/9840/> (noting Lawless's death).

⁶¹ During 1952–53, John Simon was the Article and Book Review Editor for the *Yale Law Journal*, *Editorial Board*. See 61 YALE L.J. (1952) (masthead).

⁶² Bernard S. Meyer, *Recognition of Exchange Controls After the International Monetary Fund Agreement*, 62 YALE L.J. 867 (1953).

⁶³ See Ferlazzo, *supra* note 4, at 786 (discussing Meyer's early career).

⁶⁴ "Law secretary" seems to be a peculiarly New York usage (probably now obsolete) similar to the Texas term "briefing attorney" (which is not obsolete). Both expressions refer to a judicial law clerk, typically one who serves for a definite, relatively short term. Judge Meyer sometimes used the term "law secretary" to refer to his law clerks, but by 1979 the term sounded like a relic of a bygone era. I do not think that any of the law clerks for New York Court of Appeals judges in 1979 referred to themselves as "law secretaries." See Judith S. Kaye, *A Passion for Justice*, 68 ALB. L. REV. 211, 212 (2005).

repeated that point at a dinner that his former clerks and secretary gave on November 29, 1986, at La Marmite, in Williston Park, Long Island, to celebrate his impending retirement from the Court of Appeals. On that occasion, Meyer said that he always made that statement to the persons he wanted to hire. In 1979, I understood the words about being treated as an equal to be both a promise and an inspirational challenge.

B. The Best State Court in the Nation

I left my interview with Judge Meyer thinking that I had not made much of an impression. So, I was all the more delighted when I received a call on May 9, 1979, offering me a clerkship for a term of “one to three” years. I gave Judge Meyer an enthusiastic acceptance within a few hours. I had been offered admission into a degree program at the Harvard Graduate School of Education for the coming year, but clerking for a judge at what many lawyers thought of as the best state court in the nation⁶⁵ was clearly the

⁶⁵ The sterling reputation of the New York Court of Appeals had long been well-established. See Paxton Blair, Book Review, 53 COLUM. L. REV. 145, 147 (1953) (reviewing HENRY B. COHEN & ARTHUR KARGER, *THE POWERS OF THE NEW YORK COURT OF APPEALS* (1952)) (“It is a widely held belief both among members of the American Bar and among the faculty and students of American law schools that the New York Court of Appeals commands today more genuine respect than any other tribunal sitting under our flag.”). That reputation continues today. See Jack B. Weinstein, *The New York Court of Appeals in the Eyes of a Neophyte*, 48 SYRACUSE L. REV. 1469, 1469 (1998) (“New York Court of Appeals decisions are cited as guiding wisdom by all the states’ judiciaries, the federal courts, and the common law nations of the world.”).

Of course, those of us who clerked at the Court of Appeals in 1979–80 worried that the California Supreme Court was ascendant. We feared that it might soon eclipse, or perhaps had already surpassed, the New York high court as the nation’s most visible and influential state tribunal.

When I entered law teaching in 1982, not long after my clerkship with Judge Meyer, I noted with a mixture of relief and pride the contents of the newest edition of the Prosser torts casebook. William L. Prosser (1898–1972) had been the dean of the University of California at Berkeley law school and the most important torts scholar of the twentieth century. Christopher J. Robinette, *The Prosser Notebook: Classroom as Biography and Intellectual History*, 2010 U. ILL. L. REV. 577, 579 (2010) (citing Craig Joyce, Book Review, *Keepers of the Flame: Prosser and Keeton on the Law of Torts (Fifth Edition) and the Prosser Legacy*, 39 VAND. L. REV. 851, 852 (1986)). The new edition of his legendary casebook still contained more “principal cases” from the New York Court of Appeals than from the California Supreme Court. See generally WILLIAM L. PROSSER ET AL., *CASES AND MATERIALS ON TORTS* (7th ed. 1982) (containing numerous cases from the New York Court of Appeals). By this measure, New York was still ahead. But Irving Younger, the legendary Cornell University law professor, had speculated in 1980 that “[b]y the time Charles Breitel became chief judge [of the New York Court of Appeals] in 1974, ‘it was [only] one of the top three [courts in the country] but not the pre-eminent one,’” adding that “[f]or the last five to seven years, it has been doing rather well.” *Watching the Top Court*, EMPIRE ST. REP., Apr. 14, 1980, at 157, 161. In recent years, the Court of Appeals may have retreated from a leadership role in some

2011/2012]

Judge Bernard S. Meyer

975

better option. “For generations,” the New York Court of Appeals “ha[d] been regarded by legal experts as one of the leading tribunals in the country.”⁶⁶ Among other things, the court had “helped rewrite the law of negligence for a new, industrial age.”⁶⁷ As I look back, I can see that my clerking for Judge Meyer was a natural fit.⁶⁸

I quickly spread the news that I had landed the position, knowing it was a coup. I cheerfully told the legendary Yale Law School placement director, Gwendolyn Hachette, when I saw her while I was jogging that afternoon on Prospect Street. When Yale Law Dean Harry H. Wellington quickly inquired about my plans as I was hooded at the graduation ceremonies twelve days later, I proudly reported, “clerking at the New York Court of Appeals.” During that era, such a clerkship came with not just cachet, but cash. Clerks at

areas of the law. Bonventre, *supra* note 44, at 499 (discussing “the dearth of notable advances in the court’s case law and its loss of leadership in the [torts] field,” as well as in the areas of right to counsel and death penalty jurisprudence).

Of course, the prominence of a state supreme court is a function of more than the caliber of its judiciary and the absence of political divisiveness. In part, a court’s reputation may be a function of state population. The courts in large states see more litigation than smaller states and new issues tend to be raised before them earlier than in other jurisdictions. That often gives the highest court of a large state the chance to put its imprint on emerging areas of the law before other states have had an opportunity to rule. By 1980, California had surpassed New York as the most populous state. See BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, 1980 CENSUS OF POPULATION, 1–16, 34–7 (1983), available at http://www2.census.gov/prod2/decennial/documents/1980/1980censusofpopu80134unse_bw.pdf (indicating that California had more than twenty-three million persons and New York, in second place, had more than seventeen million). By 2010, New York had slipped to third place in state population, after California and Texas. U.S. CENSUS BUREAU, U.S. DEPT. OF COMMERCE, POPULATION DISTRIBUTION AND CHANGE: 2000 TO 2010, 2 (2011) [hereinafter POPULATION DISTRIBUTION AND CHANGE], <http://www.census.gov/prod/cen2010/briefs/c2010br-01.pdf>. Still, population is only one factor contributing to court prominence. For much of the twentieth century Pennsylvania was (and today remains) one of the most populous states. See, e.g., *id.* at 2 (stating that Pennsylvania had the sixth highest population in 2000 and 2010). However, in my chief areas of teaching and scholarship—torts and ethics—there seem to be surprisingly few notable decisions from Pennsylvania.

⁶⁶ David Margolick, *New York’s Court of Appeals Faces Vast Changes as a New Era Begins*, N.Y. TIMES, Nov. 7, 1982, at 1.

⁶⁷ *Id.*

⁶⁸ Although we saw each other only five times in the more than twenty-five years between the end of my clerkship and Judge Meyer’s death, we shared a fond regard for one another. In my letter congratulating Judge Meyer on his eightieth birthday, I said, “There have been few events in my life as formative and significant as the opportunity I had to clerk for you during the first thirteen months of your tenure on the New York Court of Appeals. I think of that experience every day, and I am forever grateful that I had the good fortune to begin my work as a member of the legal profession under your guidance and supervision.” Letter from author to Bernard S. Meyer (June 12, 1996) (on file with Albany Law Review). Judge Meyer graciously responded, “I have long been proud of the mark you have made in the field of legal education, though I must confess I wasn’t surprised at that since of all of the law secretaries who assisted me you were the best!” Letter from Bernard S. Meyer to author (July 19, 1996) (on file with Albany Law Review). Even if Judge Meyer lavished similar praise on all of his law clerks, I appreciated his kind words.

New York's highest court were paid just a bit below the salaries of first-year associates at Wall Street law firms.⁶⁹

C. *The Learning Curve*

I think that my co-clerk, Morgan F. Kelly, was hired by Judge Meyer before I was given an offer. However, nearly two decades later, when I served as Reporter for the American Bar Association's Standards for State Judicial Retirement,⁷⁰ Judge Meyer, who was a leader of that law reform effort,⁷¹ introduced me as his "first clerk." Perhaps that was because I completed my clerkship before Kelly, who stayed for two years with Judge Meyer, rather than one.⁷² Kelly and I were Judge Meyer's only clerks during his first year on the Court of Appeals.⁷³

Kelly, a graduate of St. John's University School of Law in Jamaica, New York, had previously clerked at the Appellate Division for the Second Department. He brought with him to Meyer's chambers valuable knowledge about New York law, standards of review, and the state's appellate court system. In contrast, I had no background in New York jurisprudence, no

⁶⁹ I was scheduled to make \$23,381 per year. When I told that news to Yale law professor Quintin Johnstone, he was unimpressed. He said that, on Wall Street that year, new lawyers were making about \$27,000. However, I later learned that my clerkship salary would rise. Near the beginning of October 1980, more than two months after I had finished clerking for Judge Meyer, I received a check from the State of New York for \$2,191.52, with a note saying that the legislature had passed a retroactive pay increase for certain nonjudicial personnel and that it applied to my period of service. Memorandum from J. Brian Fitzpatrick to Court of Appeals Employees (former) (on file with Albany Law Review) (undated, but accompanying a statement for the salary period ending Sept. 24, 1980). I thought that the news was miraculous. My year at the Court of Appeals had taught me that a legislature, in awarding retroactive benefits, could rationally differentiate between employees still in service (whom the government might wish to retain) and employees who had left service (and who therefore could not be retained). However, the New York State Legislature had not chosen to draw such a distinction. As a result of the retroactive raise, my annual "base salary" for clerking at the Court of Appeals in 1979–80 rose to \$25,949. *See id.* ("Chapter 537 of the Law of 1980 as amended by Chapter 542 provides a new salary schedule and a salary increase effective April 1, 1979 The enclosed check represents the increases retroactively for the period . . . through your termination date.")

⁷⁰ STANDARDS FOR STATE JUDICIAL RETIREMENT, AM. BAR ASS'N 2 (2000).

⁷¹ *See* James A. Noe, *Judicial Retirement Standards Adopted*, JUD. DIVISION REC., Winter 2000, at 7 ("The standards were based in large part on the study and recommendations by Judge Bernard S. Meyer (Ret.).").

⁷² COURT OF APPEALS, COUNSEL TO THE COURT: LAW CLERKS AND ATTORNEYS OF THE COURT OF APPEALS 34 (2005) [hereinafter COUNSEL TO THE COURT] (indicating that Kelly clerked from 1979 to 1981).

⁷³ Meyer's other clerks during his time on the Court of Appeals were Richard C. Hamburger (1980–82), Salvatore D. Ferlazzo (1981–83), Thomas H. Busch (1982–84), Howard Comet (1983–85), Nancy Creswell (1984–86), and James Kennedy (1985–86). *See id.* at 80.

2011/2012]

Judge Bernard S. Meyer

977

experience with its courts, and was a member of the bar in Pennsylvania, not New York.⁷⁴ I needed to surmount a sharp learning curve if I was to prove useful in my new position.

I do not know how common it has been for judges of the Court of Appeals to hire clerks who graduated from out-of-state law schools. However, clerking at the New York Court of Appeals—a major tribunal by any measure—has often led to careers and retirements outside of New York. Law clerks and attorneys who served the New York Court of Appeals have fanned out to at least twenty-eight states, the District of Columbia, and five foreign nations.⁷⁵

III. TAKING THE OATH IN NEW YORK CITY

Judge Meyer was scheduled to be confirmed by the New York Senate the day after my commencement at Yale. The plan was that I would leave most of my belongings in New Haven, take a suitcase to New York City, attend Judge Meyer's swearing-in at a luncheon at the elegant Halloran House,⁷⁶ then leave with him and his wife for Albany. Meyer planned to take up his duties as soon as possible as part of the Court of Appeals' impending session of arguments.

However, on the day in question (Tuesday, May 22, 1979), the time sequence was thrown off. The confirmation process in Albany took longer than expected. Mrs. Edythe Meyer, the judge's second wife,⁷⁷ later told me that sitting in the senate gallery that day was

⁷⁴ In my application letter to Judge Meyer, I had expressed a willingness to take the New York bar examination, if that was necessary. Letter from author to Bernard S. Meyer (Apr. 20, 1979) (on file with Albany Law Review). When I was offered the position, Meyer said that I should do that during the year. However, we quickly found ourselves so preoccupied with the work of the court that the subject was never mentioned again. It would have been utterly impractical for me to take time to study for the bar examination. At the conclusion of my year with Judge Meyer, I moved to Chicago to clerk at the Seventh Circuit, without having become licensed in New York.

⁷⁵ See COUNSEL TO THE COURT, *supra* note 72, at 89–98 (proving a geographic listing of counsel).

⁷⁶ “The building, [which was originally the Shelton Towers Hotel] became the Halloran House in 1978, is not an architectural masterpiece, but its decorative elements are spectacular.” Carter B. Horsley, *The New York Marriott East Side*, THE MIDTOWN BOOK, <http://www.thecityreview.com/shelton.html> (last visited Feb. 10, 2012) (“[A] transitional precursor to the explosion of Art Deco skyscrapers that came shortly thereafter . . . [t]he 34-story, 1,200-room hotel was the world's tallest when it was built [in 1924.]”). Located at 525 Lexington Avenue, between 48th and 49th Streets, the building is now called the New York Marriott East Side. *Id.*

⁷⁷ *Critic of Attica Inquiry*, *supra* note 9 (indicating that after being divorced for three years, Meyer married the former Edythe Birnbaum Gilbert). “Ironically, one day after his appointment to head the [Attica prison riot] investigation was announced by Governor Carey and by Attorney General Lefkowitz on April 17,” Meyer married Edythe Birnbaum Gilbert. *Id.* For family photographs, see Ferlazzo, *supra* note 4, at 786–89. After Edythe died in 1989,

the most moving event of her life—even more moving, she said, than her own wedding day. I understood Mrs. Meyer to mean that the senators offered many tributes to her husband's prior work and qualifications and that what was said was particularly poignant because she knew how hard it had been for her husband to win a seat on the Court of Appeals.

Those of us waiting in the Halloran House hotel lobby were told that, because of the delay in Albany, the luncheon would be pushed back. Other persons who had not yet arrived were called and told to postpone their travel. Judge and Mrs. Meyer did not reach the hotel until sometime in the early evening. I think that they flew by private aircraft from Albany to reach New York City as quickly as possible. The "luncheon" did not start until perhaps 7:30 or 8:00 p.m. At an appropriate juncture, Judge Meyer took the oath of office from Chief Judge Cooke in front of a large number of family members, friends, and professional associates. Colleagues gave testimonials, speeches were made, and gratitude expressed.

The spirits in the room were high. In private conversations, some attendees speculated that if Edward F. Kennedy won the Democratic nomination from President Jimmy Carter, and was elected president in 1980,⁷⁸ Meyer would soon be headed to the United States Supreme Court. Meyer's former partner, John F. English, had been an advisor to John F. Kennedy during his 1960 presidential campaign, to Robert F. Kennedy in his 1964 senatorial and 1968 presidential races,⁷⁹ and later to Edward Kennedy.⁸⁰ I recalled from my visits to the Meyer, English law firm offices that a conference room was lined with pictures of English and the Kennedys on the various campaign trails. Ultimately, English served as the "deputy national chairman" of Carter's 1980 re-election campaign.⁸¹ In a recent history of the New York Court of Appeals, there is a photograph showing Meyer with Eleanor Roosevelt at a dinner for John F. Kennedy in 1959.⁸² The website of

Meyer married his third wife, Hortense Fox Handel. *Id.* at 789. I had the pleasure of having lunch with the two of them at the Mayflower Hotel, in Washington, D.C., during an American Law Institute annual meeting in the late 1990s.

⁷⁸ See Katharine Q. Seeyle & Julie Bosman, *Carrying Primary Scars into the General Election*, N.Y. TIMES, Apr. 1, 2008, at A14 (discussing Kennedy's insurgent campaign for president).

⁷⁹ See ARTHUR M. SCHLESINGER, JR., ROBERT KENNEDY AND HIS TIMES 667, 755, 836–37 (1978) (discussing English).

⁸⁰ See Frank Lynn, *John Francis English, 61, Is Dead; Top Political Adviser to Kennedys*, N.Y. TIMES, Nov. 8, 1987, at L52 (identifying English as a key advisor to all three Kennedys).

⁸¹ *Id.*

⁸² Ferlazzo, *supra* note 4, at 788.

2011/2012]

Judge Bernard S. Meyer

979

the law firm that continues to bear Judge Meyer's name shows a photograph of Meyer and Edward Kennedy taken in 1975.⁸³

IV. ARRIVING IN ALBANY IN THE MIDDLE OF THE NIGHT

We did not leave Halloran House until about 10:00 or 11:00 p.m.,⁸⁴ but the plan was still to reach Albany that night so that Judge Meyer could begin his duties at the court the next day. However, Meyer had not yet packed. Therefore, Judge Meyer, Mrs. Meyer, one or two other persons, and I left Manhattan in his car, not for Albany, but rather for Long Island. We stopped briefly at the judge's former law office before reaching the Meyer house in Hewlett Neck.⁸⁵

After Judge Meyer finished packing, the Meyers and I finally started the three-hour drive to Albany sometime after 1:00 a.m. We did not arrive at the state capital until after 4:00 a.m. When he dropped me off at my hotel, Judge Meyer said that I did not need to be at the Court of Appeals until 9:30 a.m. that day. I was tired and the Meyers must have been exhausted. However, Bernard S. Meyer had just achieved the dream of a lifetime—a seat on the New York Court of Appeals—and he was not going to waste a minute of the time that he could use doing the work of the court. The rush to Albany in the dark of night at the end of an exhilarating, but

⁸³ *History*, MEYER, SUOZZI, ENGLISH & KLEIN, P.C., <http://www.msek.com/aboutus/history-law-firm-meyer-suozzi-english-and-klein-msek-new-york-washington-dc.html> (last visited Feb. 10, 2012) (including several interesting photographs illustrating the firm's political connections).

⁸⁴ There was some confusion as we left the hotel. The valet parking attendant retrieved Judge Meyer's car. As rain was coming down, the passengers quickly piled in and Judge Meyer tried unsuccessfully to open the trunk with his extra set of keys. It was eventually determined that the attendant had delivered the wrong car, whose make and model were similar to Meyer's large dark blue sedan. I have used these facts as a hypothetical in my torts classes for thirty years, asking students whether the attendant, the passengers, or the judge—all of whom mistakenly exercised some degree of dominion and control over another's vehicle—could be held liable to the true owner for conversion or trespass to chattels. Because the interference was not serious, no one would be liable for conversion. See RESTATEMENT (SECOND) OF TORTS § 222A (1965) (listing the factors used to determine the "seriousness" of interference). And, because there was no dispossession, no loss of use, and no impairment of the car's condition, quality, or value, the brief interference might also not amount to trespass to chattels. *Id.* § 218. A variation of the problem appears in the teacher's manual for my torts casebook. VINCENT R. JOHNSON & ALAN GUNN, TEACHING TORTS: A TEACHER'S GUIDE TO STUDIES IN AMERICAN TORT LAW 38 (1995) ("Bernard leaves his new Cadillac Fleetwood at a parking garage . . ."). However, Meyer did not drive a Cadillac; he owned a Buick or Oldsmobile, which was remarkably similar to an official car assigned to the Court of Appeals in Albany for court use. This similarity caused some clerks at the court to remark that Meyer—the new judge—looked like he belonged there.

⁸⁵ See Molotsky, *supra* note 7 (noting that Meyer lived in Hewlett Neck).

draining day was a clue about just how hard we would work (and how often we would pack) during the coming year.

V. PERSISTING IN THE FACE OF POLITICAL ADVERSITY

On the drive to Albany from Long Island, Judge Meyer and his wife talked about the day's events, and I mainly listened. The conversation was punctuated by occasional silence, which was not surprising given the late hour. In those quiet moments, Judge Meyer may well have thought about how close he had come to reaching the Court of Appeals many years earlier.

A. *The 1969 Race*

In 1969, a judgeship on the Court of Appeals had opened up. Kenneth B. Keating, the former United States Republican Senator from New York who had lost his seat to Democrat Robert F. Kennedy in 1964,⁸⁶ had been elected an Associate Judge of the Court of Appeals in 1965.⁸⁷ Four years later, Keating resigned from the court to accept an appointment as ambassador to India by the newly elected president, Richard M. Nixon.⁸⁸ The offer was particularly attractive because Keating would have been forced to retire from the court in 1970 due to his reaching the mandatory retirement age.⁸⁹

In late August 1969, the *New York Times* reported "that the Democrats have all but settled on Supreme Court Justice Bernard S. Meyer of Nassau County"⁹⁰ as their candidate to run against the Republican nominee, James Gibson, the presiding justice of the Appellate Division (Third Department) who was backed by Governor Nelson Rockefeller.⁹¹ However, within a week of that heady news, Meyer's hopes were dashed. Gibson had already won the nominations of both the Republican Party and the Conservative

⁸⁶ Korman & Leban, *supra* note 27, at 675. "Ken Keating was no pushover. Sixty-four years old, a dignified, white-haired veteran of both world wars and a graduate of Harvard Law School, he had served six terms in the House before being persuaded by Nelson Rockefeller to run for the Senate in 1958." Kevin Baker, *Carpet Bagging*, KEVIN BAKER, http://www.kevinbaker.info/c_c.html (last visited Feb. 10, 2012).

⁸⁷ Korman & Leban, *supra* note 27, at 675.

⁸⁸ *Id.* at 681.

⁸⁹ *See id.*

⁹⁰ Bill Kovach, *Governor Backs Justice Gibson for Court of Appeals*, N.Y. TIMES, Aug. 31, 1969, at 36.

⁹¹ *Id.*

2011/2012]

Judge Bernard S. Meyer

981

Party.⁹² Then, the state chairmen of the Democratic and Republican Parties brokered a deal that ultimately left Meyer in the cold.⁹³ Under the arrangement, the Democratic Party would cross-endorse the nomination of Gibson in exchange for an “understanding” that the Republican Party would support two Democrats for the three vacancies that would open up on the Court of Appeals in 1972.⁹⁴

The deal was reached on a telephone call by the Democratic chair, John J. Burns, to the Republican chair, Charles Lanigan, as Burns met with ten Democratic leaders at the Dryden East Hotel, 150 East 39th Street, in New York City.⁹⁵ The bargain was struck shortly before the eleven Democrats left for the party convention at the Americana Hotel, located at Seventh Avenue and 52nd Street, where they persuaded members of the party’s state committee to nominate Gibson instead of Meyer.⁹⁶ Behind the closed-door bargain laid “considerations of religion, campaign tactics and deeper-rooted political factors.”⁹⁷

Meyer was a Long Island Jew and Gibson was an upstate Protestant.⁹⁸ The membership of the Court of Appeals then consisted of four Catholics and two Jews.⁹⁹ Importantly, the contest for Keating’s former seat was the “only statewide” race on the November general election ballot.¹⁰⁰ Some Democrats thought that keeping an upstate Protestant on the court was good for reasons of geographic and religious balance, and some also thought that was preferable because of the effect that such a nomination would have on races down the ticket.¹⁰¹ Among the Democrats, “[s]upport for Mr. Gibson was centered upstate, where many committee members feared the nomination of a candidate other than a Protestant would have an adverse political effect in upstate municipal campaigns.”¹⁰² Specifically, “Mayor Erastus Corning 3d of Albany . . . argued that Gibson’s nomination would help his own re-election campaign”¹⁰³

⁹² Knowles, *supra* note 21, at 33.

⁹³ Richard Reeves, *Gibson Choice Tied to 1972 Judgeships*, N.Y. TIMES, Sept. 6, 1969, at 1.

⁹⁴ *Id.*

⁹⁵ *See id.* (stating that the meeting occurred in room 1502).

⁹⁶ *Id.* at 20.

⁹⁷ Knowles, *supra* note 21, at 33.

⁹⁸ *Id.*

⁹⁹ Kovach, *supra* note 90.

¹⁰⁰ *Id.*

¹⁰¹ *See id.*

¹⁰² Knowles, *supra* note 21, at 33.

¹⁰³ Reeves, *supra* note 93, at 20.

Another political complication concerned the potential impact of the Court of Appeals race on the downstate contest for mayor of New York City. “[T]here was unhappiness with Justice Meyer, whose apparent willingness to accept a Liberal nomination also was questioned by some supporters of Mario A. Procaccino [the Democratic candidate] in New York City’s mayoral election.”¹⁰⁴ Procaccino’s friends told Democratic Party leaders “that Mr. Meyer’s name on the Liberal ballot line might help Mayor [John] Lindsay, who [was] seeking re-election on the Liberal line.”¹⁰⁵ As the chairman of the Liberal Party told the *New York Times*, “[i]t was apparent that Judge Meyer had become the victim of the Procaccino [campaign] that forced the nomination of Gibson on the Democratic Party.”¹⁰⁶ Many liberal Democrats believed “that Mr. Meyer was rejected because he was willing to accept the Liberal nomination.”¹⁰⁷

As events played out, party leaders barely had the power that was needed to deny Meyer the Democratic nomination for the Court of Appeals. Gibson “won Democratic acceptance by less than a single vote after a six-hour battle” at the state party convention.¹⁰⁸ Gibson defeated Meyer on the second ballot by a vote of 111.06 votes to 110.39 votes.¹⁰⁹ “The result was not announced for more than an hour and a half . . . as party officials checked and rechecked the accuracy of the count.”¹¹⁰ Gibson’s dual nomination on the Republican and Democratic tickets was “tantamount to election in November.”¹¹¹ The loss of the nomination must have been a bitter disappointment to Meyer.

B. *The 1972 Race*

Bernard S. Meyer’s second try for the Court of Appeals in 1972 was very different from the first race in 1969.¹¹² The rules had

¹⁰⁴ Knowles, *supra* note 21, at 33.

¹⁰⁵ Reeves, *supra* note 93, at 20. Lindsey, who had been elected mayor of New York City in 1965 with the support of both the Republican party and the Liberal party, was denied the Republican nomination in 1969 and won re-election as a candidate of the Liberals. Josh Barbanell, *A Torn G.O.P. Dreams of a Mayoral Triumph*, N.Y. TIMES, Mar. 20, 1989, at B1; see Andy Logan, *Mayoral Follies, The 1969 Edition*, N.Y. TIMES, Jan. 25, 1998, at 24.

¹⁰⁶ Reeves, *supra* note 93, at 20.

¹⁰⁷ *Id.*

¹⁰⁸ Knowles, *supra* note 21, at 1.

¹⁰⁹ Reeves, *supra* note 93, at 33.

¹¹⁰ Knowles, *supra* note 21, at 1.

¹¹¹ Reeves, *supra* note 93, at 33.

¹¹² See Lesley Oelsner, *3 Republicans Lead Race for Appeals Court Seats*, N.Y. TIMES, Nov. 8, 1972, at 32.

changed in two ways. First, the new state chair of the Democratic Party, Joseph F. Crangle, had repudiated the 1969 agreement, which would have given the Democrats two seats on the Court of Appeals.¹¹³ Crangle concluded quite erroneously, and apparently “[a]t the last minute,”¹¹⁴ that the Democrats could “win all three” seats that were open.¹¹⁵ In hindsight, this was completely foolish. 1972 was a Republican year. Richard Nixon swept to re-election as the country’s thirty-seventh president, winning forty-nine states, including New York.¹¹⁶ Second, in 1972, the Democratic Party’s candidates for the three open positions were to be selected in a primary election, “the first [such] contest in the court’s history.”¹¹⁷ “[P]reviously, candidates were chosen by political conventions.”¹¹⁸

Under the canons of judicial ethics of that era, campaigning was tightly constrained.¹¹⁹ Candidates for judgeships were not permitted to announce their views on issues that might come before the courts, and could only promise to faithfully and impartially apply the law.¹²⁰ Moreover, in the early 1970s, it was still the case that lawyers were absolutely prohibited from engaging in commercial advertising.¹²¹ Advertising by judicial candidates, and

¹¹³ See *id.* (indicating that Crangle anticipated that the Democratic national ticket would be headed by Senator Edmund S. Muskie).

¹¹⁴ See David Gould, *Sol Wachtler*, in *The Judges of the New York Court of Appeals: A Biographical History*, *supra* note 4, at 733–34.

¹¹⁵ Burks, *supra* note 18, at 82.

¹¹⁶ See *Electoral Votes for President and Vice President*, NAT’L ARCHIVES AND RECORDS ADMIN., http://www.archives.gov/federal-register/electoral-college/votes/1965_1969.html#1972 (last visited Feb. 10, 2012) (illustrating that the Democratic nominee, George McGovern, won only the electoral votes of Massachusetts and the District of Columbia).

¹¹⁷ Lesley Oelsner, *Appeals Court Race Lacks Politicking*, N.Y. TIMES, June 10, 1972, at 13.

¹¹⁸ *Id.*

¹¹⁹ See Vincent R. Johnson, *The Ethical Foundations of American Judicial Independence*, 29 FORDHAM URB. L.J. 1007, 1020–23 (2002).

¹²⁰ Similarly strict rules applied until the beginning of the twenty-first century. See Vincent R. Johnson, *Ethical Campaigning for the Judiciary*, 29 TEX. TECH. L. REV. 811, 832–38 (1997/1998) (discussing restrictions applicable to statements about justiciable issues, pending cases, and impending cases); Johnson, *supra* note 119, at 1020–23 (noting restrictions on political activities, such as restricting judges from publicly endorsing candidates). The United States Supreme Court’s decision in *Republican Party of Minn. v. White* marked a turning point. *Republican Party of Minn. v. White*, 536 U.S. 765 (2002). *White* held that rules of judicial ethics that bar judges and judicial candidates from announcing their views on disputed legal or political issues violate the First Amendment. *Id.* at 788.

¹²¹ In 1977, the Supreme Court held that a total ban on advertising of the terms and availability of routine legal services was unconstitutional. See *Bates v. State Bar of Ariz.*, 433 U.S. 350, 383 (1977). Between the turn of the twentieth century and 1977, most forms of lawyer self-promotion were “rigorously banned.” Vincent Robert Johnson, *Solicitation of Law Firm Clients by Departing Partners and Associates: Tort, Fiduciary, and Disciplinary Liability*, 50 U. PITT. L. REV. 1, 19 (1988).

other forms of attracting voter attention, were likely to appear undignified, at least in the eyes of other lawyers, and were therefore dubious.¹²² The result was a dull primary election. As one reporter summed up the Court of Appeals candidates' political activity: "[T]o the despair of . . . campaign managers, there are no television debates, no billboard advertisements, no promises of what they will do if elected. And no nasty words by any candidate about any other."¹²³

Although the five candidates in the Democratic primary campaigned hard, going to political clubs, bar associations, and fraternal groups, "most people" did not know there was a primary race for the Court of Appeals.¹²⁴ There was nothing exciting. Campaigning did not include much more than the candidates talking about their legal backgrounds, endorsements, and, in some instances, prior judicial experience.¹²⁵

During the primary campaign, Meyer came across as "pleasantly erudite," and his published opinions stood out "for their scholarly, textbook-like reasoning."¹²⁶ Among the five candidates, Meyer was the most active in the legal profession.¹²⁷ He was also the most highly rated, winning "the highest rating of both the New York State Bar Association and the Association of the Bar of the City of New York."¹²⁸ Also garnering "[l]iberal party support," Meyer finished among the top three contenders in the Democratic primary and thus, became one of the seven candidates in the general election.¹²⁹

During the final month of the campaign, the *New York Times* noted that Meyer was one of the two most highly rated candidates.¹³⁰ That newspaper described Meyer as "a judicial 'activist' identified prominently with movements to take politics and unnecessary clutter out of the courts"¹³¹ "Justice Meyer advocated 'reason and logic over philosophy and personal predilections,'" and said that "[b]y and large, social policies don't

¹²² See Oelsner, *supra* note 117 (noting that Justice Nanette Dembitz, "a woman in the running for the first time," declined to hold a rally because "[i]t wouldn't be dignified").

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.* ("Justice Meyer . . . is clearly the most activist . . . in terms of professional activity.")

¹²⁸ *Id.*

¹²⁹ Burks, *supra* note 18, at 60.

¹³⁰ *Id.* (discussing who received "the highest rating" from the State Bar Association and the Association of the Bar of the City of New York).

¹³¹ *Id.*

belong in legal decisions”¹³²

The most notable aspect of the fall campaign was that one of the Republican nominees, Sol Wachtler,¹³³ disregarded the taboo about television advertising and appeared in expensive thirty- or sixty-second “spots” wearing his judicial robes and declaring “[o]ur criminal justice system does not punish, deter or rehabilitate.”¹³⁴ “There were television advertisements showing Justice Wachtler in front of an empty cell, asking where the ‘muggers’ were.”¹³⁵

In the 1972 general election, all three seats on the Court of Appeals were won by the Republican candidates.¹³⁶ “Republican sources said that if the Democratic State Chairman, Joseph F. Crangle, had not negated a 1969 bipartisan agreement . . . to offer endorsements by both major parties to Appeals Court candidates, Justice Meyer would have received [the] Republican blessing,”¹³⁷ and presumably would have swept to victory.

C. *The 1973 and 1978 Openings*

Meyer was briefly a candidate for Chief Judge of the Court of Appeals at the Democratic State Convention in 1973.¹³⁸ However, he dropped out early upon realizing “that a fair amount of money would be necessary” for an effective campaign.¹³⁹ As events played out, there was a “bitter Democratic primary” and the general election was characterized by “lavish” spending.¹⁴⁰

Again in 1978, Meyer was seriously considered for the high court.¹⁴¹ He was one of the seven nominees whose names were forwarded to the governor by the Commission on Judicial Nomination as candidates to replace retiring Chief Judge Breitel.¹⁴² The nod went to Judge Cooke.¹⁴³ Because Cooke was already a

¹³² *Id.*

¹³³ See MEYER ET AL., *supra* note 6, at 18 (offering a brief biography of Judge Wachtler); see also Gould, *supra* note 114, at 733–43 (providing additional biographical information).

¹³⁴ Burks, *supra* note 18, at 1.

¹³⁵ See Oelsner, *supra* note 112, at 32.

¹³⁶ Farrell, *supra* note 19, at 52.

¹³⁷ *Id.*

¹³⁸ See Carroll, *supra* note 22, at 18 (indicating that three others were the front runners).

¹³⁹ See Molotsky, *supra* note 7, at LI10.

¹⁴⁰ Grace Lichtenstein, *Chief-Judge Race Really is One*, N.Y. TIMES, Sept. 16, 1979, at 1.

¹⁴¹ See Tom Goldstein, *Carey Gets List of Seven Names for Chief Judge*, N.Y. TIMES, Dec. 16, 1978, at 25.

¹⁴² *Id.* (indicating that the Governor would “gain collateral benefits by appointing a judge already sitting on the seven-member court” because that would open another judgeship for a second appointment).

¹⁴³ E.J. Dionne, Jr., *Carey Names Cooke Chief Judge; 68 ‘Recess’ Appointments Also Set*,

member of the Court of Appeals, his nomination opened up the vacancy to which Meyer was eventually appointed.

VI. PROGRESSIVE REFORMER

As a judge on the Court of Appeals, Bernard S. Meyer was a progressive reformer. At the time of his appointment, the *New York Times* described him as “a liberal Democrat.”¹⁴⁴ Meyer put it more lightly, calling himself “middle-of-the-road, on the liberal side.”¹⁴⁵ However, three-and-a-half years later, the *Times* referred to him, along “[w]ith Judge Fuchsberg,” as “the most liberal member of the court.”¹⁴⁶ Whatever the terminology, it was clear every day that Judge Meyer intended to use his office to make the world a better place and, whenever possible, remedy injustice.¹⁴⁷ Sometimes this meant improving the law itself.

A few years before his appointment to the Court of Appeals, Meyer had said quite accurately, “[m]ore than anything else, I think of myself as a reformer in the law, in an effort to make the application of the law more uniform and easier.”¹⁴⁸ At the time of his death, *Newsday* remarked that Meyer’s “greatest contribution” to the law was “writing standardized jury instructions for civil cases.”¹⁴⁹ The phrasing and clarity of those instructions, which were routinely employed by New York judges in jury trials for decades, undoubtedly influenced the resolution of many thousands of cases.

A. *Respect for the Law*

Judge Meyer had deep respect for existing law and for the judicial process.¹⁵⁰ According to *Newsday*, “precedent, not personal ideology was the tenet of his legal philosophy.”¹⁵¹ Meyer “honored the stability of the law, followed precedent where it led, and became a

N.Y. TIMES, Jan. 3, 1979, at 1.

¹⁴⁴ Carroll, *supra* note 2, at A1.

¹⁴⁵ *Id.*

¹⁴⁶ Lawrence H. Cooke, *Sketches of the Judges on State’s Court of Appeals*, N.Y. TIMES, Nov. 7, 1982, at 54.

¹⁴⁷ See Molotsky, *supra* note 7, at LI10 (discussing Judge Meyer’s view of the role of the judiciary).

¹⁴⁸ *Critic of the Attica Inquiry*, *supra* note 9, at 1.

¹⁴⁹ Op-Ed., *A Judge Who Mattered: Meyer Was a Judicial Role Model*, NEWSDAY, Sept. 12, 2005, at A42 [hereinafter *A Judge Who Mattered*].

¹⁵⁰ See, e.g., *People v. Green*, 56 N.Y.2d 427, 433–34, 437 N.E.2d 1146, 1150, 452 N.Y.S.2d 389, 393 (1982) (following *stare decisis*).

¹⁵¹ *A Judge Who Mattered*, *supra* note 149, at A42.

judicial role model.”¹⁵² This sometimes meant that Meyer had to apply established legal standards that he did not like or defer to factual determinations of lower court judges and juries that he would not himself have made. In one case, Judge Fuchsberg wrote an eloquent opinion explaining for a four-three majority of the court why a release of “any and all claims” signed by a student who was seriously injured in a parachuting accident did not provide adequate notice that it released a claim for negligence, and therefore was invalid.¹⁵³ Judge Meyer, though he was sympathetic to the student, joined Judge Jones’s dissent, which reasoned that “[a] more broadly worded exoneration provision would be difficult to imagine,” and “contracts should not be so construed as to make them meaningless.”¹⁵⁴

Deference to established principles and findings of fact did not render Meyer a passive judge. He knew that some factual findings lacked adequate support in the evidence and that such a flaw could be the basis for reversing a conviction.¹⁵⁵ He also looked for ways in which the law could be improved and sought to identify important legal questions that had not yet been settled.¹⁵⁶ He was eager to resolve unanswered legal issues in ways that were consistent with progressive approaches to public policy and a liberal view of important constitutional principles.¹⁵⁷

¹⁵² Ferlazzo, *supra* note 4, at 786 (attributing these comments to Chief Judge Judith S. Kaye).

¹⁵³ *Gross v. Sweet*, 49 N.Y.2d 102, 109–10, 400 N.E.2d 306, 310–11, 424 N.Y.S.2d 365, 369–70 (1979). An edited version of the majority and dissenting opinions of *Gross* have appeared in every edition of my torts casebook. See VINCENT R. JOHNSON & ALAN GUNN, *STUDIES IN AMERICAN TORT LAW* 758–61 (4th ed. 2009).

¹⁵⁴ *Gross*, 49 N.Y.2d at 112–13, 400 N.E.2d at 312–13, 424 N.Y.S.2d at 371–72 (Jones, J., dissenting).

¹⁵⁵ See, e.g., *In re Philip A.*, 49 N.Y.2d 198, 200, 400 N.E.2d 358, 359, 424 N.Y.S.2d 418, 419–20 (1980) (“[W]hile the question whether the ‘substantial pain’ necessary to establish assault in the third degree has been proved is generally a question for the trier of fact . . . there is an objective level . . . below which the question is one of law, and the charge should be dismissed. . . . Here we have nothing more than evidence that complainant was hit, that it caused him pain, the degree of which was not spelled out, caused him to cry and caused a red mark. All of that is consistent with ‘petty slaps’ and, therefore, was insufficient to establish ‘substantial pain’ beyond a reasonable doubt.”).

¹⁵⁶ See generally Bernard S. Meyer, *Some Problems the Court of Appeals May Be Faced With Under the Death Penalty Statute*, 48 SYRACUSE L. REV. 1499 (1998) (discussing constitutional issues with New York’s death penalty statute).

¹⁵⁷ See *Critic of Attica Inquiry*, *supra* note 9, at 1 (noting that Meyer thought of himself as a “reformer in the law” and made “an effort to make the application of the law more uniform and easier.”).

B. Civil Libertarian

As a trial court judge from 1959 to 1972, Judge Meyer was “known to be a supporter of civil liberties, ruling in favor of the rights of the individual.”¹⁵⁸ He had the same reputation on the Court of Appeals, particularly in criminal cases. Meyer respected law enforcement officers and rejected challenges to their conduct if the officers had acted lawfully.¹⁵⁹ However, he believed that police officers had to conduct themselves in a manner consistent with the rule of law.¹⁶⁰ Thus, on many occasions, he wrote decisions recognizing the state or federal constitutional rights of persons who were accused of crimes¹⁶¹ or had already been improperly convicted.¹⁶² Meyer knew that rendering decisions in favor of civil liberties could trigger bad publicity for himself or the Court. However, that did not deter him from deciding cases in the way that legal principles required. In one dispute, Meyer joined in a four-judge majority opinion holding that a law banning topless dancing at state-licensed bars was unconstitutional.¹⁶³ The four judges were then lampooned by an unflattering cartoon in the *New York Post*.¹⁶⁴

When Meyer was appointed to the Court of Appeals, the *New York Times* said that his confirmation was “expected to solidify a

¹⁵⁸ *Id.*

¹⁵⁹ *See, e.g.*, *People v. Brnja*, 50 N.Y.2d 366, 369, 406 N.E.2d 1066, 1068, 429 N.Y.S.2d 173, 174 (1980) (upholding an arrest challenged on constitutional grounds).

¹⁶⁰ *See generally* Vincent R. Johnson, *The Rule of Law and Enforcement of Chinese Tort Law*, 34 T. JEFFERSON L. REV. (forthcoming) (exploring the meaning of “rule of law” as that term has been used for 220 years in United States Supreme Court opinions).

¹⁶¹ *See, e.g.*, *Cooper v. Morin*, 49 N.Y.2d 69, 81–82, 399 N.E.2d 1188, 1195, 424 N.Y.S.2d 168, 176 (1979) (holding that a prohibition against direct contact visits with pretrial detainees violated the Due Process Clause of the New York State Constitution).

¹⁶² *See, e.g.*, *People v. McConnell*, 49 N.Y.2d 340, 343, 402 N.E.2d 133, 133–34, 425 N.Y.S.2d 794, 795 (1980) (ordering specific performance of a plea bargain entered into by a defendant who had delivered his side of the bargain by testifying against codefendants); *People v. Harris*, 48 N.Y.2d 208, 215, 397 N.E.2d 733, 736, 422 N.Y.S.2d 43, 46 (1979) (holding that statements to the police should have been suppressed due to lack of Miranda warnings); *People v. Gonzalez*, 47 N.Y.2d 606, 611, 393 N.E.2d 987, 990, 419 N.Y.S.2d 913, 916 (1979) (“The undisputed dilatoriness of appointed counsel in obtaining the record, his failure to consult with either trial counsel or defendant, and his failure to file a ‘brief’ until prodded by the Appellate Division clerk strongly suggest that the assistance given defendant did not meet the required standard.”).

¹⁶³ *See Bellanca v. N.Y. State Liquor Auth.*, 50 N.Y.2d 524, 531, 407 N.E.2d 460, 464, 429 N.Y.S.2d 616, 620 (1980), *rev’d*, 452 U.S. 714 (1981) (finding nothing in the record to show a need for the rule); *see also* Selwyn Raab, *Law Prohibiting Topless Dancing in Bars is Upset*, N.Y. TIMES, June 11, 1980, at B1 (discussing *Bellanca*).

¹⁶⁴ Editorial cartoon, NEW YORK POST, June 12, 1980, at 6 (showing hairy-chested judges at a bar and bearing the caption: “Right, that’s three of us against topless and four Forget it, what would you like to drink?”).

four-member liberal majority on the seven-member court.”¹⁶⁵ During his first year on the court, that was often true. However, the judges frequently divided along unpredictable lines, which reflected well on their judicial independence.¹⁶⁶ In criminal matters, it sometimes felt as though Meyer and Fuchsberg, whose chambers in Albany were just across the hall, were the court’s only liberals.¹⁶⁷

It took only two votes among the court’s judges to grant permission to appeal in a civil case, and a single judge could grant a criminal leave application that had been assigned to that judge.¹⁶⁸ One dilemma posed by this arrangement was that when Meyer identified gaps in the law which he hoped to resolve in ways that might be characterized as liberal or progressive, his vote to put the matter on the court’s oral argument calendar might result in the gap being filled the wrong way. The fact that there might be two votes to grant leave did not mean that there were four votes to decide the case in favor of the petitioner. Thus, while Judge Meyer was often sympathetic to litigants who raised unsettled questions, he soon became a bit careful about too readily granting leave to appeal. Some unanswered questions might be better left for another day.

C. *Judicial Activist and Friend of Those in Need*

In the cases decided by the court during his first year, Judge Meyer regularly authored opinions or otherwise voted in favor of disadvantaged litigants. The group included a juvenile who was subject to delinquency proceedings;¹⁶⁹ a troublesome student who had been dismissed from her college;¹⁷⁰ a school principal¹⁷¹ and

¹⁶⁵ Carroll, *supra* note 2, at A1.

¹⁶⁶ See, e.g., *State v. Gen. Motors Corp.*, 48 N.Y.2d 836, 838, 840, 400 N.E.2d 287, 288–89, 424 N.Y.S.2d 345, 345–47 (1979) (involving alleged deceptive trade practices related to automobile marketing, five judges, including Meyer, agreed that the corporate defendants were entitled to a trial, but two judges found that it was “beyond dispute and in fact uncontested that General Motors did indeed engage in the practice of engine switching without notice to automobile purchasers”).

¹⁶⁷ See Margolick, *supra* note 66, at 1 (“Judges Fuchsberg and Meyer are generally perceived to be in the pro-defendant, civil libertarian wing.”).

¹⁶⁸ N.Y. C.P.L.R. 5602 (McKinney 1995); N.Y. CRIM. PROC. LAW § 460.20 (McKinney 2005).

¹⁶⁹ See *In re Philip A.*, 49 N.Y.2d 198, 199–200, 400 N.E.2d 358, 359, 424 N.Y.S.2d 418, 419–20 (1980) (finding the facts insufficient to establish “substantial pain” beyond a reasonable doubt).

¹⁷⁰ See *Tedeschi v. Wagner Coll.*, 49 N.Y.2d 652, 655–56, 404 N.E.2d 1302, 1303–04, 427 N.Y.S.2d 760, 761–62 (1980) (involving a student who “repeatedly threatened to commit suicide” and engaged in harassing and disruptive behavior).

county worker¹⁷² whose positions had been abolished; a child who had been denied recommended educational retesting;¹⁷³ a woman who was injured when the taxi in which she was riding collided with a “hit and run” driver;¹⁷⁴ a worker whose employer made no attempt to accommodate religious observance;¹⁷⁵ persons whose property had been taken by eminent domain;¹⁷⁶ women battered by their husbands and discriminated against by the police;¹⁷⁷ heroin addicts who were not protected from ingesting dangerous substances in a rehabilitation center;¹⁷⁸ a developer who had been

¹⁷¹ See *Flanagan v. Bd. of Ed., Commack Union Free Sch. Dist.*, 47 N.Y.2d 613, 616, 618, 393 N.E.2d 991, 992–93, 419 N.Y.S.2d 917, 918–19 (1979) (“Assuming that the school district can abolish appellant’s position, that does not destroy the rights that he has under contract.”).

¹⁷² See *Bennett v. Cnty. of Nassau*, 47 N.Y.2d 535, 537, 540–41, 393 N.E.2d 446, 447, 449, 419 N.Y.S.2d 451, 451, 453 (1979) (holding that if statutory provisions impaired county employees’ vested rights when their positions were transferred to the state, the provisions were unconstitutional, and therefore the provisions had to be interpreted as being optional).

¹⁷³ See *Hoffman v. Bd. of Ed. of City of New York*, 49 N.Y.2d 121, 127, 400 N.E.2d 317, 321, 424 N.Y.S.2d 376, 380 (1979) (Meyer, J., dissenting) (“[T]his case involves not ‘educational malpractice’ as the majority in this court suggests but discernible affirmative negligence on the part of the board of education in failing to carry out the recommendation for re-evaluation within a period of two years which was an integral part of the procedure by which plaintiff was placed in a [class for students with retarded mental development], and thus readily identifiable as the proximate cause of plaintiff’s damages.”); see also Ari L. Goldman, *Court Kills Award to Man Taught as Retarded Pupil*, N.Y. TIMES, Dec. 18, 1979, at B1 (noting that the *Hoffman* case had been “watched closely in California, Iowa, Florida and New Jersey, where similar cases [were] pending”). Judge Meyer had me provide copies of the briefs in the case to a law student at the University of Chicago who was writing a law journal note and had requested Meyer’s assistance.

¹⁷⁴ See *Velazquez v. Water Taxi, Inc.*, 49 N.Y.2d 762, 765, 403 N.E.2d 172, 174, 426 N.Y.S.2d 467, 469 (1980) (Meyer, J., dissenting) (“Because the majority fails to take account of the difference between plaintiff’s common-law cause of action against Water Taxi for the negligence of its own driver and plaintiff’s right against Water Taxi as a self-insurer answerable in compulsory arbitration for the negligence of the hit-and-run driver whose vehicle collided with the taxi in which plaintiff was a passenger, and improperly imposes upon plaintiff rather than Water Taxi the burden of establishing what the arbitrator in fact decided, I respectfully dissent.”).

¹⁷⁵ See *Schweizer Aircraft Corp. v. State Div. of Human Rights*, 48 N.Y.2d 294, 297, 299, 397 N.E.2d 1323, 1324–25, 422 N.Y.S.2d 656, 657–58 (1979) (“The after the fact testimony of the union representative concerning what the consequences might have been had an inquiry been made is abstract opinion, not fact.”).

¹⁷⁶ See *In re Cnty. of Suffolk*, 47 N.Y.2d 507, 510, 392 N.E.2d 1236, 1237, 419 N.Y.S.2d 52, 53 (1979) (involving condemnation of a parcel of property on which a “family had conducted a flower-growing nursery business for over half a century”).

¹⁷⁷ See *Bruno v. Codd*, 47 N.Y.2d 582, 585–86, 593–94, 393 N.E.2d 976, 977, 982, 419 N.Y.S.2d 901, 902, 907–08 (1979) (Meyer, J., dissenting) (finding that the plaintiffs were entitled to a trial).

¹⁷⁸ See *Padula v. State*, 48 N.Y.2d 366, 373, 398 N.E.2d 548, 551, 428 N.Y.S.2d 943, 946 (1979) (“[I]n relation to persons in the custody of the State for treatment of a drug problem, contributory (or comparative) negligence should turn not on whether the drug problem or its effects be categorized as a mental disease nor on whether the injured person understood what he was doing, but on whether based upon the entire testimony presented (including objective behavioral evidence, claimant’s subjective testimony and the opinions of experts) the trier of

denied a liquor license for a new club;¹⁷⁹ an injured volunteer firefighter;¹⁸⁰ and a man who ran away from police officers who lacked reason to stop him.¹⁸¹

Judge Meyer was not afraid to use the law to aid those who needed help most, and he did so often.¹⁸² As he told the *New York Times* when he was nominated for the Court of Appeals, “[i]n the non-pejorative sense, I do consider myself an activist’ I have tried to make the law more accessible to the people.”¹⁸³ In the 1960s, Meyer had helped to “pull together and codify the many aspects of matrimonial law,”¹⁸⁴ but that was just one of the countless projects in which he participated to improve the legal system. It has been said that what Judge Meyer had in mind by the term

“judicial activist” was a judge who saw not just the immediate technical issue but also the entire problem facing the parties before him—the problem in relation to the whole body of law and the problem in relation to law as part of the fabric of society; a judge who viewed the primary task as the reconciliation of legality and logic with decency and justice.¹⁸⁵

fact concludes that the injured person was able to control his actions.”). *Padula* is a fascinating case, which I discuss in my torts casebook and have used as a principal case in earlier editions of the book. See JOHNSON & GUNN, *supra* note 153, at 266 (discussing the significance of “[i]nability to [c]ontrol [o]ne’s [a]ctions” in negligence cases).

¹⁷⁹ See *Circus Disco Ltd. v. New York State Liquor Auth.*, 51 N.Y.2d 24, 30–32, 409 N.E.2d 963, 966–67, 431 N.Y.S.2d 491, 494–95 (1980) (“[P]etitioner’s principals [did] much of the work themselves Absent any evidence that petitioner willfully misled the authority or of any prejudice to the public interest . . . denial of a license, which would as a practical matter destroy the half-million-dollar investment . . . is . . . ‘so disproportionate as to constitute an abuse of discretion.’”).

¹⁸⁰ See *Maines v. Cronomer Valley Fire Dept., Inc.*, 50 N.Y.2d 535, 540, 407 N.E.2d 466, 468, 429 N.Y.S.2d 622, 624 (1980) (holding that a state statute did not bar an action by an injured fireman plaintiff, who accepted compensation benefits, against a fellow fireman whose injury-causing acts were outside of the scope of employment).

¹⁸¹ See *People v. Howard*, 50 N.Y.2d 583, 586, 408 N.E.2d 908, 910, 430 N.Y.S.2d 578, 581 (1980) (holding that police officers “may not pursue, absent probable cause to believe that the individual has committed . . . a crime, [and] seize or search the individual or his possessions, even though he ran away.”).

¹⁸² See *Kaye*, *supra* note 2, at 1 (“I like *Newsday*’s recent considered evaluation of the gentleman—they were right on target: as *Newsday* wrote, Judge Meyer was a compassionate champion for the people who most needed help from the law; he was an individual whose life-work improved the quality of law for everyone.”).

¹⁸³ See *Molotsky*, *supra* note 7, at 10.

¹⁸⁴ *Id.* at 11.

¹⁸⁵ *Kaye*, *supra* note 2, at 5 (crediting *Newsday*); see also *Wachtler*, *supra* note 5, at xi (explaining in his response, Judge Meyer stated that the term “judicial activism” did not amount to “dirty words” because “[m]y definition of a judicial activist is a Judge who tries to see not just the legal problem presented by the papers or in the trial immediately before him

However, this does not mean that Judge Meyer was a fuzzy thinker or that he believed that judges are licensed to roam at large dispensing equitable remedies. Rather, Meyer was meticulous and precise in all things legal. He consistently worked within the framework of the law. He was a lawyer's lawyer.¹⁸⁶ However, when Meyer made decisions, they were not narrowly technical, nor oblivious to consequences. He clearly understood, and was concerned about, the impact of the court's rulings.

D. Frequent Dissenter

Judge Meyer was willing to use his power of authorship to chart a different course when he believed that the Court of Appeals was headed in the wrong direction, either in its development of the law or in its application of law to the facts of a dispute. A study¹⁸⁷ of the 317 signed¹⁸⁸ opinions that Meyer authored during his seven-and-a-half years on the court shows that a full 123 opinions were dissenting opinions (dissenting either in whole (113) or in part (10)). Only slightly more than half of his signed opinions (169 of 317) were written for a majority of the court. Meyer's first partial year on the Court of Appeals (1979) was typical: sixteen majority opinions, fourteen dissents.

Meyer spoke for a unanimous Court of Appeals in an amazing 125 cases. On eighteen occasions, he wrote the majority opinion when the court divided four-to-three.¹⁸⁹ The year 1982 appears to have been a particularly difficult one: Meyer wrote only fifteen majority opinions, but twenty-six dissents¹⁹⁰ and five concurrences.

or her but the whole problem faced by the parties involved, the problem in relation to the whole body of the law, the problem in relation to law as a part of the whole fabric of society.”).

¹⁸⁶ Cf. McNulty, *supra* note 25, at 17 (“Judge Meyer was the judge for the lawyer’s lawyers.”).

¹⁸⁷ The study was conducted at the author’s request by two law students at St. Mary’s University, Brandon J. Prater and Luis C. deBonoPaula.

¹⁸⁸ Like other judges on the Court of Appeals, Meyer authored numerous unsigned opinions in per curiam, memorandum format, or line entry format.

¹⁸⁹ This count includes *Prink v. Rockefeller Ctr., Inc.*, where three judges dissented in part. 48 N.Y.2d 309, 398 N.E.2d 517, 422 N.Y.S.2d 911 (1979).

¹⁹⁰ This includes two opinions dissenting in part.

2011/2012]

Judge Bernard S. Meyer

993

SIGNED OPINIONS OF JUDGE BERNARD S. MEYER, NEW YORK COURT
OF APPEALS, 1979–1986

	MAJORITY	CONCURRING	DISSENTING	DISSENTING IN PART	CONCURRING IN PART AND DISSENTING IN PART	TOTAL
1979	16	3	13	1	0	33
1980	24	4	19	4	0	51
1981	26	6	21	0	0	53
1982	15	5	24	2	0	46
1983	22	3	9	1	1	36
1984	24	1	15	2	0	42
1985	25	2	8	0	0	35
1986	17	0	4	0	0	21
TOTAL	169	24	113	10	1	317

VII. ELOQUENT AUTHOR

In an interview with the *New York Times* in 1975, after Meyer had been named special state investigator of the Attica prison riot¹⁹¹ prosecution, he “describe[d] himself as an ‘analytical’ person, whose basic legal philosophy is that ‘it is as important that people know that justice has been done as that it be done.’”¹⁹² This belief presumably influenced his earlier work in the fair trial-free press arena and it carried through to his later service on the state’s high court.¹⁹³ Meyer strove for clarity in legal writing and he was not afraid to spell out exactly why he had reached a decision. His opinions were “both praised as scholarly and criticized as overly scholarly.”¹⁹⁴

Judge Meyer wrote all of his own opinions. I produced many drafts over the course of my year as his law clerk. Hopefully, some of those drafts were of use. However, Judge Meyer did his own thinking and his own writing. As my clerkship approached its end, it occurred to me that only one of the sentences I had written during the entire year ever made it into print in a court opinion.

Judge Meyer had a fluid, nuanced, logical, persuasive style of writing. His opinions were no longer than necessary to express the grounds of the court’s decision. Looking back, thirty years later, at his early Court of Appeals opinions, it is easy to see their gem-like quality. Their brevity and precision is infinitely superior to the excessively long opinions that supreme courts in certain states now issue. Those tribunals often tediously restate every detail of pertinent earlier decisions or include so many facts of the instant dispute that in subsequent years the decisions will be factually distinguished in countless ways and thereby rendered irrelevant to the resolution of later cases.

¹⁹¹ Meyer issued a “571-page, three volume report,” which was submitted to Governor Hugh Carey. *Critic of Attica Inquiry*, *supra* note 9, at 34.

¹⁹² *Id.*

¹⁹³ *Cf. Molotsky*, *supra* note 7, at 11 (quoting Meyer as stating that “[i]t is important that the press understand the problems of the courts and that the courts understand the problems of the press”).

¹⁹⁴ Cooke, *supra* note 146, at 54; *see, e.g.*, *People v. Mirenda*, 57 N.Y.2d 261, 267–68, 442 N.E.2d 49, 52, 455 N.Y.S.2d 752, 755 (1982) (Meyer, J., dissenting) (offering a scholarly dissent favoring the rights of a criminal defendant).

A. Quotable

Judge Meyer's early opinions make one think of the metaphor of the judge as umpire,¹⁹⁵ laconically calling balls and strikes, or imposing penalties. In his opinions, Meyer was concerned with deciding cases, not with attempting to articulate the contours of a grand judicial philosophy. As Salvatore D. Ferlazzo, who clerked for Judge Meyer from 1981 to 1983, explained, "[e]ach decision was intended to fit carefully within the clear universe of the law rather than be an emotional departure to fit someone's preconceived notion of fairness."¹⁹⁶

There are elegant sentences in Judge Meyer's opinions that will long be quoted. For example, in an opinion liberally interpreting the requirements of New York's freedom of information law, he wrote that "[m]eeting the public's legitimate right of access to information concerning government is fulfillment of a governmental obligation, not the gift of, or waste of, public funds."¹⁹⁷ However, Meyer's goal was not to be quoted, but to decide cases.

When public television took the innovative step of filming a day of arguments at the Court of Appeals for a program that would be aired nationally, Meyer made no special effort to attract the attention of the cameras.¹⁹⁸ He asked only questions that were important to him as a judge, not questions that might be entertaining to viewers. The program, called *Three Appeals*, was "the first videotape of oral arguments ever made inside the courthouse in Albany."¹⁹⁹

¹⁹⁵ "Judges are like umpires. Umpires don't make the rules, they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules, but it is a limited role. Nobody ever went to a ball game to see the umpire." *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005) (statement of John G. Roberts).

¹⁹⁶ Ferlazzo, *supra* note 4, at 788; *see supra* note 73 and accompanying text.

¹⁹⁷ *Doolan v. Bd. of Coop. Ed. Servs.*, 48 N.Y.2d 341, 347, 398 N.E.2d 533, 537, 422 N.Y.S.2d 927, 931 (1979).

¹⁹⁸ *THREE APPEALS* (W.N.E.T. 1980) (hosted by Harvard law professor Charles Nesson and produced by Eric Salzman). The arguments were taped in Albany on October 16, 1979, and aired on public television stations on April 28, 1980. In appreciation for their cooperation, each of the judges of the Court of Appeals was given a copy of the tape. Judge Meyer gave his tape to Hofstra University School of Law. Soon after entering law teaching in 1982, I asked Judge Meyer if I could use his copy of the tape in my classes. He then arranged for Hofstra to give me the tape and I used it in my classes at St. Mary's University for about twenty years. Although its contents are now dated, the program offered a superb vehicle for introducing first-year law students to the world of appellate advocacy.

¹⁹⁹ *See id.*; Marcia Chambers, *TV-Radio Coverage in Court Endorsed*, N.Y. TIMES, Jan. 26, 1980, at 24 (noting that the judges "seemed pleased" with what they saw at a preview of the hour-long documentary by WNET, New York City's Public Broadcasting station); Editorial,

Meyer's remarks once supplied the *New York Times* "Quotations of the Day."²⁰⁰ On that occasion, Meyer and three other Court of Appeals judges had resigned their membership in Albany's University Club, which was where the judges of the court often had "working dinners."²⁰¹ The club had voted to continue excluding women from membership.²⁰² Meyer was quoted as saying, "I don't find this policy acceptable. I'm opposed to discrimination of any kind."²⁰³

B. Precise Sentences

Occasionally, Meyer would indulge himself in the intellectual luxury of a sentence of awesome length, with numerous subordinate clauses.²⁰⁴ If one could reach the end of that sentence, one could grasp the essence of the case²⁰⁵ and perhaps the reasoning of the court as well.²⁰⁶ These maneuvers of drafting showmanship flouted

Cool TV for a Hot Bench, N.Y. TIMES, Feb. 4, 1980, at A18 (praising the experiment which produced a "remarkable film").

²⁰⁰ Selwyn Raab, *Four Judges to Quit Club Barring Female Members*, N.Y. TIMES, May 31, 1980, at 1, 27.

²⁰¹ *Id.* at 1.

²⁰² *Id.* In recent decades, principles of judicial ethics have crystallized, which now make clear that a judge shall not be a member of, or use the benefits or facilities of, an organization that practices invidious discrimination. See MODEL CODE OF JUDICIAL CONDUCT R. 3.6 (2010) ("Affiliation with Discriminatory Organizations"). These principles had not yet emerged at the time that the judges of the New York Court of Appeals struggled with the University Club's exclusionary policy. Judge Meyer was quoted as saying that "I had no idea of it at all," it "is against my principles," but that his colleagues "have a right to do anything they like." Fredric U. Dicker, *3 Judges Quitting Over Sex Bias*, TIMES UNION (Albany), May 30, 1980, at 1, 4.

²⁰³ *Quotations of the Day*, N.Y. TIMES, May 31, 1980 at 1, 27.

²⁰⁴ See Kaye, *supra* note 2, at 2 ("Indeed, when Judge Meyer left our Court . . . in his parting remarks he quipped that he had managed to deliver a single sentence that ran to something over three hundred words. What a champion! . . . He . . . often managed . . . to squeeze into a single meticulously worded, carefully punctuated and precisely parenthesized sentence the entire case . . ."). The sentence exceeding three hundred words appears not to have been in an opinion, but in his remarks of gratitude on the occasion of his retirement. Wachtler, *supra* note 5, at viii–ix (1986) (Judge Meyer's response).

²⁰⁵ See, e.g., *People v. Gonzalez*, 47 N.Y.2d 606, 607, 393 N.E.2d 987, 988, 419 N.Y.S.2d 913, 914 (1979) ("Has an indigent criminal defendant been deprived of his constitutional right to effective assistance of counsel where the attorney appointed to handle his appeal files a 'brief that summarizes the evidence, states 'that in the opinion of the writer there were no points to be raised' on appeal, and then sets forth four point headings stating the points defendant desired to have presented, but advances no argument in support of any of the points?").

²⁰⁶ See, e.g., *People v. Elwell*, 50 N.Y.2d 231, 241, 406 N.E.2d 471, 477, 428 N.Y.S.2d 655, 662 (1980) ("Bearing in mind the balance to be struck between the individual's constitutional right to be free of official interference by way of search or arrest with society's interest in preventing crime and apprehending criminals, the uneven application of the *Draper* rule, the ease with which details of personal description can become in the official's mind a substitute

modern writing conventions which lionize short sentences. However, they were nevertheless successful in informing the reader about the cases. Of course, such linguistic extravagance was rare.

More commonly, Judge Meyer walked the reader efficiently and precisely through the reasoning process that led to the court's decision, or at least to his position.²⁰⁷ Judge Meyer thought that it was important that Court of Appeals opinions provide useful guidance to the lower courts of the state.

Meyer often began his opinions with a strong, concise sentence. These opening salvos sometimes took the form of a question (e.g., "When is pain 'substantial' within the meaning of subdivision 9 of section 10.00 of the Penal Law?").²⁰⁸ On other occasions, the words were a declaration of the court's holding²⁰⁹ (e.g., "An individual to whom a police officer addresses a question has a constitutional right not to respond.").²¹⁰ Sometimes the opening volley was the

for inquiry concerning the basis of the informant's knowledge with consequent improper intrusion on individual liberty, the temptation under *Draper* to sustain an arrest or search by hindsight inclusion of observed physical characteristics or movements in the data said to have been received from the informant, and the greater possibility of danger to individual rights from a warrantless arrest or search than when a Magistrate has examined into the basis for a warrant, we conclude that the rule under our Constitution should be that a warrantless search or arrest will be sustained only when the police observe conduct suggestive of, or directly involving, the criminal activity about which an informant who did not indicate the basis for his knowledge has given information to the police, or when the information furnished about the criminal activity is so detailed as to make clear that it must have been based on personal observation of that activity . . .").

²⁰⁷ See, e.g., *Church of St. Paul & St. Andrew v. Barwick*, 67 N.Y.2d 510, 525, 496 N.E.2d 183, 193, 505 N.Y.S.2d 24, 34 (1986) (Meyer, J., dissenting) ("Because the majority's misconceptions accord the Commission a position to which neither the Constitution nor statute entitles it and which impinges upon First Amendment rights, I respectfully dissent."); *People v. Berg*, 59 N.Y.2d 294, 300, 451 N.E.2d 450, 453, 464 N.Y.S.2d 703, 706 (1983) (Meyer, J., dissenting) ("I could, perhaps, accept the majority's rationale had the witness not clearly stated before being called to testify that he would refuse to do so and had the witness not been the victim.").

²⁰⁸ *In re Philip A.*, 49 N.Y.2d 198, 199, 400 N.E.2d 358, 359, 424 N.Y.S.2d 418, 419 (1980); see also *Lucenti v. Cayuga Apartments, Inc.*, 48 N.Y.2d 530, 534, 399 N.E.2d 918, 919, 423 N.Y.S.2d 886, 887 (1979) ("When prior to title closing a building is substantially damaged by fire may the purchaser under a real estate contract which contains no risk of loss provision obtain specific performance with an abatement of the purchase price?").

²⁰⁹ See, e.g., *Rich v. Lefkovits*, 56 N.Y.2d 276, 277, 437 N.E.2d 260, 261, 452 N.Y.S.2d 1, 2 (1982) ("Defendant's defense that improper substituted service deprived the court of jurisdiction over his person was not waived by the form of the affirmative defense."); *Methodist Hosp. of Brooklyn v. State Ins. Fund*, 64 N.Y.2d 365, 371-72, 476 N.E.2d 304, 306, 486 N.Y.S.2d 905, 907 (1985) ("The transfer of \$190 million from the State Insurance Fund to the general fund of the State does not violate the Federal or State Constitution.").

²¹⁰ See, e.g., *People v. Howard*, 50 N.Y.2d 583, 586, 408 N.E.2d 908, 910, 430 N.Y.S.2d 578, 581 (1980) ("He may remain silent or walk or run away. His refusal to answer is not a crime."); see also *People v. Kazmarick*, 52 N.Y.2d 322, 323, 420 N.E.2d 45, 46, 438 N.Y.S.2d 247, 248 (1981) ("A pending unrelated criminal case upon which an arrest warrant has issued does not bar the police from questioning a suspect when the suspect does not in fact have

statement of an important principle which led the court to its holding in the appeal²¹¹ (e.g., “A defendant’s attorney who learns of an alibi witness at arraignment does not act unethically in not then revealing the existence of that witness to the prosecution.”).²¹² This kind of precise usage of language left no doubt in the mind of the reader as to what cases were about.²¹³

C. *Insights from the Academy*

As a former chairman of the student editorial board of the *Maryland Law Review*²¹⁴—what would probably today be called “editor-in-chief”—Judge Meyer was eager to cite law review articles and other scholarship when insights from the academy could inform the work of the court.²¹⁵ During his first year on the Court of Appeals, a case raised issues about student rights at private

counsel on the unrelated charge.”).

²¹¹ See *Adventurers Whitestone Corp. v. City of New York*, 65 N.Y.2d 83, 85, 479 N.E.2d 241, 242, 489 N.Y.S.2d 896, 897 (1985) (“Interest on a condemnation judgment is paid to compensate for delay in payment of the award and is payable at such rate as is fixed by statute.”).

²¹² *People v. White*, 57 N.Y.2d 129, 131, 440 N.E.2d 1310, 1310, 454 N.Y.S.2d 964, 964 (1982); see also *People v. Hoag*, 51 N.Y.2d 632, 634, 416 N.E.2d 1033, 1034, 435 N.Y.S.2d 698, 698 (1981) (“Driving while ability is impaired (DWAI) . . . is a lesser included offense of the charge of driving while intoxicated (DWI) . . .”).

²¹³ See, e.g., *People v. Ely*, 68 N.Y.2d 520, 522, 503 N.E.2d 88, 89, 510 N.Y.S.2d 532, 533 (1986) (“The predicate for admission of tape recordings in evidence is clear and convincing proof that the tapes are genuine and that they have not been altered. Absent such proof, the defendant’s concession that the voice on the tapes is his or hers and that he or she recalls making some of the statements on the tapes does not exclude the possibility of alteration and, therefore, does not sufficiently establish authenticity to make the tapes admissible.”).

²¹⁴ See *Maryland Law Review*, Editorial Staff, 2 MD. L. REV. (1937) (masthead).

²¹⁵ See, e.g., *Padula v. State*, 48 N.Y.2d 366, 372, 398 N.E.2d 548, 551, 422 N.Y.S.2d 943, 946 (1979) (citing Daniel D. Pugh, *The Insanity Defense in Operation: A Practicing Psychiatrist Views Durham and Brauner*, 1973 WASH. U. L. Q. 89 (1973)); *Cooper v. Morin*, 49 N.Y.2d 69, 79–81, 399 N.E.2d 1188, 1194–95, 424 N.Y.S.2d 168, 174–75 (1979) (citing A. E. Dick Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873 (1976); William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1976–1977); Note, *Conjugal Visitation Rights and the Appropriate Standard of Judicial Review for Prison Regulations*, 73 MICH. L. REV. 398, 414–16 (1974); Note, *Constitutional Limitations on the Conditions of Pretrial Detention*, 79 YALE L.J. 941, 950 (1970); Note, *The Fundamental Right to Family Integrity and its Role in New York Foster Care Adjudication*, 44 BROOK. L. REV. 63 (1977–1978); Brenda G. MCGOWAN & KAREN L. BLUMENTHAL, WHY PUNISH THE CHILDREN: A STUDY OF CHILDREN OF WOMEN PRISONERS (1978); Mary C. Schwartz & Judith F. Weintraub, *The Prisoner’s Wife: A Study in Crisis*, 38 FED. PROBATION 20 (1974); Eugene Zemans & Ruth Shonle Cavan, *Marital Relationships of Prisoners*, 49 J. CRIM. L. CRIMINOLOGY & POLI. SCI. 50 (1958–1959); Carolyn Simpson, *Conjugal Visiting in United States Prisons*, 10 COLUM. HUM. RTS. L. REV. 643 (1978–1979); Note, *On Prisoners and Parenting: Preserving the Tie That Binds*, 87 YALE L.J. 1408 (1977–1978).

colleges.²¹⁶ Coincidentally, I had written a lengthy paper at Yale on that very subject a year earlier.²¹⁷ My paper dealt in part with an abstruse body of law that is now almost entirely faded from view, the common law of associations.²¹⁸ Judge Meyer read my law school essay and drew upon the sources I had cited²¹⁹ in drafting an opinion holding that a private college has a duty to follow its own disciplinary procedures even when expelling a difficult student.²²⁰

D. Attention to Legislative History

Judge Meyer keenly scoured legislative history in an effort to bolster his arguments about how statutes should be construed. More than once, he sent me to the New York State Library²²¹ when we were in Albany to review the Governor's "bill jacket" for a particular piece of legislation. The library was located at the far end of the Empire State Plaza, a lavish monumental edifice, which Meyer thought Rockefeller had been profligate in spending two-billion dollars to build.²²² At least in earlier times, the Governor's

²¹⁶ *Tedeschi v. Wagner Coll.*, 49 N.Y.2d 652, 404 N.E.2d 1302, 427 N.Y.S.2d 760 (1980).

²¹⁷ Letter from author to Bernard Meyer, *supra* note 74 (applying for a clerkship and mentioning author's paper on a "new theory" of student rights based on the common law of associations).

²¹⁸ See generally Zechariah Chafee, Jr., *The Internal Affairs of Associations Not for Profit*, 43 HARV. L. REV. 993 (1930) (discussing legal causes of action for individuals expelled from not for profit associations); *Developments in the Law—Judicial Control of Actions of Private Associations*, 76 HARV. L. REV. 985 (1963) (discussing the evolution of judicial treatment of the law of associations).

²¹⁹ *Tedeschi*, 49 N.Y.2d at 658–59, 404 N.E.2d at 1305, 427 N.Y.S.2d at 763 (citing John A. Beach, *Fundamental Fairness in Search of a Legal Rationale in Private College Student Discipline and Expulsions*, 2 J.C. & U.L. 65, 65–70, 79–81 (1974); CTR. FOR LAW & EDUC., THE CONSTITUTIONAL RIGHTS OF STUDENTS: ANALYSIS AND LITIGATION MATERIALS FOR THE STUDENT'S LAWYER 371–72 (1976); Note, *Contract Law and the Student-University Relationship*, 48 IND. L.J. 253 (1972–1973); Note, *Consumer Protection and Higher Education—Student Suits Against Schools*, 37 OHIO ST. L.J. 608 (1976); Note, *Private Government on the Campus—Judicial Review of University Expulsions*, 72 YALE L.J. 1362 (1962–1963); Note, *Common Law Rights for Private University Students: Beyond the State Action Principle*, 84 YALE L.J. 120, 122, 143–144 (1974); David M. Rabban, Note, *Judicial Review of the University-Student Relationship: Expulsion and Governance*, 26 STAN. L. REV. 95, 97, 104–06 (1973)).

²²⁰ *Tedeschi*, 49 N.Y.2d at 660, 404 N.E.2d at 1306, 427 N.Y.S.2d at 764 ("Whether by analogy to the law of associations, on the basis of a supposed contract between university and student, or simply as a matter of essential fairness in the somewhat one-sided relationship between the institution and the individual, we hold that when a university has adopted a rule or guideline establishing the procedure to be followed in relation to suspension or expulsion that procedure must be substantially observed.").

²²¹ *About the New York State Library*, N.Y.S. EDUC., <http://www.nysl.nysed.gov/general.htm> (last visited Feb. 10, 2012).

²²² See Chris Churchill, *Empire State Plaza Price Tag: \$2 Billion*, TIMES UNION BLOG (Albany, N.Y.), (Nov. 17, 2009), <http://blog.timesunion.com/realestate/empire-state-plaza->

bill jacket was an envelope that contained original copies of communications that the governor had received and presumably considered before signing a piece of legislation. In one instance, brittle pieces of yellowed paper, dating from the 1920s, crumbled as I opened them to review their contents. When a bill jacket contained something pertinent to a case before the court, it was cited by Judge Meyer.²²³

E. Fascinating Issues

During Meyer's first year, the Court of Appeals considered a fascinating range of cases. The appeals raised many statutory and regulatory issues, but numerous common law and constitutional questions as well. As a result, Meyer authored an interesting mix of opinions that reflected the broad range of the court's work.

For example, in one opinion, he explained why a legal provision making it a misdemeanor for a home improvement contractor to abandon performance of the contract without justification violated the United States Constitution's ban, under the Thirteenth Amendment, against involuntary servitude.²²⁴ In another case, he rejected the California theory of "palimony."²²⁵ Meyer's opinion, which has now been cited more than a thousand times, made clear that a contract as to earnings and assets may not be implied in law from the mere relationship of an unmarried couple living together, but such persons were free to contract with each other, in writing or otherwise, regarding personal services, including domestic services.²²⁶ In another appeal, Judge Meyer reasoned that a county

price-tag-2-billion/565.

²²³ See, e.g., *Lorie C. v. St. Lawrence Cnty. Dep't of Social Servs.*, 49 N.Y.2d 161, 170 n.2, 400 N.E.2d 336, 340 n.2, 424 N.Y.S.2d 395, 400 n.2 (1980) (discussing the contents of a bill jacket).

²²⁴ See *People v. Lavender*, 48 N.Y.2d 334, 339, 398 N.E.2d 530, 532-33, 422 N.Y.S.2d 924, 927 (1979).

²²⁵ *Morone v. Morone*, 50 N.Y.2d 481, 484, 413 N.E.2d 1154, 1155, 429 N.Y.S.2d 592, 593 (1980). The holding he rejected was that of *Marvin v. Marvin*, which held that that "a nonmarital partner may recover in quantum meruit for the reasonable value of household services rendered less the reasonable value of support received if he can show that he rendered services with the expectation of monetary reward." 557 P.2d 106, 122-23 (Cal. 1976). "*Marvin* is known as the 'palimony' case, but courts do not award the equivalent of alimony to an unmarried partner, nor did plaintiff in *Marvin* receive support." Candace Saari Kovacic-Fleischer, *Cohabitation and the Restatement (Third) of Restitution & Unjust Enrichment*, 68 WASH. & LEE L. REV. 1407, 1439 n.171 (2011).

²²⁶ *Morone*, 50 N.Y.2d at 484, 413 N.E.2d at 1155, 429 N.Y.S.2d at 593 (expressly rejecting the different path charted by the California Supreme Court as "conceptually so amorphous as practically to defy equitable enforcement"); see also Selwyn Raab, *Albany Court Rules on Assets of Unwed*, N.Y. TIMES, June 7, 1980, at 1, 45 (quoting lawyers in the case as saying it

2011/2012]

Judge Bernard S. Meyer

1001

law banning all gasoline price signs at a service station, except certain required uniform price signs atop pumps, was an unconstitutional infringement of commercial speech based solely on content.²²⁷

Meyer's extensive background in commercial law shaped some of his early decisions as a member of the Court of Appeals. Among his longest opinions were ones carefully sorting out difficult issues of corporation²²⁸ and partnership law.²²⁹

F. National Prominence

Even as a trial judge from 1959 to 1972, Meyer had garnered national prominence as “one of the leading judges in the country on zoning issues as a result of his meticulously reasoned and clearly written opinions.”²³⁰ When I taught at Vermont Law School in 1991 as a visiting professor, I met a distinguished, elderly professor, Norman Williams, who was an expert in land use planning.²³¹ When Williams learned that I had clerked for Judge Meyer, his eyes lit up. The professor explained that while writing his treatise,²³² he had become intimately familiar with New York zoning decisions. He said that he could not understand how there could be so many “bad” decisions in a state with so many “excellent” decisions—until he discovered that all of the good opinions had been written by

was “a monumental, landmark decision,” and “a great victory for women’s rights”).

²²⁷ See *People v. Mobil Oil Corp.*, 48 N.Y.2d 192, 200, 397 N.E.2d 724, 729, 422 N.Y.S.2d 33, 38 (1979) (“The strong societal and individual interest in the free dissemination of truthful price information [i]s a means of assuring informed and reliable decision making in our free enterprise system . . .”).

²²⁸ See, e.g., *Zion v. Kurtz*, 50 N.Y.2d 92, 96, 405 N.E.2d 681, 682, 428 N.Y.S.2d 199, 200 (1980) (“On these appeals we conclude that when all of the stockholders of a Delaware corporation agree that, except as specified in their agreement, no ‘business or activities’ of the corporation shall be conducted without the consent of a minority stockholder, the agreement is, as between the original parties to it, enforceable even though all formal steps required by the statute have not been taken.”).

²²⁹ See *Whitley v. Klauber*, 51 N.Y.2d 555, 559–60, 416 N.E.2d 569, 570, 435 N.Y.S.2d 568, 569–70 (1980) (involving issues related to the return of limited partnership capital and the rights of judgment creditors).

²³⁰ Ferlazzo, *supra* note 4, at 787 (stating that former Chief Judge Sol Wachtler “who served concurrently with Judge Meyer as a justice in Nassau County” confirmed the same opinion).

²³¹ There is now an endowed “annual Norman Williams Distinguished Lecture in Land Use Planning and the Law at Vermont Law School.” See *Climate Change Makes Humankind’s Survival Uncertain, McKibben Says*, VT. LAW SCH. (Feb. 18, 2011), http://www.vermontlaw.edu/News_and_Events/News/Climate_Change_Makes_Humankinds_Survival_Uncertain_McKibben_Says.htm.

²³² The most recent edition is NORMAN WILLIAMS, JR. & JOHN M. TAYLOR, *AMERICAN LAND PLANNING LAW: LAND USE AND THE POLICE POWER* (3d ed. 2003).

Judge Meyer.

It was Williams to whom former Chief Judge Wachtler referred in a speech marking Meyer's retirement from the Court of Appeals in December 1986. Wachtler said:

One legal scholar, rating him among the top three leading Judges in the country, observed: 'With the rapid development of Nassau County on Long Island, several hundred zoning opinions reached the trial courts from that area during the 1950's—mostly brief, often by memorandum, and mostly totally undistinguished. Out of this morass, one judge stands out sharply and with great distinction—former Justice Bernard Meyer, whose opinions have been meticulously reasoned and clearly written. His intellectual vigor and precision would have opened a new era' to the New York Court of Appeals. Eventually, he did bring this brilliance to our court.²³³

VIII. CRUSHING WORKLOAD

Working for Bernard S. Meyer was physically demanding, as well as intellectually challenging. However, to say only this is to offer a pale reflection of reality. The demands of clerking for Judge Meyer during his first year on the New York Court of Appeals (1979–1980) were relentless. This was true because of the heavy caseload of the court, the peripatetic nature of the work, the obstacles to accessing, using, and communicating information in a precomputer age, the challenges of learning a new job, and the high standards of the judge himself.

Of course, the fact that the demands in Judge Meyer's chambers were overwhelming was a good thing for a new law clerk just entering the legal profession. It indelibly impressed on me the idea that being a good lawyer or a good judge is a very difficult assignment that entails long hours and hard work. As an arrangement for teaching that moral lesson, the clerkship was unsurpassed. No one could teach a young lawyer to work to his or her limits better than Bernard S. Meyer.

Judge Meyer set a great personal example, had high expectations for his clerks, and was a complete pleasure to deal with on a daily basis. However, it was still a very tough job. At the vantage point of more than thirty years, I can now confidently assert that I have

²³³ Wachtler, *supra* note 5, at vii–viii.

2011/2012]

Judge Bernard S. Meyer

1003

never heard of a clerkship with a more crushing workload or exhausting schedule than the one I experienced with Judge Meyer at the New York Court of Appeals.²³⁴

A. *The Caseload of the Court*

While the Supreme Court of the United States at one point heard arguments in, and decided on the merits, more than 200 cases each

²³⁴ This of course is a large claim, so I feel called upon to offer facts suggesting that I have a basis to draw this conclusion. After my year at the New York Court of Appeals, I clerked for two years in Chicago for the Chief Judge of the United States Court of Appeals for the Seventh Circuit, Thomas E. Fairchild. I later spent a year in Washington, D.C., as a United States Supreme Court Fellow, assisting Chief Justice William H. Rehnquist with his duties as head of the Judicial Branch. I have even lived vicariously through my wife's two federal court clerkships. For thirty years, I have followed the careers of my students who have gone on to clerkships in state and federal courts in Texas and around the nation. I also supervise more than twenty students each year who intern for state and federal courts in San Antonio, South Texas, and occasionally other states. I routinely ask my present and former students about the workloads of their courts: how hard the lawyers and judges work; when do they arrive at and leave the office; whether they take work home; and how many cases the court decides each year. Nothing I have heard comes close to the demands of being a clerk for Judge Meyer at the New York Court of Appeals in 1979–1980.

I can think of only two possible exceptions, but I think they should be distinguished. First, there are some situations where a crush of work is due to a backlog and presumably the heavy workload is temporary. For example, several years ago, one of my students applied for a clerkship with a new federal judge in Louisiana. During the months before the judicial vacancy was filled unfinished tasks had accumulated. The new judge was overwhelmed. During the interview, she told the applicant that he had the job. She then asked him if could go into the other room and start working immediately on the waiting cases, which is what he did. However, there was no backlog when Judge Meyer reached the New York Court of Appeals. The court was current in handling its docket. It had decided cases with a six-judge court during the months when there was a vacancy.

Second, some courts, particularly along the Rio Grande border, are inundated by drug-related proceedings and other criminal and immigration matters. At those courts, the workloads are staggering. See *Immigration Crisis Tests Federal Courts on Southwest Border*, THIRD BRANCH (June 2006), http://www.uscourts.gov/news/TheThirdBranch/06-06-01/Immigration_Crisis_Tests_Federal_Courts_on_Southwest_Border.aspx (putting the felony caseload in the Laredo division of the Southern District of Texas at “an average of 1,400 per judge.”); *Federal Courts Hit Hard by Increased Law Enforcement on Border*, THIRD BRANCH (July 2008), http://www.uscourts.gov/news/TheThirdBranch/08-07-01/Federal_Courts_Hit_Hard_by_Increased_Law_Enforcement_on_Border.aspx (noting recruitment and retention problems “because many employees at border locations are experiencing burnout due to the nature and sheer volume of the work.”). However, there is little pretense that those courts are doing individualized justice based on a full and fair hearing of the facts of each case in the great Anglo-American tradition. Rather, they are functioning more like administrative agencies seeking to achieve a minimally acceptable level of rough justice in the context of mass, but disaggregated, litigation. That was certainly not the case at the New York Court of Appeals during Judge Meyer's first year. Every case received plenary consideration with a view toward not only equitably resolving the dispute, but shaping the law of New York for its role in future cases. Moreover, it is fair to distinguish trial courts from appellate courts. See also Margolick, *supra* note 66, at 1 (quoting a senior attorney at the National Center for State Courts and stating that not long after Meyer joined the Court of Appeals, that in terms of dockets nationally, “[i]t's clear that New York ha[d] the worst mess by a long shot.”).

year, the number has dropped to fewer than 100 cases annually in recent times.²³⁵ By contrast, during Judge Meyer's first year on the New York Court of Appeals, the state's highest tribunal heard arguments in about 675 cases.²³⁶ The court had apparently been operating at a similar breakneck pace for years.²³⁷ It would continue to do so into the future.²³⁸ Only years later were relevant laws amended to give the Court of Appeals greater control in selecting the cases that would come before it.²³⁹

When Meyer joined the Court of Appeals, each of the cases in which the court heard argument was decided with an opinion. As Judge Hugh R. Jones explained in his 1979 Cardozo Lecture before the Association of the Bar of the City of New York, "we no longer have recourse to the once familiar acronym, 'ANOPAC' (Affirmed, No Opinion, All Concur)."²⁴⁰ In some instances, the dispositive writing in an appeal was a short *per curiam* decision, a memorandum, or a line entry.²⁴¹ However, in many instances, the

²³⁵ "Beginning in 1875 and continuing until 1925, the Court typically decided more than 200 cases per term. In 1925, Congress authorized the Court to decide for itself which cases it would hear. As a result, the Court averaged only about 125 signed opinions per term, and that figure has declined to well under 100 in recent years." LEE EPSTEIN ET AL., *THE SUPREME COURT COMPENDIUM: DATA, DECISIONS, AND DEVELOPMENT* 58 (4th ed. 2006).

²³⁶ The first day that Judge Meyer heard arguments was Tuesday, May 29, 1979. The Court of Appeals Day Calendars for the one-year period between May 29, 1979, and May 28, 1980, show that 675 cases were calendared. (Copies on file with author). In rare instances, a few of those matters were submitted on the briefs and no time was allocated for oral argument. My notes indicate that at least one of the calendared cases settled before oral argument, but I do not know whether it was replaced with another appeal.

²³⁷ See Burks, *supra* note 18, at 1 (stating during the 1978 campaign for three seats on the Court of Appeals, there was "widespread agreement" among the candidates that "the number of 'unimportant cases'" reaching the court needed to be curtailed because "[i]t now hears nearly 600 cases a year and acts on 1,000 motions and 800 'criminal applications'").

²³⁸ See Margolick, *supra* note 66, at 1 ("In 1981 the Court of Appeals decided 706 cases on the merits, more than three times as many as the United States Supreme Court.").

²³⁹ See David D. Siegel, Book Review, *Arthur Karger, The Powers of the New York Court of Appeals Third Edition*, 69 N.Y. St. B. J. 66, 67 (1997) ("With the 1985 legislation, the appeal by permission came altogether into its own, being much expanded in conjunction with the concomitant diminution in the appeal of right. It is because of this alteration that one hears the Court of Appeals described today as essentially a "certiorari" court, implying only that what it reviews is ordinarily what it chooses to review. In Court of Appeals practice, we call the step that asks the court to make that choice a motion for leave to appeal instead of a petition for certiorari. Same difference."); see also MEYER ET AL., *supra* note 6, at 62 (discussing the amendment which provided the Court of Appeals with broader discretion in choosing which cases it would take).

²⁴⁰ MEYER ET AL., *supra* note 6, at 128 (quoting Hon. Hugh R. Jones, *Cogitations on Appellate Decision-Making*, 34 RECORD 543, 548 (1979)).

²⁴¹ Jones, *supra* note 240, at 548 ("If there is a writing in a court below . . . which adequately articulates the grounds for the correct disposition, we rely on and refer to that opinion, both for affirmance or for reversal. If there is no such writing and the case is judged to have little precedential value (no case has none!) a very brief memorandum is prepared which without elaboration informs counsel and the litigants why we reached the result we

2011/2012]

Judge Bernard S. Meyer

1005

opinion explained in great detail the basis and contours of the court's ruling and the legal support for the decision. This usually entailed a detailed recitation of the facts, exploration of the law, and articulation of the court's ratio decidendi.²⁴² In many instances, individual judges authored additional concurring and dissenting opinions.

Because the New York Court of Appeals is a "hot court," Meyer and the other judges were expected to become versed in the issues of each case in advance of the oral argument.²⁴³ To facilitate this process, Judge Meyer's law clerks produced a bench memo for each appeal. Often in the neighborhood of four to seven pages in length, typewritten, double spaced, these memoranda reviewed the issues of the case and recommended how the appeal should be decided. Judge Meyer read each bench memo before oral argument and as much of the briefs and records as time allowed.

1. Sessions in Albany

It is possible to get some sense of the pace of the work of the New York Court of Appeals during Meyer's era by focusing on the court's schedule. Each of the seven judges maintained home chambers somewhere in New York State (Chief Judge Cooke in Monticello; Judge Matthew J. Jasen in Buffalo; Judge Domenick L. Gabrielli in Bath; Judge Jones in Utica; Judge Wachtler in Mineola; Judge Fuchsberg in lower Manhattan; and Judge Meyer in midtown Manhattan). Allowing for some slight variations in the court's calendar, related generally to holidays and election-dispute appeals, the pattern was highly predictable: two weeks in Albany, three weeks at home chambers, then back to Albany for another two weeks, next three weeks at home chambers, and so forth.

During the sessions in Albany, the judges normally heard eighty cases: eight cases a day, five days a week, for two weeks. That meant that every thirty-five days (five weeks), there were eighty new cases that needed to be decided on the merits. That meant forty new cases for each of the two law clerks.

did.”).

²⁴² “[T]he reason for deciding.” BLACK’S LAW DICTIONARY 1290 (8th ed. 2004) (defining ratio decidendi).

²⁴³ See Benkart, *supra* note 31, at 689 (indicating that almost immediately after Breitler’s election as Chief Judge in 1973, “the Court of Appeals became a ‘hot bench’” because “the new chief decreed that each judge had to be fully prepared on all cases before the oral argument.”).

2. Dividing the Work

When the mass of printed materials relating to upcoming appeals arrived in Judge Meyer's chambers a day or two after the completion of the preceding session,²⁴⁴ the cases bore sequential numbers. Kelly and I physically segregated the materials. Kelly took the odd-numbered cases; I took the even ones. In an effort to gain a foothold in attacking the large stack of materials, I always looked for the ones with the thinnest briefs and records. I worked on those first in order to create the illusion of progress. However, there were never many appeals of that variety. More commonly, the briefs pressed the page limits set by the court, and sometimes the records and appendices were as thick as small books.

All of the papers related to an appeal needed to be read before a bench memo could be written. However, that was usually only the starting point. Typically, it was necessary to pull the cases that had been cited and differently interpreted by the parties to the litigation, in order to gain a clear understanding of the relevant law.

3. The Range of Tasks

Grinding out factually reliable bench memos that made legally sound recommendations, at a pace averaging more than one new appeal each day, was a demanding assignment. Of course, that was only part of the job. Judge Meyer's clerks also reviewed and made recommendations on whether he should grant leave to appeal in criminal matters (about ten matters per clerk per month);²⁴⁵ drafted reports for circulation to all judges of the court about how motions should be decided (about three matters per clerk per month);²⁴⁶

²⁴⁴ It was frequently possible to obtain some of the new cases prior to the end of the preceding session, but that had to be specially requested. Of course, we did that regularly so that we could get started on the next avalanche of material.

²⁴⁵ See Meyer's Address to Albany Cnty. Bar Ass'n, *supra* note 3, at 4 ("Criminal motions for leave to appeal are made to and decided by individual judges and generally will be dealt with during the three-week intersession, when such oral hearings as may be necessary can be held.").

²⁴⁶ Judge Meyer explained the handling of motions in these terms:

Civil motions are . . . made to the entire Court and may be for leave to appeal, to dismiss an appeal, or for reargument or for a stay. They are processed in two ways. About one-third of the motions are assigned to the seven judges individually and the other two-thirds are assigned to the central legal staff in the first instance. Reports on judge-assigned motions will be prepared by the judge's staff and approved by him for circulation. Central staff-assigned motions will be prepared by a member of the central staff but cannot be circulated until an individual judge has reviewed the report and approved it for circulation. [In the evening during sessions of the Court in Albany.] I

2011/2012]

Judge Bernard S. Meyer

1007

performed research and drafting related to opinions Judge Meyer would author (something of that variety was virtually always pending); answered phone calls from lawyers; scheduled and attended hearings at the home chambers; and generally played a role in the management of the office.

In Albany, it was also common for one of the clerks to assist Judge Meyer with preparing to report to the court's conference the next day on the case or two that he was assigned at the end of a day's arguments. That part of the work took place sometime between when the judges left the bench around 6 p.m. one day and 10 a.m. the next morning when the judges reconvened.²⁴⁷

work on the motions done by my own staff and central staff first, so as to get them into circulation, and then review the motion reports received from other judges that will be dealt with in conference the next morning. I complete as much of the motion work as I have time for [after arguments for the day end] before dinner and finish whatever is left when I return from dinner, before getting to work on the case on which I must report the next morning. The number of motions considered each day may vary from 5 to 20, but on most days my motion work will be complete by 8:30 or 9 o'clock [p.m.]. While that may give you the impression that the period for consideration of each motion is too short, I emphasize that the motion reports are full, often running to 15 to 20 pages, that a standard format has been devised which assures that the background facts and law will be fully developed, and that unless the movant has sought leave to file fewer than 10 copies each judge has a set of motion papers to check against should he have any questions. One added factor that will be of interest to those of you who move before us for leave to appeal to our Court is that it takes only two votes out of seven members of the court to grant the motion.

Id. at 4–5.

²⁴⁷ Judge Meyer described this part of the work as follows:

The formal session of the court begins at 2 p.m. and continues until all calendared cases are concluded. Normally there are eight cases scheduled each day, but election cases or other preference matters may increase that to nine or ten. Arguments will normally conclude between 5:30 and 6:00, but not infrequently go past 7 and on rare occasion have run as late as 9.

Immediately after we come off the bench, the Chief Judge spreads out on a table face down 3 by 5 cards on which have been typed the number and name of each case on the calendar and moves them around as would a three card monte dealer. The next junior judge after the judge who drew the last case the day before begins the draw and it proceeds in order of seniority until all cases have been assigned. Since there are at least eight cases on the calendar, one judge (and sometimes more) draws two cases. A judge is expected to be prepared by 10 o'clock the next morning to report on the case or cases that he drew, stating the position he believes the Court should take, the form its statement of that position should take (that is to say, opinion, per curiam, memorandum or simple line entry) and the reasoning on which his conclusions are based.

That is not as terrifying as it sounds because, as you know, the Court is a hot court and the judges are, therefore, familiar in advance of argument with the legal issues and factual material involved, and, of course, have had the advantage of both oral argument and their own questions to counsel as a means of clarifying unclear matters. It is, nonetheless, a formidable chore, especially for the judge or judges who draw more than one case.

The draw completed, we agree on a time to meet for dinner and return to chambers. My two law secretaries review cases on the basis of calendar numbers, one working on

4. Prompt Decisions

At the New York Court of Appeals, during Judge Meyer's first year, appeals never languished. Except in the rarest instances, a case argued during one Albany session was decided before the end of the next Albany session, often much sooner. Thus, virtually no case that had been argued went more than seven weeks before a decision was issued. This reflected great credit on the work ethic of the judges and the management of the court. "Justice delayed" might have been "justice denied." Less poetically, the crush of cases was so great that if the court ever got behind, it might take years to catch up.

B. Peripatetic Judging

The reality of the Court of Appeals calendar—which alternated three-week intersessions at home chambers with two-week sessions in Albany—was that most judges and their staffs traveled on three of the five weekends. The judges, secretaries, and law clerks often left Albany late Friday afternoon of the first week, after the last case had been argued, then returned to Albany on Sunday evening or early Monday morning, in advance of the second week of arguments. Most of the travel was by car or bus.

odd numbered cases and the other on the evens. The appropriate one will be alerted to what case we've drawn, and we'll discuss for a few minutes what additional research into the case record or into the law needs to be done. He begins on that, and I turn my attention to motions.

....

[Later.] . . . I then turn my attention back to the case I am to report on the next day. By that time the law secretary will have ready for me the cases, annotations and law review articles he thinks I should look at and will give me an oral report on his research. I will then review once again the briefs, the law secretary's earlier written report and the research materials he has suggested and do whatever additional research I think necessary. My object is, if possible, to complete the research part of my work before I leave, which will generally be about 11 p.m. When I return the next morning will depend on how much research remains to be done, but generally will be between 6 and 7 a.m. If I believe that the matter will require a full opinion or a *per curiam*, I will simply prepare an outline along the lines I think it should develop. If I think the matter can be disposed of by memorandum or line entry, I will draft the memorandum or entry and take it with me to conference.

Having completed work on the case on which I must report, I will then turn my attention to the other cases, which, of course, I must be prepared to discuss and vote on. That means reviewing my law secretary's report to me on the case, my own notes (usually endorsed on his report as I read the briefs), and my notes taken during argument, and in some instances re-reading applicable cases preparatory to discussion. That will usually take me, with 10 or 15 minutes out for coffee and a Danish and a look at the *New York Times* headlines, until just about conference time at 10 a.m.

Id. at 2–6.

2011/2012]

Judge Bernard S. Meyer

1009

The consequences of this pattern sank in quickly with me. Less than three days after we had arrived in Albany in the middle of the night following Judge Meyer's swearing-in, we returned to Manhattan. However, Judge Meyer's "home chambers" did not yet exist, and I had no place to live. My belongings were still in New Haven. I stayed with the Meyers that weekend at their home on Long Island. On Saturday, Judge Meyer and I drove into Manhattan, where he worked at the offices of Fink, Weinberger—a law firm in which some of his friends practiced.²⁴⁸ I had a morning and an afternoon to locate an apartment. Fortunately, a bulletin board at New York University led me to a one-room rental at 68 Bedford Street and I struck a deal with the owner for \$215 per month. Judge Meyer and I returned to Long Island Saturday evening and then left for Albany again on Sunday or Monday (Memorial Day).

This recurrent pattern of travel added its own pressures to the job. Packing and unpacking and simply getting from one place to another takes time and effort. Those challenges were certainly nothing in comparison to the travails that jurists faced when United States Supreme Court justices rode the federal circuits by horse and stagecoach.²⁴⁹ However, the inconveniences were not negligible. At the very least, travel ate up time that could have been devoted to the great load of pending cases.

Bad weather was sometimes a problem. As Robert C. (Chuck) Zundel, who clerked for Judge Jasen from 1978 to 1980, commented, "[t]he route between Buffalo, Judge Jasen's home chambers, and Albany . . . became well known, indeed all too well known during the winter months of upstate New York."²⁵⁰ However, in the Albany area during Judge Meyer's first year it was a warm winter and there were constant concerns that there would not be enough snow for the 1980 Winter Olympics, which were being held in nearby Lake Placid.²⁵¹ Fortunately, the weather ultimately cooperated with the athletes.²⁵²

²⁴⁸ See Ferlazzo, *supra* note 4, at 786.

²⁴⁹ See DAVID M. O'BRIEN, *STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS* 101 (1986) (describing the hardships of circuit riding); WILLIAM H. REHNQUIST, *THE SUPREME COURT: HOW IT WAS, HOW IT IS* 139–40 (1987) (discussing the early justices' circuit riding duties).

²⁵⁰ Ronald C. Berger & Robert C. Zundel, Jr., *New York State Court of Appeals: Reflections of Two Law Clerks*, 48 SYRACUSE L. REV. 1487, 1489 (1998) (comments of Zundel).

²⁵¹ Barbara Basler, *Woes, Foreign and Domestic, Threaten Winter Olympics*, N.Y. TIMES, Jan. 20, 1980, at E5.

²⁵² United Press International, *Lake Placid Expects Snow*, MORNING RECORD & J., Jan. 18,

There were sometimes special challenges. During Judge Meyer's first year on the Court of Appeals, there was a gasoline shortage, and fuel could be purchased in New York State only on certain days, depending on one's license plate number.²⁵³ I remember waiting with Judge Meyer in a long line at a service station. He speculated that if we ran out of gas on the New York State Thruway, the state police would probably somehow get us to Albany for the upcoming session of court.

Judge Meyer and I quickly developed a mutually convenient routine for traveling to Albany. Since he lived on Long Island and I lived in Greenwich Village, we would meet at his home chambers in midtown Manhattan late in the morning or early in the afternoon of the day before a week of arguments in Albany. Sometimes this fell on a holiday, as when we met at about noon on New Year's Day 1980 for our journey upstate. We would then ride together in Meyer's car on the three-hour trip to Albany, roughly 150 miles. Driving with Judge Meyer was a pleasure, and it saved me from riding a bus to the state capital. (The only downside was that I had to lug a large suitcase through the streets and subways of New York City to reach the chambers. Luggage with built-in wheels had not yet been invented, and on one occasion my folding cart disintegrated).²⁵⁴ The arrangement for driving to Albany also helped us to cope with the demanding caseload.

During half of the drive to Albany, Judge Meyer drove and I orally briefed him on the upcoming cases. During the other half of the trip, I drove and Judge Meyer read bench memos about pending appeals. Throughout each trip, Judge Meyer peppered me with questions to clarify his understanding of cases. Of course, there was casual conversation, particularly about developments related to the upcoming 1980 presidential election. We were both interested in politics. However, for the most part, the drives to Albany were

1980, at 12.

²⁵³ Edward Roby, *U.S. Mandates Energy Conservation, Urges Odd-Even Gas Rationing Plans*, SCHENECTADY GAZETTE (N.Y.), Nov. 17, 1979, at 1.

²⁵⁴ At the end of a week in Albany, Judge Meyer was eager to get back to Long Island, so I usually rode the bus back to New York City and he drove directly home. However, on a few occasions, we did ride together. On one trip, I was driving when we reached Manhattan. I got to a point where I had to merge into a different lane, but simply could not do so without causing an accident. I ended up getting the two front tires of Judge Meyer's car on opposite sides of a widening "island." As a result, we took a good bounce as I eventually managed to get the car over the island. The vehicle, bearing the license plate, "Court of Appeals 7," must have looked as though it was being driven carelessly. When the crisis emerged, Judge Meyer only had time to exclaim, "You can't do that." He never said anything further, but I noticed that he always made sure thereafter that I was not at the wheel in New York City.

2011/2012]

Judge Bernard S. Meyer

1011

productive work sessions.

When we reached Albany, I was dropped off at my hotel.²⁵⁵ Soon thereafter, I rendezvoused with Judge Meyer at Court of Appeals Hall, the beautiful “classic Greek Revival building,” with massive Ionian columns in front, at 20 Eagle Street, the home of the New York Court of Appeals.²⁵⁶ Work then quickly got underway on Sunday afternoon and evening with final preparations for the coming week.

C. Before Computers

The first order of business upon arrival in Albany was to unpack “the boxes.” What this means must be placed in context. Judge Meyer’s first year on the Court of Appeals occurred near the end of the pre-computer age. There were no personal computers in the judge’s chambers in New York City and Albany. Online databases, like LexisNexis and Westlaw, were still in their nascent stages and were unavailable to us. Judicial opinions were typically drafted longhand on yellow legal tablets and the drafts were given to a secretary to type.²⁵⁷ There was a small photocopier in Judge Meyer’s home chambers in Manhattan and copiers were available at various locations in Court of Appeals Hall in Albany. However, aside from photocopiers, Judge Meyer’s chambers operated without any modern technology (except that the typewriters were electric).

²⁵⁵ There was a pecking order to where court personnel stayed. Secretaries and law clerks without cars, like myself, stayed at the Sheraton at the bottom of Albany’s capitol hill on Broadway, not far from the long distance bus station. The court was within easy walking distance (ten-to-fifteen minutes) and there was a shuttle to the court each morning at about 7:10 on weekdays. Law clerks with cars tended to stay at a place farther away, on the other side of the Hudson River. The rates were lower there and the clerks could make a small profit on the state’s per diem allowance. Judges stayed at nicer hotels, in apartments, or in places they owned.

²⁵⁶ *Court of Appeals Hall Construction, Restoration and Renovation 1842–2004*, THE HISTORICAL SOC’Y OF THE COURT OF THE STATE OF N.Y. (Dec. 13, 2011), [hereinafter *Restoration and Renovation*], http://www.courts.state.ny.us/history/renovation/Restore_Book.pdf.

²⁵⁷ Sometime in 1981, when I clerked at the Seventh Circuit in Chicago, that court began to introduce Wang computers. However, judges or law clerks did not use them. Longhand drafts were given to a secretary in the judge’s chambers who was designated the “Wang operator,” the only person permitted to use the Wang. Initially, the court’s introduction of Wang computers made little difference to the work of the court. In the Chief Judge’s chambers, the “Wang operator” treated the computer as a typewriter and instructed law clerks not to make a lot of changes to anything she had already typed. Things did not improve quickly in some parts of the judiciary. When I was a Fellow at the United States Supreme Court in 1988–1989, the Court was still using an antiquated, cumbersome computer system, which was less user-friendly than the huge Compaq portable computer I had purchased for myself in 1985.

Drafts of opinions from other judges arrived by U.S. Mail. Public access to the Internet was still more than a decade away. Facsimile machines were also a rarity. On one occasion, I was sent across Manhattan to Judge Fuchsberg's chambers because he had a fax machine or something similar. When Meyer joined the Court of Appeals in 1979, essentially no case-related information could be digitally stored, retrieved, or transmitted.

Predicting that I could clearly dictate bench memos for typing by a secretary faster than I could type the memos myself, I requested a recorder suitable for dictation. What we received from the Office of Court Administration ("OCA") was a huge reel-to-reel recorder with a microphone that was attached by a heavy wire, and a set of headphones and a foot pedal for the secretary to use for playing back material during transcription. The device was ancient and must have weighed ten pounds. It was as big as two shoeboxes placed side by side. Quite impractically, OCA had given us only two reels of recording tape, so it was important to make sure that at least one of the reels was available, and not tied up in transcription, when I needed to dictate a report. However, the antiquated recording device worked and I used it all year. We managed to get by with the two reels of tape until I tracked down a place where this peculiar form of media could still be purchased. I then walked to an office in the Empire State Building to do so.

D. Constantly Moving the Office

Everything from Judge Meyer's Manhattan office that might be needed by him or his staff during a session in Albany had to be physically transported there. This included all of the hard-copy materials related to the eighty cases that would be argued during the upcoming two weeks, as well as material relating to any cases still pending from the prior Albany session. This added up to a small mountain of paper and other items (including the large tape recorder). Thus, every session in Albany began with packing "the boxes" for their trip to Albany. The boxes were large, sturdy, black fiberglass containers with heavy straps that secured the lids. They bore the scuffmarks of many trips across New York State.

It normally took about seventeen boxes to pack up everything that was needed by Judge Meyer's team during a normal oral argument session. Of course, the packing in New York City had to be delayed as long as possible or else it would interfere with work at the home chambers. Then, in Albany, the boxes needed to be

2011/2012]

Judge Bernard S. Meyer

1013

unpacked immediately, otherwise work could not begin.

State employees, who circled the state in a truck on the Saturday before oral arguments, physically transported the boxes to Albany. Those workers picked up boxes at each home chambers, and delivered them to the appropriate offices in Court of Appeals Hall by midday Sunday. At the end of the two-week session in Albany the process played out in reverse order and materials were returned to each judge's home chambers.

E. Keeping Track of Everything

To say that moving the office to Albany, and moving it back to Manhattan, every two or three weeks was a logistical challenge is an understatement. It was a task that called for precise organization. It was necessary to carefully track the handling of appeals so that one would know when to dispose of materials that were no longer needed. Otherwise materials would be unnecessarily shipped across the state and would confuse the handling of the items that were needed. This was a bit trickier than might first appear because some cases were decided by the Court of Appeals for all practical purposes, but only tentatively so. Consideration of such a case might be re-opened at any time before a decision was announced.

On the other hand, even when only the necessary materials were shipped, it was important to unbox them in a manner so that, at any moment, the papers relating to a particular appeal could readily be located. With often more than a hundred sets of materials (briefs, records, appendices, bench memos, notes, copies of cases, and draft opinions) in play during any two-week court session, this too was a challenge.

At Judge Meyer's request, I created a process to bring order to potential chaos. Spelled out in a small manual²⁵⁸ that I drafted for the clerks who would succeed me, the process explained how materials were to be unboxed and shelved at the beginning of a session in Albany, and how the location of the materials would change as the cases progressed toward final decision.²⁵⁹ "The reasons for this elaborate procedure . . . [were that a]t the

²⁵⁸ Vincent R. Johnson, Notes on Clerking (July 2, 1980) (produced for use in Judge Meyer's chambers) (on file with author).

²⁵⁹ The manual also advised new clerks on how to handle phone calls from attorneys, criminal leave applications, and motions, as well as requests for an interim stay, release on bail or recognizance, or a hearing. *See id.*

conclusion of the session, you have to decide what to throw out, what to pack up for home chambers, and what to leave in the courthouse chambers.”²⁶⁰

The efficacy of the shelving process turned upon a trivial detail: placing labels on bookcases in the judge’s Albany office to guide the proper placement of materials. The labels read “Pending,” “TD” (tentatively down), “Down,” or “Old TD,” terms that the judges themselves used on their tally sheets that were created during the court’s confidential deliberations. The regime for shelving and moving the materials was tedious and it was complete with indexes and mechanisms for double-checking the status of individual cases. But, apparently, the process continued to work fine for some period of time after I finished my clerkship. At Judge Meyer’s retirement party in late 1986, I was told that when he changed offices in Court of Appeals Hall in the early 1980s his staff peeled the original labels off of their designated locations in his initial chambers and moved them to similar bookcases in the new office.

IX. MASTERING THE NEW JOB

A. *Midtown Manhattan*

The plan was always that Judge Meyer’s home chambers would be located in midtown Manhattan, either at the headquarters of the Association of the Bar of the City of New York or somewhere in that vicinity. Both Meyer and lawyers in midtown law firms (he said) believed this was important. The matter may have been more symbolic than a question of convenient access to judicial resources.²⁶¹ Although Judge Meyer sometimes held hearings or considered emergency motions, not many lawyers needed to come to the home chambers. However, Judge Fuchsberg was already based in lower Manhattan.²⁶² In the eyes of the midtown legal community, locating Judge Meyer in midtown Manhattan might have been viewed as a way of asserting that that part of the city was an equally desirable place to practice law. Certainly, locating

²⁶⁰ *Id.* at 2 (outlining how to handle briefs and records).

²⁶¹ It is easy to speculate that there was a territorial rivalry within the New York bar similar to the rivalry in New York real estate. See JAMES GLANZ & ERIC LIPTON, *CITY IN THE SKY: THE RISE AND FALL OF THE WORLD TRADE CENTER* 9 (2003) (discussing how the World Trade Center came to be located in downtown Manhattan at a time when “the corporate epicenter was moving north, to Midtown—a place so far away, in commercial terms, that it might as well have been a separate city.”).

²⁶² See Cohen, *supra* note 4, at 763–65; MEYER ET AL., *supra* note 6, at 30.

2011/2012]

Judge Bernard S. Meyer

1015

his chambers near the headquarters of the Association of the Bar of the City of New York was a way for Meyer to express his gratitude to that professional organization which had, in his various quests, provided important endorsements of his qualifications to sit on the Court of Appeals.

Meyer was sworn in less than five weeks after his nomination by Governor Carey.²⁶³ It was therefore not surprising that OCA said that more time would be needed to prepare his new midtown chambers for him. The location that was finally chosen was The Bar Building (36 West 44th Street, between Fifth and Sixth Avenues), which is immediately adjacent to the bar association's landmark building, the House of the New York City Bar Association (42 West 44th Street).²⁶⁴

B. Temporary Chambers with No Books

During the construction of the new office, temporary home chambers were established in the Lincoln Building, on 42nd Street across from Grand Central Station.²⁶⁵ Those offices were a Spartan-affair, with no particular charm and fewer conveniences. However, there was one modest amenity that proved to be extremely helpful, a tiny, shared law library in the basement, thirty or so floors beneath the temporary chambers.

For some reason, which still seems inexplicable to me, OCA was unable to supply Judge Meyer's temporary chambers with law books. We had no books. There were no volumes containing the decisions of the courts of New York or any other tribunals, and no compilations of statutes. Needless to say, this was a huge impediment to doing the work of the Court of Appeals in an era before computerized legal research. To mitigate the problem, I would frequently go down to the basement of the Lincoln Building to conduct research in the tight library quarters or photocopy cases to take back upstairs. Judge Meyer also arranged for me to have access to the library at New York University School of Law, which I could use in the evenings and on weekends, since it was near my apartment. I spent endless hours at NYU, many of them copying

²⁶³ MEYER ET AL., *supra* note 6, at 31.

²⁶⁴ *Our Historic Building*, N.Y.C. BAR ASS'N, <http://www.abcny.org/about-us/our-historic-building> (last visited Feb. 10, 2012).

²⁶⁵ Now called One Grand Central Place (60 East 42nd Street, New York City), the Lincoln Building was completed in 1930 with fifty-three stories and built in neo-gothic style. See *Facts and Figures*, W&H PROPERTIES, <http://www.onegrandcentralplace.com/facts-figures.phtml> (last visited Feb. 10, 2012).

materials for Judge Meyer to consult at the temporary chambers in the Lincoln Building or while commuting to and from Long Island by train.

C. Home Chambers in the Bar Building

Judge Meyer was not able to move into the Bar Building until late November or early December 1979. To my mind, the facilities there were disappointing. There was an office for the judge, a conference room, an office for each of the two law clerks, a storage room, which housed a photocopier and water dispenser (and “the boxes”), and a secretarial/entry area which provided access to each of the offices. The chambers never looked particularly attractive or “pulled together” before I finished my clerkship in July 1980. The impression the facilities gave was that OCA was working with half of the budget that it needed and inexperienced design personnel. However, Judge Meyer did not seem to mind or even take notice of these aesthetic matters. Despite the fact that he was always well dressed, cut a tall,²⁶⁶ handsome professional figure, and lived in a fine house, he seemed oblivious to the missing window treatments at the office or the fact that furniture in the conference room was too large for the available space.²⁶⁷

However, the new home chambers on 44th Street did have books. After months of operating without copies of even the *New York Reports* or *McKinney’s Consolidated Laws*, even a small collection of books was a luxury (albeit an essential one). As the new bound copies of *New York Supplement 2d* arrived in the chambers and were placed on the shelves in Judge Meyer’s conference room, I saved the outdated paperback advance sheets and carefully moved them into my office because ready access to even such modest resources was useful.

Moreover, the great library collection of the Association of the Bar of the City of New York was just steps away in the adjacent building.²⁶⁸ That library, in 1979–1980, was still dominated by the

²⁶⁶ The travails of aging would eventually take their toll. By the late 1990s, Judge Meyer’s stature had become seriously bent by back problems.

²⁶⁷ In contrast, Judge Fuchsberg’s chambers, both in lower Manhattan and Albany were gorgeous. When the court was in session, it was always a pleasure to wander across the hall into Judge Fuchsberg’s attractive offices to commiserate with his clerks (Vincent E. Gentile and William Wiegmann) about how difficult pending cases would be decided. Visitors were sure to notice the spectacular artwork (which may have been on loan from museums) and a framed letter to Jacob Fuchsberg from Albert Einstein.

²⁶⁸ See *Library*, N.Y.C. BAR ASS’N, <http://www.nycbar.org/index.php/library/overview-hours>

2011/2012]

Judge Bernard S. Meyer

1017

hard copy format. Patrons in the massive reading room would fill out little paper slips at their desks and place them in a location that could readily be spotted. Members of the staff would then pick up the slips, retrieve the requested volumes from somewhere in the stacks that rose three stories high around the reading room, or from the unseen bowels of the collection, and deliver the books promptly to the intended user. The library operated in a grand antiquated manner that was worlds away from both the shared law library in the basement of the Lincoln Building and later Internet-based legal research.

D. Secretarial Support

Judge Meyer had originally hired as his secretary a woman who was an experienced member of the Court's staff. Logically, that should have eased the transition for a new member of the Court. However, this quickly proved not to be so. The arrangement was a disaster which seriously threatened the productivity of the chambers.²⁶⁹ One draft opinion was lost. By mid-summer 1979, Judge Meyer persuaded his former secretary, Carol Mason, who had worked for him in private practice, to join his Court of Appeals team. This was a critical change. Mason was the consummate professional. With her in charge of the office, everything quickly fell into place and productivity rose. Mason continued to work for Judge Meyer during his years on the Court of Appeals. At a Court ceremony marking the occasion of his retirement, Meyer described Mason as "marvelously efficient."²⁷⁰ The transition from the temporary offices to permanent home chambers paralleled an important change in secretarial support.

E. Endless Reading

I did more reading during my clerkship with Judge Meyer than during any year of my life. Everything in the extensive case files that I was responsible for had to be read. So did relevant case law and pertinent law review articles. My bench memos needed to be

(last visited Feb. 10, 2012).

²⁶⁹ There was one useful piece of advice that Judge Meyer's initial secretary gave me. She said that the way to make sure that no one bothered food that I put into one of the court refrigerators in Albany was to label the paper bag "Judge Meyer." That worked perfectly all year.

²⁷⁰ Wachtler Remarks at Meyer Retirement, *supra* note 5, at xi (Judge Meyer's Response).

proofread, as did Judge Meyer's opinion drafts. And, of course, opinions and motion reports drafted in other chambers, or by the law clerks on the Central Staff of the court,²⁷¹ had to be read and considered.

The reading began even before Judge Meyer was sworn in as a member of the Court of Appeals. In anticipation of his confirmation, the Clerk of the Court had provided Meyer with the briefs and records for appeals that were likely to be argued after he joined the tribunal. Kelly and I met with Judge Meyer at his law office in mid-May 1979 and were given work to get started on. I asked Kelly, who had valuable clerking experience, how he would attack the materials. He gave me solid advice that was useful all year: start by reading the opinion of the Appellate Division, if there is one, and if not, any opinion of the trial court. I read my first set of briefs for Judge Meyer while riding the New Haven Railroad back to Yale University (from which I had not yet graduated) and while sitting in the Yale law library. It proved to be a learning experience. I eventually discovered that I had missed the point of that case²⁷² entirely, foolishly thinking that the "substantial evidence" standard applicable to review of administrative determinations was more demanding than it is.²⁷³

²⁷¹ "Central Staff" was the official name given to law clerks not assigned to a specific judge. This part of the court's operations was inaugurated by the Clerk of the Court, Joe Bellacosa, in 1975. Bellacosa was eventually appointed to Judge Meyer's seat on the court when Meyer retired at the end of 1986. See Anthony J. Albanese, *Joseph William Bellacosa*, in *THE JUDGES OF THE NEW YORK COURT OF APPEALS: A BIOGRAPHICAL HISTORY*, *supra* note 4, at 875 (noting Bellacosa's appointment on January 5, 1987); Elizabeth Kolbert, *Bellacosa is Appointed to State Court*, *N.Y. TIMES*, Jan. 6, 1987, at B3 (mentioning that Meyer, at his retirement party, had predicted Bellacosa's appointment).

When Judge Meyer joined the court, the responsibilities of the law clerks on the Central Staff were twofold. As Ronald Berger later explained: "First, we were the guardians of the Court's certiorari jurisdiction—reading all of the motions for leave to appeal and writing reports to the Judges discussing the merits of each motion. Second, we wrote written summaries of each pending appeal, summarizing the facts of the case, the rulings of the lower courts and the arguments of the respective parties . . ." Berger & Zundel, *supra* note 250, at 1488 (comments of Berger).

²⁷² *Sarro v. N.Y.C. Bd. of Educ.*, 47 N.Y.2d 913, 914, 393 N.E.2d 477, 478, 419 N.Y.S.2d 483, 483 (1979) (holding that the suspension of a teacher imposed by the board of education should not have been reduced from five to three years by the Appellate Division because "courts should show particular deference in matters of internal discipline to determinations made by boards of education . . .").

²⁷³ See *300 Gramatan Ave. Assocs. v. State Div. of Human Rights*, 45 N.Y.2d 176, 179–80, 379 N.E.2d 1183, 1185, 408 N.Y.S.2d 54, 56 (1978) ("Generally speaking, upon a judicial review of findings made by an administrative agency, a determination is regarded as being supported by substantial evidence when the proof is 'so substantial that from it an inference of the existence of the fact found may be drawn reasonably' . . . [W]here there is room for choice, neither the weight which might be accorded nor the choice which might be made by a court are germane . . ." (citations omitted)); see also *In re Boulware*, 47 N.Y.2d 928, 393

2011/2012]

Judge Bernard S. Meyer

1019

Other important legal standards gradually sank in, such as the differences between what was “final,”²⁷⁴ what was “appealable,”²⁷⁵ and what was “reviewable.”²⁷⁶ That was important because the workload of the Court of Appeals during Judge Meyer’s first year was so great that the court often seized on these procedural points to dispose of appeals.²⁷⁷

Court-related reading was not limited to normal work hours. I always took work home and always worked on weekends, whether at the chambers or somewhere else. I read briefs while riding on New York City subways and buses, waiting at the laundry for the machines to cycle, standing in line for theater tickets at the TKTS booth in Times Square, enjoying good weather in Washington Square or Central Park, and in a hundred other places. I estimated during my clerkship that I was reading about thirteen hours every day, and gave up wearing contact lenses (the old fashioned “hard” kind) to ease the strain on my eyes.

The great personal benefit from reading contending arguments all day as part of a job where the only assignment is to “get it right” is that you begin to develop judgment. You learn to differentiate what is persuasive from what is not. You also begin to understand how an effective lawyer musters facts, law, and public policy considerations into a convincing argument. The exercise of judgment is the essence of good lawyering.²⁷⁸ I tell my best law students that they should start their careers by working for a good judge on an active court. Doing so will not only assist the administration of justice, it will also help them to cultivate the habits of mind that are indispensable to the development of sound professional judgment.

N.E.2d 487, 419 N.Y.S.2d 492, 493 (1979) (finding substantial evidence of employee misconduct).

²⁷⁴ See Berger & Zundel, *supra* note 250, at 1488. (“Because only final orders [could] be appealed to the Court of Appeals, the issue of ‘finality’ of an order haunted us daily.”); Wachtler, *supra* note 5, at x (response of Judge Meyer noting the “mysteries of finality”).

²⁷⁵ See MEYER ET AL., *supra* note 6, at 75–78 (discussing appealability).

²⁷⁶ *Id.* at 78–80; see also Siegel, *supra* note 239, at 66 (alluding to the mysteries of procedural concepts in New York practice).

²⁷⁷ Cf. Siegel, *supra* note 239, at 67 (“When a case reaches Court of Appeals level . . . it behooves the practitioner to dot i’s and cross t’s with at least a bit more punctilio than was observed below.”); Margolick, *supra* note 66 (Commenting on the “court’s new-found penchant for procedural grounds” that may have been “an attempt to deal with a docket that can only be described as enormous.”).

²⁷⁸ See ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 3, 61, 93 (1993) (discussing the ideal of the lawyer-statesman and asserting “it is this quality of judgment that the ideal of the lawyer-statesman values most” and explaining “excellence of judgment”).

F. Long Hours

During the two-week sessions in Albany, I reached the courthouse at 7:20 in the morning, and departed at about 10:40 in the evening, having taken both lunch and dinner at my desk. Consistently, Judge Meyer was present in his chambers before I arrived and after I left. It seemed obvious to me that he needed less sleep than I did. At the end of a day, it was always hard for me to get back to my hotel at the foot of the hill and fall asleep soon enough to be ready to rise for an early start the next morning.

There was so much work to do during the sessions in Albany that I rarely²⁷⁹ walked from Judge Meyer's office on the third floor (rear, left side) down to the first floor to see an oral argument in the "breathtaking"²⁸⁰ courtroom designed by H.H. Richardson.²⁸¹ I remember doing so only once: the issue was whether an athlete from Taiwan could compete in the 1980 Winter Olympics.²⁸² His attorney made a brief and dramatic presentation, which moved me but failed to move the court.²⁸³

One consequence of Judge Meyer's strong work ethic was that although he loved working with the persons who were part of the court, he developed no particular fondness for the state capitol. At his retirement ceremony Meyer remarked, "I cannot truthfully say that I will miss Albany, for other than this building [Court of

²⁷⁹ Even when former United States Attorney General Ramsey Clark was in the building to argue a case, I felt compelled to keep working. Clark had been allocated thirty minutes in *People v. Hill*. *People v. Hill*, 50 N.Y.2d 894, 408 N.E.2d 678, 430 N.Y.S.2d 270 (1980); see Court of Appeals Day Calendar, Thurs. May 29, 1980 (on file with author). I could not have explained to Judge Meyer why I was sitting in court watching arguments when there were always mountains of work waiting to be done in the chambers. For similar reasons, I could not justify taking time to tour the great "Romanesque Revival" New York State House, which was just across the street, though I wanted to do that.

²⁸⁰ See Weinstein, *supra* note 65, at 1469 ("As the Taj Mahal suggests Love and the Parthenon Beauty, so, for all who have viewed its chaste architecture and breathtaking courtroom, the New York Court of Appeals in Albany connotes Justice.").

²⁸¹ *Restoration and Renovation*, *supra* note 256, at 2.

²⁸² The first boycott to the Winter Olympics occurred in 1980 due to a mandate issued by the International Olympic Committee, which required Taiwan to change its name and national anthem. Alex Frere, *Winter Olympics Open Today amid Political Conflicts*, SARASOTA HERALD TRIB., Feb. 12, 1980, at A1.

²⁸³ See *Liang Ren-Guey v. Lake Placid 1980 Olympic Games, Inc.*, 49 N.Y.2d 771, 773, 403 N.E.2d 178, 179, 426 N.Y.S.2d 473, 474 (1980) (per curiam) ("In view of the statement of interest submitted by the Attorney General of the United States on behalf of the Department of State . . . we are persuaded that the courts of our State must refrain from the exercise of jurisdiction to resolve a dispute which has at its core the international 'two-Chinas' problem."). It was my understanding that this one sentence per curiam opinion was drafted at the courtroom bench by one of the judges (not Meyer) while the case was being argued, and then circulated to other judges sitting at the bench.

2011/2012]

Judge Bernard S. Meyer

1021

Appeals Hall], a few restaurants and my apartment and the streets traveled between them I have never really made its acquaintance.”²⁸⁴

G. *Mystery and Majesty*

In the words of Ronald C. Berger, who clerked in the late 1970s, “[t]he Court of Appeals building on Eagle Street was a flurry of activity when the Court was in session—Judges, law clerks, litigants and the public all passing through with a sense of urgency.”²⁸⁵ Sometimes court employees crossed the building’s rotunda several times in a day, on each occasion passing beneath or in sight of the dramatically muraled dome that soared high above the lobby. The rotunda was ringed by balconies on the second and third floors, where the judges’ chambers were located.²⁸⁶ Sixty-four feet in diameter, and twenty-three feet high, the dome is “[e]mblazoned with the sun, moon and stars,” as well as a speeding chariot and symbols of the zodiac.²⁸⁷ Complete with the imposing seals of the State of New York and the Court of Appeals, and rendered in vivid colors dominated by bright blue and metallic gold, the mural depicts “[t]he Romance of the Skies.”²⁸⁸

It is a majestic legal environment in which the New York Court of Appeals convenes. However, much of the important work is done in the quiet privacy of offices and ordinary workspaces, such as file rooms or library nooks, which are screened from public view. As far as I could see, judges rarely visited one another’s chambers.²⁸⁹ They saw each other mainly in the courtroom, at the daily conference in the library, and at dinner each evening. As a reporter for the *New*

²⁸⁴ Wachtler Remarks at Meyer Retirement, *supra* note 5, at xi (Judge Meyer’s Response).

²⁸⁵ Berger & Zundel, *supra* note 250, at 1488.

²⁸⁶ *Restoration and Renovation*, *supra* note 256, at 20.

²⁸⁷ *Id.* at 12–13.

²⁸⁸ *Id.* at 13.

²⁸⁹ The only such visitor to Judge Meyer’s chambers whom I can remember in 1979–1980 was Chief Judge Cooke. What impressed me was that Cooke obviously had the skills of a born politician. To reach Judge Meyer’s office, a visitor had to pass first through the secretary’s reception area, then through the office shared by the two law clerks. In the latter, Kelly’s desk was on one side of the door leading to Judge Meyer and mine was on the other. A visitor wanting to see the judge had to walk right between us. When Chief Judge Cook jovially bounded in one evening, he turned first to Kelly, recounting one anecdote, then to me, telling another. After that, he said that he wanted to see Judge Meyer. Cooke must have had an inexhaustible supply of stories, sayings, and humorous expressions, which helped to put others at ease and, ultimately, enabled him to reach the pinnacle of the New York judiciary. Cf. William H. Honan, *Lawrence H. Cooke, 85, New York Chief Judge, Dies*, N.Y. TIMES, Aug. 19, 2000, at C16 (mentioning Cooke’s “homespun style”).

York Times put it a few years later, the judges and their clerks “share[d] the intense and intimate lives of cloistered colleagues.”²⁹⁰

The high point of each day in Judge Meyer’s chambers was when he returned from the court’s morning conference. Kelly and I sat in firm leather armchairs in front of Judge Meyer’s large desk, which was the focal point of the spacious office, surrounded by paneled walls with bookcases and capped by a high chandelier. Behind heavy draperies, large windows looked out onto the Hudson River Valley. The style of the room was restrained mid-century elegance, which exuded an air of authority. Ready to take notes, we were briefed by Judge Meyer on what had been said at the conference and how the cases argued the previous day were likely to be decided. The gathering offered a treasured glimpse into the mysteries of judicial decision making. It brought a sense of progress and sharp reality to matters on the endless docket.²⁹¹ The briefing was sometimes punctuated by the arrival of a court employee bringing a tray with Meyer’s lunch. It provided the first reliable information about whether we were likely to be on the “winning side” of particular disputes, and about the direction the court was taking since Judge Meyer joined the bench.

²⁹⁰ Margolick, *supra* note 66, at 54.

²⁹¹ Regarding the court’s morning conference, Judge Meyer explained:

Conference begins with consideration of motion reports, there being extended discussion only on those on which there is disagreement. Conference on cases follows, the reporting judge stating at length his proposed disposition and the reasoning on which it is based, followed by each judge in ascending order of seniority, beginning with me as the junior judge, stating his point of view and continuing around the table in order of seniority until all points have been argued out. Unless that produces unanimity, as it quite often does, the reporting judge, if he is with the majority, will write the majority opinion, and the dissenters will agree among themselves who will write the dissent. If the reporting judge ends up in the minority he will write the dissent and the majority judges will agree among themselves on who will write. Writings are circulated while we are in Albany to the extent possible, but the pressure of time does not allow for any extensive writing, so opinions of any length will usually be prepared and circulated during the three-week intersession, with proposals for change being made by the other judges either by memorandum or by phone.

Of course, not all matters are agreed upon the first time considered. When the conference discussion suggests the need for additional research or consideration of the record, the matter will be put over for further conference on another day.

Once the cases argued the previous day have been conferenced, adjourned matters will be considered and writings on matters from prior sessions will be reviewed and discussed. Conference ends at 1 o’clock, leaving an hour for lunch at one’s desk, during which reports on the cases to be argued that afternoon will be reviewed, with particular emphasis on what factual or legal issues left unclear by the briefs should be the subject of questioning. At 2 o’clock the cycle begins again with commencement of oral argument. Meyer, *supra* note 3, at 6–7.

2011/2012]

Judge Bernard S. Meyer

1023

H. Clerks' Mischief

Our daily briefing by Judge Meyer was preceded by the only relaxed moments of the day. At 10:00 a.m., the judges retired to the court's library, which also served as their conference room, to discuss the appeals argued the day before. With the judges out of the chambers and the library off limits, the law clerks took a short break. As described by Berger, the "Judges' personal clerks and the pool clerks . . . gathered in a conference room off the courtroom for coffee and snacks and discussed everything from politics to the previous night's sports scores."²⁹² It was still a predominantly male world. The first female judge would not be appointed to the Court of Appeals until 1983,²⁹³ although in 1979–1980 there were three women law clerks among the fifteen clerks working in judges' chambers.²⁹⁴

At the morning break, clerks who had spent more than a year at the court often "held forth," showing off their superior knowledge of the institution's operations and politics. Certain stories were told and retold. On one occasion, a crazy idea quickly garnered support. It was decided that a picture should be taken of the clerks in the courtroom wearing judicial robes. (I wonder if this had been done in previous years or thereafter?) At the appointed time, we gathered in the court's robing room, donned our own judge's robe, then sat at the bench in the same order of seniority that determined where the judges themselves sat to hear arguments. Pictures were taken and prints later distributed to all of the subjects in "8 x 10" color format.

It was reported that when Chief Judge Cooke learned of this prank, he responded dryly, "cameras are not permitted in the courtroom." There were no adverse consequences, but I cannot imagine that any of the clerks involved ever displayed their trophy photos in a public location. Chief Judge Cooke's remark suggests the photographs were taken in the summer or early fall of 1979 because on October 16, 1979, a "session of the New York Court of Appeals in Albany was opened to still and television photographers for the first time in the court's history."²⁹⁵

²⁹² Berger & Zundel, *supra* note 250, at 1488.

²⁹³ See MEYER ET AL., *supra* note 6, at 18 (discussing Judith S. Kaye). "Four of the thirteen judges appointed since 1983 have been women." *Id.* at 4.

²⁹⁴ Joann R. Balsberg clerked for Chief Judge Cooke from 1979 to 1982; Lisabeth Harrison clerked for Judge Gabrielli from 1979 to 1981; and Mary Louise Crowley clerked for Judge Jones from 1976 to 1984. See COUNSEL TO THE COURT, *supra* note 72, at 74–78.

²⁹⁵ See *Appeals Court Opened to Cameras for First Time*, N.Y. TIMES, Oct. 17, 1979, at B2 (photo caption).

I. The Pace During Intersessions

During the three-week intersessions, the pace was similar,²⁹⁶ but a bit more relaxed.²⁹⁷ I arrived at Judge Meyer's chambers in Manhattan closer to 9:00 a.m. and never left before 6:00 p.m. Judge Meyer was present before I arrived, but sometimes left before me. He always took work home. In order to make his time commuting on the bus to Penn Station and on the train to Long Island more productive, I put together three-ring binders. They contained bench memos, relevant cases, and key documents that had been carefully photocopied two-sided in a way so that the judge could just flip each page upward and keep reading, without having to move the binder that was sitting crosswise on his lap on a crowded bus or train.

To celebrate special occasions, such as birthdays, Judge Meyer took his clerks and secretary to lunch at the nearby Princeton Club (15 West 43rd Street).²⁹⁸ At Christmas, Kelly and I received lovely Izod sweaters as gifts to mark the holiday.

J. Law as Both Vocation and Avocation

For Judge Meyer, as for his judicial colleagues,²⁹⁹ long work days at the Court of Appeals were no aberration. Friends described

²⁹⁶ About a year into my clerkship, I planned to be away from the office for a three-day weekend so that I could be best man in the wedding of a friend in Western Pennsylvania. Two days into the trip, and fortunately after the wedding, Judge Meyer called me on the phone and asked me to return as soon as possible. He said there was too much work yet to be done for upcoming arguments.

²⁹⁷ Judge Meyer held a similar view:

The work during intersession is not quite so intensive, but certainly is no holiday. During this period the preparatory work for the session to follow must be done, which means reviewing briefs in 70 to 80 cases, holding hearings on criminal leave applications and deciding those motions, preparing writings from the preceding session and reviewing the writings prepared by the other judges from the session just concluded. Since on the average there will be 20 criminal leave applications per month per judge to be disposed of and since each writing will take about two days to prepare and on the average each argument session will require five or six writings of opinion length, to say nothing of dissents, the three-week intersession is, as you can see, none too long.

Meyer, *supra* note 3, at 7–8.

²⁹⁸ *Princeton Club of New York—Map & Directions*, PRINCETON CLUB OF N.Y., <http://www.princetonclub.com/Default.aspx?p=DynamicModule&pageid=256828&ssid=117423&vnf=1> (last visited Feb. 10, 2012). As a Johns Hopkins graduate, Meyer had reciprocal dining privileges.

²⁹⁹ For example, “Judge Jasen arrived quite early each day to prepare for the Judges’ morning deliberations and remained at work until 10:00 p.m. or later each evening the Court was in session” Berger & Zundel, *supra* note 250, at 1489 (comments of Zundel); see also Margolick, *supra* note 66, at 54 (“Most of the judges eat lunch at their desks[,] [w]orking [u]ntil [m]idnight.”).

2011/2012]

Judge Bernard S. Meyer

1025

Meyer “as a ‘legal workaholic.’”³⁰⁰ At the Halloran House dinner in New York City, when he was sworn in as a Court of Appeals judge, Meyer’s partners praised his great work ethic and lamented how much his billable hours would be missed.

A few years earlier, an article in the *New York Times* about Meyer’s service as the Attica prosecution special state investigator described his normal fifteen-hour working days: “members of his staff . . . reported seeing him at work on the project from 6 in the morning until 9 o’clock at night.”³⁰¹ In that article, Meyer was quoted as explaining, “law is my avocation and my vocation.”³⁰² Nothing changed when he reached the Court of Appeals.

Just as Meyer had found “[t]he job of investigating the Attica prosecution . . . ‘tremendously interesting,’” he found the work of the Court of Appeals to be entirely engaging.³⁰³ There was no issue that came before the court that Meyer did not care about. As Chief Judge Wachtler said at the time of Meyer’s retirement: “I have never met anyone more committed in every case—no matter how seemingly insignificant—to tirelessly seek justice, to apply all of his legal talent, his enormous energy and scholarship in the search for truth.”³⁰⁴ And, as Chief Judge Judith Kaye later said, “[t]o describe Judge Meyer’s work as merely a passion doesn’t do justice to his boundless energy and tireless commitment to the law.”³⁰⁵

At the time of his appointment to the Court of Appeals, Meyer was quoted as saying, “I get a lot more done on Saturday and Sunday than on any day of the week.”³⁰⁶ He often used the Hofstra University Law School Library, which was open on weekends.³⁰⁷

In April 1980, New York City had a massively disruptive transit strike. All subway and bus service was shut down completely for eleven days,³⁰⁸ and traffic was hopelessly snarled. Furthermore, “job absenteeism hovered between 15% and 20%”³⁰⁹ and many offices were closed. At one point, I finished the large pile of work

³⁰⁰ Carroll, *supra* note 2, at A1.

³⁰¹ *Critic of Attica Inquiry*, *supra* note 9, at 1.

³⁰² *Id.*

³⁰³ *Id.*

³⁰⁴ Wachtler Remarks at Meyer Retirement, *supra* note 5, at viii.

³⁰⁵ See Kaye, *supra* note 2, at 3–4.

³⁰⁶ See Molotsky, *supra* note 7, at L110.

³⁰⁷ See *id.* (noting that Meyer said the library had a “fine collection”).

³⁰⁸ See *New York City Transit—History and Chronology*, MTA, <http://www.mta.info/nyct/facts/ffhist.htm> (last visited Feb. 10, 2012).

³⁰⁹ See Mark S. Feinman, *The New York City Transit Authority in the 1980s*, N.Y.C. SUBWAY HIST., <http://www.nycsubway.org/articles/history-nycta1980s.html> (last visited Feb. 10, 2012).

that I had taken home in anticipation of the strike and walked forty blocks up Manhattan to retrieve more briefs at the chambers. When I arrived, I was not surprised to see that Judge Meyer had already made it into the office and was hard at work.

*K. The Great Arcania of Court of Appeals Practice*³¹⁰

In Judge Meyer's chambers, we often made reference to, and sometimes cited, a book dealing with procedural matters. That widely honored volume was Henry Cohen and Arthur Karger's *Powers of the New York Court of Appeals*.³¹¹ We had a copy of Cohen & Karger in the temporary home chambers in the Lincoln Building at a time when we had no other books and we transported that volume between Manhattan and Albany for every sitting of court during Judge Meyer's first year. There were several other copies of the same treatise in Court of Appeals Hall, "all tattered from overuse by floundering law clerks."³¹² Charting a path through thick jurisprudential thickets, Cohen & Karger was "far and away the most intimate guide to the practice of the court."³¹³

However, by 1979, Cohen and Karger's treatise was more than a quarter of a century old.³¹⁴ Parts were outdated. That made consulting this valuable work maddening. When Cohen & Karger applied, it was the bible.³¹⁵ There was no more commanding authority on New York law.³¹⁶ However, between 1952 and 1979, the law had changed. Certain sections of Cohen & Karger had been rendered obsolete. Yet, there was no way to tell by looking at the volume which parts were gold and which were lead. Only the experienced lawyers at the court seemed to know when Cohen and Karger's dictates could be ignored. This was another obstacle for a new judge and his clerks at the Court of Appeals. It was a problem that could be surmounted only by time and experience until a new

³¹⁰ See Siegel, *supra* note 239, at 66 (attributing the term "Great Arcania" to Chief Judge Breitel).

³¹¹ See HENRY COHEN & ARTHUR KARGER, *THE POWERS OF THE NEW YORK COURT OF APPEALS* (2d ed. 1952).

³¹² Berger & Zundel, *supra* note 250, at 1488 (noting this comment of Berger, who clerked at the Court of Appeals in the late 1970s).

³¹³ Siegel, *supra* note 239, at 66.

³¹⁴ See *id.*

³¹⁵ Siegel, *supra* note 239 ("I've heard more than one person refer to *The Powers of the Court of Appeals* as the bible of Court of Appeals practice, and why shouldn't it be? Its authors . . . had access to the great secret files of the Court of Appeals when they did the book.").

³¹⁶ See *id.*

2011/2012]

Judge Bernard S. Meyer

1027

edition of the book was published in 1997,³¹⁷ long after Judge Meyer retired.³¹⁸

X. LIFE AFTER THE BENCH

According to the *New York Times*, “Judge Bernard Meyer ha[d] capped an eminent judicial career with . . . distinguished service on New York’s highest court.”³¹⁹ Meyer loved serving on the Court of Appeals and hated the fact that he had to retire at age seventy.³²⁰ In January 1987, after seven-and-a-half years of service, he reluctantly returned to private practice.³²¹ He was the senior partner in Meyer, Suozzi, English & Klein for nearly two decades until his death caused by heart failure on September 3, 2005,³²² after “a long illness.”³²³ Today, the firm still bears the same name and has offices in New York (Albany, Garden City, and New York City) and Washington, D.C.³²⁴

Before ascending to the Court of Appeals, Meyer had argued cases before that tribunal.³²⁵ After he retired from the bench at the end of 1986, he was involved with at least ten lawsuits that reached the Court of Appeals, either representing one of the parties or serving in an “of counsel” capacity.³²⁶ Meyer was “often called as an expert

³¹⁷ See ARTHUR KARGER, *THE POWERS OF THE NEW YORK COURT OF APPEALS* (3d ed. 1997). “The 1952 book [the second edition] was reprinted in 1992 and supplemented by three authors in 1994 for William S. Hein & Co. apparently with the permission of the Lawyers Cooperative Publishing Co., which had succeeded to the copyright of Baker Voorhis, the publisher of the 1952 book.” Siegel, *supra* note 239, at 66.

³¹⁸ Margalit Fox, *Bernard S. Meyer, 89; Served on New York’s Top Court*, N.Y. TIMES, Sept. 8, 2005, at B9.

³¹⁹ Editorial, *Give New York’s High Court the Best*, N.Y. TIMES, Dec. 31, 1986, at A18.

³²⁰ E.R. Shipp, *7 to Be Considered for Appeals Court*, N.Y. TIMES, Dec. 2, 1986 (noting that Meyer was required to step down at age seventy).

³²¹ See *Bernard S. Meyer—In Memoriam*, *supra* note 17.

³²² Brand, *supra* note 24, at A38; Fox, *supra* note 318, at B9; *Bernard S. Meyer—In Memoriam*, *supra* note 17.

³²³ Obituary, *Bernard S. Meyer*, N.Y. L.J., Sept. 7, 2005, at 2; see also Brand, *supra* note 24, at A38 (“He had been hospitalized twice since June after suffering pneumonia and breaking his hip in a fall.”).

³²⁴ *Bernard S. Meyer—In Memoriam*, *supra* note 17 (discussing locations).

³²⁵ See, e.g., *Fuller v. Preis*, 35 N.Y.2d 425, 425, 322 N.E.2d 263, 264, 363 N.Y.S.2d 568, 570 (1974) (counsel for appellants).

³²⁶ See *Bluebird Partners, L.P. v. First Fid. Bank, N.A.*, 97 N.Y.2d 456, 458, 767 N.E.2d 672, 673, 741 N.Y.S.2d 181, 182 (2002) (of counsel for amici curiae); *Abiele Contracting, Inc. v. N.Y.C. Sch. Constr. Auth.*, 91 N.Y.2d 1, 4, 689 N.E.2d 864, 865, 666 N.Y.S.2d 970, 971 (1997) (of counsel for appellant); *Donald E. Axinn Cos. v. Bd. of Assessors of Cnty. of Nassau*, 85 N.Y.2d 838, 839, 647 N.E.2d 1350, 1351, 623 N.Y.S.2d 842, 843 (1995) (of counsel for appellant); *Fried v. Seippel*, 80 N.Y.2d 32, 35, 599 N.E.2d 651, 652, 587 N.Y.S.2d 247, 248 (1992) (for appellant); *Soc’y of the Plastics Indus., Inc. v. Cnty. of Suffolk*, 77 N.Y.2d 761, 763, 573 N.E.2d 1034, 1035, 570 N.Y.S.2d 778, 779 (1991) (for respondents); *People v. Vespucci*, 75

witness in cases involving New York state law.”³²⁷ He was “one of the commissioners appointed in 1987 by Governor Mario M. Cuomo to the New York State Commission on Government Integrity.”³²⁸

N.Y.2d 434, 436, 553 N.E.2d 965, 966, 554 N.Y.S.2d 417, 418 (1990) (for appellants in first and second actions); Greasy Spoon Inc. v. Jefferson Towers, Inc., 75 N.Y.2d 792, 793, 551 N.E.2d 585, 586, 552 N.Y.S.2d 92, 93 (1990) (for respondent); N.Y. Pub. Interest Research Grp., Inc. v. Town of Islip, 71 N.Y.2d 292, 294, 520 N.E.2d 517, 518, 525 N.Y.S.2d 798, 799 (1988) (of counsel for Town of Islip et al. respondents); Johnson v. Manhattan & Bronx Surface Transit Operating Auth., 71 N.Y.2d 198, 200, 519 N.E.2d 326, 327, 524 N.Y.S.2d 415, 416 (1988) (for respondent); McCann v. Scaduto, 71 N.Y.2d 164, 168, 519 N.E.2d 309, 310, 524 N.Y.S.2d 398, 399 (1987) (for appellant in the second proceeding).

When Judge Meyer and his wife Edythe had lunch with me in Washington, D.C., on Veteran’s Day in fall 1989, Mrs. Meyer privately told me that there had been some controversy about Meyer appearing before the Court of Appeals in a case soon after his retirement. In American law generally, there is no principle of judicial ethics which broadly bars a former judge from representing a person before a tribunal on which the judge once sat, although more limited conflict of interest rules apply. See, e.g., MODEL RULES OF PROF’L CONDUCT R. 1.12 (2011), available at http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_12_former_judge_arbitrator_mediator_or_other_third_party_neutral.html (last visited Feb. 10, 2012) (addressing the obligations of former judges). However, to avoid the appearance of impropriety, some federal, state, and local provisions prohibit certain former public officials or employees of the executive and legislative branches from representing others before the entity on which the person previously served. See Vincent R. Johnson, *Ethics in Government at the Local Level*, 36 SETON HALL L. REV. 715, 746–47 (2006) (discussing rules barring former public officials and employees from representing private interests). These restrictions are usually limited to a short time period, such as one or two years after leaving public service. *Id.* There are many variations of these kinds of provisions, and numerous governmental entities have no rules at all limiting representation by persons leaving public office or employment. See *id.* Relevant legal principles are only beginning to gain a consensus, and will be clarified by the American Law Institute’s new project on The Principles of Government Ethics. See *Current Projects: Principles of Government Ethics*, AM. L. INST., http://www.ali.org/index.cfm?fuseaction=projects.proj_ip&projectid=22 (last visited Feb. 10, 2012) (“This project seeks to enunciate a set of principles or best practices that will both reflect the emerging law of government ethics and provide guidelines to shape its future development.”). However, the ALI “project will focus on standards applicable to the legislative and executive branches, and will exclude ethical issues unique to the judiciary.” *Id.* This is not surprising because “[t]he judicial branch has a very different way of interacting with the outside world in the conduct of official business” RICHARD W. PAINTER, *GETTING THE GOVERNMENT AMERICA DESERVES: HOW ETHICS REFORM CAN MAKE A DIFFERENCE* xv (2009). In the absence of clear standards to guide the conduct of former judges, reasonable minds can differ about the propriety of a former judge’s appearance before the bench on which the judge once sat.

After completing this article, I learned that there is a fine new book about Judge Meyer in preparation, and was permitted to read the manuscript. See Norman I. Silber, *The Life of Judge Bernard S. Meyer* (2009) (unpublished manuscript) (copy on file with author) (“An Oral History Memoire in Judge Meyer’s words, based on interviews at the Columbia University Oral History Research Office”). In the book, Judge Meyer explains that the Court of Appeals “was sufficiently upset by the fact that I had waited only ten months [after retirement before arguing a case] that it then had a rule passed that said that an ex-judge of the court could not appear before the court for two years after.” *Id.* at 185.

³²⁷ Brand, *supra* note 24, at A38.

³²⁸ Peter Bienstock, Letter to the Editor, *Remembering Judge Meyer*, N.Y. L.J., Sept. 8, 2005, at 2.

A. ABA Standards on State Judicial Retirement

After leaving the Court of Appeals, Judge Meyer sought to reform the law on state judicial retirement. He authored a book that nationally surveyed the relevant legal provisions.³²⁹ That work documented “extensive discrepancies among the state statutes and glaring weaknesses” that could be found in the “bewildering patchwork of laws” dealing with judicial retirement and disability.³³⁰ In Meyer’s volume, entitled *Judicial Retirement Laws of the Fifty States and the District of Columbia*, he argued that:

The major change that should be made is the abolition of mandatory retirement for age, or to phrase the suggestion differently, to authorize imposition of involuntary retirement only when mental or physical disability warrants doing so. Age alone should play no part The facts that federal judges may serve for life and thirteen states have no mandatory age requirement, and that many other states permit retired judges to continue serving full or part time without age limitation, without any suggestion that litigants in those jurisdictions have suffered in any way as a result, strongly suggests that [this] change . . . is desirable³³¹

Judge Meyer’s book, which was published by Fordham University Press and “circulated to all the Chief Justices of the states”³³² by the American Bar Association, catalyzed an important law reform project. Jointly sponsored by the American Bar Association’s Senior Lawyers Division, Judicial Division, and Torts and Insurance Practice Section,³³³ the effort culminated in the promulgation of the Standards for Judicial Retirement.³³⁴

The Standards were crafted by a joint committee for which Judge Meyer was a Consultant and I was the Reporter.³³⁵ There were

³²⁹ MEYER, *supra* note 26, at 31.

³³⁰ STANDARDS FOR STATE JUDICIAL RETIREMENT, *supra* note 70, at 1–2.

³³¹ MEYER, *supra* note 26, at 31. Three of my students at St. Mary’s University helped Judge Meyer with the research. *Id.* at x (acknowledging the work of Steven J. Duskie, Stanley Pietrusiak, and West Winter).

³³² *See* Noe, *supra* note 71, at 7.

³³³ *See id.* (describing the project).

³³⁴ *See* STANDARDS FOR STATE JUDICIAL RETIREMENT, *supra* note 70.

³³⁵ *Id.* at 2 (listing task force members). I was asked to prepare an initial draft of black letter rules for the Standards based on pages 46–61 of Judge Meyer’s Fordham University Press book. *See* Letter from Bernard S. Meyer to author, Jan. 27, 1999 (on file with author). That draft was then revised by Judge Meyer. *See* Letter from Bernard S. Meyer to author, Apr. 14, 1999 (on file with author); Letter from Bernard S. Meyer to author, Apr. 23, 1999 (on file with author). Several months later, the Joint Committee met for two days in Chicago and

conference calls with participants spanning the country, from Maine in the east to Hawaii in the west. There was also one critical face-to-face meeting of the joint committee in late 1999 in Chicago, which was the last time I saw Judge Meyer. The committee was unable to agree on recommending that involuntary retirement based on age should be abolished. However, it did agree to recommend that the age for mandatory retirement should be set at a point better reflecting the recent increases in the lifespan of Americans.³³⁶

In part, the Standards for State Judicial Retirement seek to protect judges from unprincipled legislative variations in the terms and availability of retirement and disability benefits. On July 10, 2000, the American Bar Association House of Delegates approved the proposed standards³³⁷ after vigorous debate, but without change.³³⁸ The standards call for mandatory retirement at age seventy-five;³³⁹ a system for retired judges to be permitted to serve

hammered out the final product. The meeting in Chicago was intense and productive. The ABA staffer assigned to the project said that she had never seen a group work harder. No one left the hotel, which was located at O'Hare International Airport, except one evening when we all went out to dinner.

By the time of the Chicago meeting, Judge Meyer was eighty-three. For many years, he had championed the idea of abolishing mandatory retirement based on age. I was therefore surprised at the meeting when he rather quickly gave way to those who called for standards recommending retirement at age seventy-five. I can think of only three possible explanations. The first is that Meyer was growing old and was less willing to fight for the positions in which he believed. The second is that Meyer realized that he was a "consultant," not a member of the joint committee, and therefore felt compelled to take a less adversarial role. The third possibility—which may be the most likely—is that Meyer clearly assessed the political realities of the composition of the Joint Committee and the power of contrary arguments. One of the reasons for not abolishing a mandatory retirement age was that doing so would result in fewer judicial vacancies and therefore make it more difficult to diversify the judiciary through appointment or election of female and minority judges. This topic was discussed at some length by the group. Though the joint committee was all male in composition, it understood this line of argument and the problems that might arise when the standards were taken to the floor of the House of Delegates for approval. Perhaps Judge Meyer was simply being practical. The standards that were agreed upon may not have been what Meyer wanted, but they very significantly improved upon any rule requiring retirement at age seventy. If applicable provisions of New York law had been based on the standards, Meyer would have been permitted to serve on his beloved Court of Appeals for five more years, until the start of 1992.

³³⁶ See STANDARDS FOR STATE JUDICIAL RETIREMENT, *supra* note 70, at Standard 5(a) ("A judge should be subject to mandatory retirement at age 75."); see also THE ECONOMIST, POCKET WORLD IN FIGURES 236 (2011) (putting life expectancy in the United States at 77.7 years for men and 82.1 years for women).

³³⁷ STANDARDS FOR STATE JUD. RETIREMENT, *supra* note 70, at 2.

³³⁸ See Noe, *supra* note 71, at 7 ("The only opposition on the floor of the House was an [unsuccessful] amendment to strike the [recommended] mandatory retirement age of 75 years in favor of no mandatory retirement age.")

³³⁹ STANDARDS FOR STATE JUDICIAL RETIREMENT, *supra* note 70, at 5(a) ("A judge should be subject to mandatory retirement at age 75.")

2011/2012]

Judge Bernard S. Meyer

1031

as senior judges until age eighty;³⁴⁰ fair and reasonable benefits for retired judges, including periodic raises;³⁴¹ and appropriate provision for judges involuntarily retired due to disability.³⁴²

B. *Intellectual Historian*

In “retirement,” Judge Meyer played a leading role in chronicling the intellectual history of the New York Court of Appeals. With Burton C. Agata and Seth H. Agata, he took on the mammoth task of charting the Court of Appeals’ development of the law in numerous substantive areas over a period spanning more than seven decades.³⁴³ That thick burgundy volume, entitled *The History of the New York Court of Appeals, 1932–2003*, was published by Columbia University Press a year after Judge Meyer’s death.³⁴⁴

Meyer’s *History* disappointed some reviewers because it said very little about the personalities, controversies, or behind-the-scenes maneuvering of the New York Court of Appeals.³⁴⁵ That kind of history would surely be interesting and perhaps begs to be written. However, it was not a book Judge Meyer was prepared to write, either by training or disposition.

Meyer was an intellectual. He was intrigued by ideas and their development. He had a keen interest in how the law could be better matched to human needs through common law adjudication and statutory enactment.

Meyer honored the principles of confidentiality that are an

³⁴⁰ *Id.* at 5(b) (“A judge involuntarily retired on the basis of age should be eligible to continue in judicial service as a senior judge in accordance with Standard 13.”); *see also* Standards 13–18 (dealing with judicial service by retired judges).

³⁴¹ *Id.* at 8 (“Amount of Benefits”); *id.* at 9 (“Judicial Review”); *id.* at 10 (“Periodic Adjustment”); *id.* at 11 (“Employment During Incapacity”); *id.* at 12 (providing full benefits for judges retired due to incapacity resulting from “injuries intentionally inflicted by a third person because of the judge’s performance of judicial duties”).

³⁴² *Id.* at 6 (“Involuntary Retirement on the Basis of Incapacity”); *id.* at 7 (“Determinations Relating to Incapacity”).

³⁴³ *See* Meredith R. Miller, Book Review, *Bernard S. Meyer et al., The History of the New York Court of Appeals, 1932–2003*, 24 *TOURO L. REV.* 163, 166 (2008) (describing the book as more like “a comprehensive, mini-treatise on a given subject” offering “ready access to significant New York decisional law,” than like “a scholarly treatment of the court, or a complete narrative history . . .”).

³⁴⁴ *See* MEYER ET AL., *supra* note 6 (published 2006).

³⁴⁵ *See, e.g.,* Bonventre, *supra* note 44, at 497 (“[T]his is not a history. Rather, it is a survey of collected Court of Appeals decisions . . . organized into chapters devoted to particular areas of the law. . . . Judge Bergan’s history [during an earlier era] was about the court itself and its personalities, about the process through which the court’s members were selected, the competitions, contenders, contentions, and campaigns, and about the political, legal, and social landscape. . . . There is virtually none of that in this work.”).

essential part of being a judge. He was also reluctant to say much about others' misfortune. To the most momentous upheaval at the Court of Appeals during the fifteen years before Meyer's *History* was published, his book devotes only one sentence. Without any details or even a footnote, the *History* says simply, "[i]n 1992, [Chief] Judge Wachtler resigned from the bench upon being charged with a crime unrelated to his judicial duties; he was later convicted."³⁴⁶ After that terse entry, the text quickly turns to better news: the two books that Wachtler later published and his subsequent service as a law professor at Touro College of Law.³⁴⁷ Later in the volume, the *History* devotes two full pages to Wachtler's leadership of the judiciary as chief judge and handling of proposals for improving the administration of justice.³⁴⁸ Meyer was far more interested in tracking ideas than in dissecting personalities. It was inevitable that Meyer's treatment of the court's progress from 1932 to 2003 would be an intellectual history.

C. Legacy

On May 23, 1979, his first day in Albany as a member of the Court of Appeals, Meyer talked to a group that had assembled in the courtroom to welcome him about the characteristics of a good judge.³⁴⁹ He "listed a host of 'T's'—intelligence, integrity, independence, industry, imagination, imperturbability—and a couple of 'H's'—humor and humility."³⁵⁰ As a member of New York State's highest tribunal, Meyer displayed all of those virtues.

Meyer's service on the Court of Appeals was honored over the years by many persons, including "[t]he American Jewish Committee [which] bestowed the Judge Learned Hand Award, its highest honor, on Judge Meyer in June 2003."³⁵¹ Meyer received honorary doctorates from Hofstra University (1980), Western State University College of Law (1982), and Albany Law School (1984), and the Distinguished Service Medallion of the Bar Association of Nassau County (1982).³⁵²

³⁴⁶ MEYER ET AL., *supra* note 6, at 18. Similarly, the court's censuring of one its members, Judge Fuchsberg, in 1978, receives only two sentences and a brief footnote. *Id.* at 30.

³⁴⁷ *Id.* at 18.

³⁴⁸ *Id.* at 740–42.

³⁴⁹ *Cf.* Kaye, *supra* note 2, at 3 (describing the tradition of gathering in the morning with Judge Meyer).

³⁵⁰ *Id.* at 4.

³⁵¹ Bernard S. Meyer—*In Memoriam*, *supra* note 17.

³⁵² *Id.*

2011/2012]

Judge Bernard S. Meyer

1033

Meyer reached the Court of Appeals later than he had hoped, and was required to leave long before he was ready. A highly talented jurist, he worked as hard as he could, for as long as he was permitted to serve.

Meyer's seven-and-a-half years on the Court of Appeals were highly productive. Praised by Chief Judge Kaye as "[a] judge who made a difference" and "[a] judge who mattered,"³⁵³ Bernard S. Meyer was a great judge. He fully measured up to the best standards of the Anglo-American judicial tradition. His performance was exactly what responsible citizens would have hoped for from the first merit appointee to the New York Court of Appeals.³⁵⁴

³⁵³ Kaye, *supra* note 2, at 5.

³⁵⁴ Cf. George Bundy Smith, *Choosing Judges for a State's Highest Court*, 48 SYRACUSE L. REV. 1493, 1498 (1998) ("[T]here are few who would argue that the process in New York [of appointing judges to the Court of Appeals] has not worked well.").