STAYING TRUE TO THE IDEALS OF FUNDAMENTAL FAIRNESS: AN EMPIRICAL STUDY OF THE DISSENTS OF JUDGE STRAUB

Danielle L. Levine*

I. INTRODUCTION

Just as a judge’s background may reveal valuable insights into his or her decision-making process, a glimpse at a judge’s opinions may reveal equally as much about a person’s belief system. Even though judicial opinions are supposed to be the epitome of objective reasonableness, it is difficult to imagine that anyone is capable of interpreting the law without injecting some of their own personal principles in the process. Even more telling are a judge’s dissenting opinions, as they represent one person’s unique identification of “should-be” exceptions to the societal norm, legal boundaries aching to be pushed, and arbitrary colloquialisms or stiff expressions in need of clarification, all of which having yet to be identified or fully appreciated by others.1

Because the decision to formally dissent means entering into public disagreement with their colleagues, and due to the fact that dissent can “weaken” the authority of a decision, it is logical to assume that justices will only dissent if they feel particularly strongly about the issue at hand. . . . [In other words] a justice’s pattern of dissent—his or her “stream of tendency”—reveals not only his or her tendency to vote a certain way in certain cases, but also what legal issues matter most in their mind.2

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1 See Caitlain Devereaux Lewis, Dissent & Vindication in the Departments: An Empirical Study, 74 ALB. L. REV. 875, 875–76 (2010/2011) (explaining that a study of appellate dissents reveals interesting and unique viewpoints and characters of each of the four departments of the New York State Supreme Court, Appellate Division).

Judge Straub’s dissents are certainly no exception to this view. In order to gain greater insight into his decision-making process, I have given a brief background of Judge Straub, including his career path, in Part II. Part III will theorize why Judge Straub’s total number of dissents in this study is less than that of Judge Pooler, and will explore the idea that if not for his senior status, he would perhaps be the “big dissenter” of this study. Part IV takes the individual cases in which Judge Straub has dissented in within the time constraints of this study, summarizes the majority opinion, and describes how Judge Straub’s analysis in his dissenting opinions differs from that of his majority opinions. Finally, Part V concludes this study by analyzing how the cases transcend the categories I originally organized them into and create cohesive themes that indicate a jurisprudential trend unique to Judge Straub.

II. JUDGE STRAUB

In order to fully appreciate the breadth of Judge Straub’s judicial opinions, and to recognize significant jurisprudential patterns and the context in which those decisions are made, it is helpful to delve into the background of Judge Chester J. Straub himself. Judge Straub is a Senior Judge in the United States Court of Appeals, Second Circuit. Judge Straub started his trek to the Second Circuit by receiving his B.A. from St. Peter’s College in 1958, a Jesuit school in New Jersey, and later receiving his law degree from University of Virginia Law School in 1961. After serving as First Lieutenant in the United States Army Intelligence and Security Command for two years, he joined the law firm of Willkie Farr & Gallagher, and became a partner in 1971; his practice concentrated mostly in litigation, regulatory, and governmental affairs. He stayed there until his appointment to the Second Circuit in

(citing Joseph C. LaValley III, The Calculus of Dissent: A Study of Appellate Division, 64 ALB. L. REV.1405, 1406 (2001)).

5 Id.
7 Chester J. Straub, supra note 4.
Dissents of Judge Straub

1998. During this time, Judge Straub also served as a New York State Assemblyman, from 1967–1972, and as a New York State Senator from 1973–1975. He is currently a member of the American Bar Association, New York State Bar Association, and The Association of the Bar of the City of New York. He was also “Chair of Governor Mario Cuomo’s New York Statewide Judicial Screening Committee from 1988 until 1994 and of the First Department Screening Committee from 1983 until 1994” as well as “a member of Senator Daniel Patrick Moynihan’s Judicial Selection Committee from 1976 until 1998.”

III. JUDGE STRAUB’S DISENTS

A. An Examination of Judge Straub’s Dissents While Taking into Consideration His Changing Role on the Court Throughout the Course of this Study

While examining the dissenting opinions of the Second Circuit within the time frame set for this study, Judge Pooler has undoubtedly dissented the most. However, this is not to say that when looking at the dissents both joined and authored by each judge, in respect to the totality of their judicial opinions rendered during their time on the Second Circuit bench, that these results would be the same.

Even when remaining within the limited time frame of this study, Judge Straub has dissented in a higher percentage of cases when considering the ratio between his dissenting opinions and actual split decision cases heard by each judge on the Second Circuit within the same time period. This is most likely explained by Judge Straub’s senior status on the court.

8 Id.
9 Id.
10 FED. BAR COUNCIL, supra note 6, at 43.
11 Chester J. Straub, supra note 4.
12 This study examines dissenting opinions from Second Circuit judges between the time periods of August 1, 2006 to October 1, 2011, approximately a five year span. This study includes both dissenting opinions authored by the judges and those opinions in which they joined.
14 See id. at 1125 (showing that Judge Pooler has dissented in 39.5% of the cases that he heard during the time span of this study, while Judge Straub dissented in 59.1% of the cases he heard).
As indicated by Table 1, it is evident that Judge Straub frequently dissented in cases in which there were split decisions, and the primary reason his total number of dissents decreased throughout his time on the Second Circuit is due to reduced number of cases he heard after obtaining senior status on the court. Even so, after becoming a senior judge, Straub’s frequency of dissents

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15 Search Terms in LexisNexis: 2nd Circuit Cases: DISSENT(dissent!) and JUDGES(Straub). The results in each row of Table 1 were obtained by utilizing these search terms, but within the various defined time periods as indicated in Table 1.

16 For the purposes of this paper, all decisions will be examined from the first day of the month listed, and no cases will be looked at past the date of October 1, 2011, even if it is technically a decision within the duration of a judge’s “full time” or “full career” on the Second Circuit.

17 See supra Table 1.
actually increased in split decision cases that he did sit for.\textsuperscript{18} As a judge with senior status, Judge Straub is able “to take on a reduced workload, as little as one-quarter of the work of an active judge.”\textsuperscript{19} In theory, a judge with senior status can continue “to retain the office . . . even while performing exclusively administrative tasks unrelated to the business of the courts.”\textsuperscript{20} In addition to the option of a lighter workload, senior judges are barred from “voting to reconsider a panel decision en banc or sitting as a member of the en banc court,”\textsuperscript{21} preventing them from dissenting in cases when they ordinarily might.\textsuperscript{22} In order to get a better idea of the impact of a judge’s senior status on their workload, it is helpful to look at the amount of cases Judge Straub has heard since he obtained his senior status in July 2008 until the time when this study ends, October 2011, which adds up to 397.\textsuperscript{23} This is only a little more than one-third of the cases heard by Judge Pooler, an active judge, who heard 1,059 cases during that same time period.\textsuperscript{24} Arguably, the dissents of judges with senior status, like Judge Straub, hold even more meaning than those in active status, such as Judge Pooler.\textsuperscript{25} This is because judge’s with senior status also have the ability to “enjoy considerable control over their dockets and may avoid certain types of cases altogether.”\textsuperscript{26} In other words, senior judges are able to only hear cases in preferred areas of law, if they choose to do so.

While this study does not purport that Judge Straub is one of those senior judges to take advantage of this perk, dissenting opinions by senior judges who do choose to tailor their docket to a certain genre of cases are even more valuable and telling than those

\textsuperscript{18} See supra Table 1.
\textsuperscript{19} Stras & Scott, supra note 3, at 461. Senior judges only need to perform a quarter of the work that active judges take on in order to obtain certification and remain eligible for raises in their salary. Id. at 470.
\textsuperscript{20} Id. at 467.
\textsuperscript{21} Id. at 466 (citing 28 U.S.C. § 46(c) (2000)).
\textsuperscript{22} See, e.g., United States v. Fell, 571 F.3d 264, 282 n.1 (2d Cir. 2009) (Calabresi, J., dissenting) (noting that Judge Straub, due to his recently obtained senior status after he participated in the en banc poll, was unable to take part in the judicial opinion but authorized Judge Calabresi to say that he agrees with Calabresi’s dissenting opinion).
\textsuperscript{23} Search Terms in LexisNexis: 2nd Circuit Cases: JUDGES(Straub). The search results were only within the specified time period defined above, July 2008 to October 2011.
\textsuperscript{24} Search Terms in LexisNexis: 2nd Circuit Cases: JUDGES(Pooler). The search results were only within the specified time period of this study, July 2008 to October 2011.
\textsuperscript{26} Stras & Scott, supra note 3, at 467 (citing Kelly J. Baker, Note, Senior Judges: Valuable Resources, Partisan Strategists, or Self-Interest Maximizers?, 16 J.L. & POL. 139, 154–55 (2000)).
taken part in by active judges, whether authored by those judges or merely those dissents in which they joined. This is not only because they are more rare, given the lighter case load of these judges, but because they may reveal a judge’s attempts to impact a certain area of law that they are passionate about. The dissenting opinion of this judge may also indicate that they have taken the time to hear this case because they truly have something important and groundbreaking to say.

B. An Examination of Judge’s Straub’s Dissents in Relation to Dissents of an Active Judge

Table 2: Judge Pooler vs. Judge Straub: Who is Truly the Big Dissenter?27

<table>
<thead>
<tr>
<th>Applicable Judge and the Increments of Time</th>
<th>Number of Split Case Decisions Heard</th>
<th>Opinions Dissented In</th>
<th>Percent of Dissenting Opinions in Split Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Straub</strong> (Total Second Circuit Dissents) (June 1998–October 2011)</td>
<td>65</td>
<td>31</td>
<td>47.69%</td>
</tr>
<tr>
<td><strong>Straub</strong> (Dissents during active status years) (June 1998–July 2008)</td>
<td>52</td>
<td>20</td>
<td>38.46%</td>
</tr>
<tr>
<td><strong>Pooler</strong> (Total Second Circuit Dissents) (June 1998–October 2011)</td>
<td>81</td>
<td>33</td>
<td>40.74%</td>
</tr>
<tr>
<td><strong>Pooler</strong> (Dissents from June 1998–July 2008, the span of time when Straub was an active Judge)</td>
<td>60</td>
<td>21</td>
<td>35.00%</td>
</tr>
</tbody>
</table>

27 Search Terms in Lexis Nexis: 2nd Circuit Cases: DISSENT(dissent!) and JUDGES(Straub) and DISSENT(dissent!) and JUDGES(Pooler), respectively. The results in each row of Table 1 were obtained by utilizing these search terms, but within the various defined time periods as indicated in Table 1.
Even though Judge Pooler is clearly the judge who has dissented the most in our study, it is interesting to see how the numbers match up between Judge Pooler and Judge Straub once the playing field is evened out. Judge Straub does not have the added benefit of being an active judge for the full duration of his time with the Second Circuit, as Judge Pooler does. In order to compensate for this, Table 2 examines the career decisions of Judge Pooler and Judge Straub, yet also focuses solely Judge Pooler’s decisions in relation to Judge Straub’s active years on the court. Initially, it is helpful to understand that Judge Straub and Judge Pooler have been on the court for the exact same length of time, both being commissioned on June 3, 1998. And, again, Judge Straub’s senior status explains why Judge Pooler’s total amount of split decision cases heard exceeds Judge Straub’s amount by sixteen.

However, even though Judge Pooler has heard more cases, Judge Straub has dissented in about 48% of split decision cases he has heard; Judge Pooler dissented in only 41% of those cases. This supports an inference, albeit a weak one, that Judge Straub has dissented more often than Judge Pooler. However, this inference is stronger when we limit the analysis of both judges’ decisions to solely the years in which Judge Straub was active, so that they both were assigned and heard roughly a comparable number of split decision cases. For Judge Straub, this would be fifty-two cases, while for Judge Pooler, it was sixty cases. Judge Straub dissented in 38.46% of those cases, while Judge Pooler dissented in 35% of those cases. Keeping in mind that this is still an imperfect analysis, as the two judges did not, in actuality, sit for the same number of cases prior to Judge Straub obtaining senior status, Judge Straub dissented in a greater percentage of cases overall.

IV. AN INDIVIDUAL ANALYSIS OF SELECT DISSENTS OF JUDGE STRAUB

The dissents selected for this study, again, span from August 2006 to October 2011. However, the best approach to reveal jurisprudential trends is to examine the dissents Judge Straub wrote or joined by

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28 Clemente, supra note 13, at 1125.
29 See Second Circuit Judges, supra note 25.
30 Id.
31 See supra Table 1.
32 See supra Table 1.
33 See supra Table 1.
separating them into different legal categories, not necessarily by the area of law examined, but by the type of party sided with in the dissent. After going through all of the cases, I will then examine the repetitive trends found among the dissents, and attempt to find a common thread between them all. The cases are broken down by the type of party the dissent favored below.

Table 3: Dissents Broken Down by Party/Class Sided With

<table>
<thead>
<tr>
<th>Type of Party/Class Sided With</th>
<th>Number of Dissents in this Study</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pro-Defendant in a Class Action Suit(^{34})</td>
<td>1</td>
</tr>
<tr>
<td>Pro-Plaintiff in a Class Action Suit(^{35})</td>
<td>1</td>
</tr>
<tr>
<td>Pro-United States/State(^{36})</td>
<td>2</td>
</tr>
<tr>
<td>Pro-Prisoner/Criminal(^{37})</td>
<td>6</td>
</tr>
<tr>
<td>Pro-Employee(^{38})</td>
<td>2</td>
</tr>
<tr>
<td>Other(^{39})</td>
<td>1</td>
</tr>
</tbody>
</table>

A. Dissent that Favors Defendants in a Class Action Suit

In *Literary Works in Electronic Databases Copyright Litigation v. Thompson Corp.*, the conflict was centered around a group of defendant publishers who had reproduced the plaintiffs’ written works electronically, the plaintiffs all being freelance authors for various types of periodicals and who subsequently alleged copyright infringement\(^{40}\). The parties were able to reach a comprehensive settlement agreement with the help of mediators.\(^{41}\) Thereafter, the District Court certified the class for settlement purposes and

\(^{34}\) *Literary Works in Elec. Databases Copyright Litig. v. Thomson Corp.*, 654 F.3d 242 (2d Cir. 2011).

\(^{35}\) *Reynolds v. Giuliani*, 506 F.3d 183 (2d Cir. 2007).


\(^{37}\) *United States v. Quinones*, 635 F.3d 590 (2d Cir. 2011); *United States v. Miller*, 626 F.3d 682 (2d Cir. 2010); *Rosario v. Ercole*, 601 F.3d 118, 122–23 (2d Cir. 2010); *Brown v. Greene*, 577 F.3d 107 (2d Cir. 2009); *United States v. Cavena*, 550 F.3d 180 (2d Cir. 2008); *Garvey v. Duncan*, 485 F.3d 709 (2d Cir. 2007).

\(^{38}\) *Matson v. Bd. of Educ. of City Sch. Dist. of N.Y.*, 631 F.3d 57 (2d Cir. 2011); *Taravella v. Town of Wolcott*, 599 F.3d 129, 131 (2d Cir. 2010).

\(^{39}\) *Natl’l Abortion Fed’n v. Gonzales*, 489 F.3d 125 (2d Cir. 2007).

\(^{40}\) *Literary Works in Elec. Databases Copyright Litig. v. Thomson Corp.*, 654 F.3d 242, 245 (2d Cir. 2011).

\(^{41}\) *Id.*
approved the settlement as fair.\textsuperscript{42} However, on plaintiff’s appeal, the Second Circuit held that the class certification was improper because not all plaintiff class members were adequately represented as required by Federal Rule of Civil Procedure 23(a)(4), as there appeared to be internal conflicts of interest among the representative class members.\textsuperscript{43} The circuit court decided that conflict existed because the settlement agreement divided the authors into three categories: A, B, and C, each group receiving a different amount of damages, yet the representative class members failed to adequately represent those having only Category C claims.\textsuperscript{44} The majority held that the District Court abused its discretion in certifying the class, as the only real solution would have been to form a subclass for the underrepresented category, and have each group represented by independent counsel during settlement talks, rather than impartial mediators.\textsuperscript{45}

However, Judge Straub makes one crucial distinction between an internal conflict of interest due to the differing amount of settlement funds each group was receiving based on the strength of their claim, as present in this matter, and a fundamental conflict of interest, only the latter qualifying as an abuse of discretion.\textsuperscript{46} Additionally, he found that the “[s]ettlement [did] not unfairly disadvantage [any] one portion of the class,” and that the representation of a mediator was not meant to ensure adequate representation of the whole class, but to facilitate their negotiations to the greatest degree possible, while also having “structural protections” in place to ensure that the class representative adequately represented their class.\textsuperscript{47} Finally, he reacts to the majority’s suggestion to create additional subclasses by pointing out the inherent difficulties and complications this would create, while reminding his colleagues “that it is not normally the province of [their] court to offer [those] types of suggestions in the first instance.”\textsuperscript{48}

\textbf{B. Dissent that Favors Plaintiffs in a Class Action Suit}

The following case does not constitute a “pro-plaintiff” dissent per

\textsuperscript{42} Id. at 247.
\textsuperscript{43} Id. at 249.
\textsuperscript{44} Id. at 249–50.
\textsuperscript{45} Id. at 253–54.
\textsuperscript{46} Id. at 260–61 (Straub, J., dissenting).
\textsuperscript{47} Id. at 261, 264.
\textsuperscript{48} Id. at 261.
se, but it is relevant enough to place in this category as the dissenter recoils from the majority’s holding that all liability on the part of the defendants should be stripped in this matter, especially without a full review of the evidence.49 In Reynolds v. Giuliani, a class action suit was brought by welfare applicants in New York City (“NYC”) under 42 U.S.C. § 1983 on behalf of New York residents seeking to apply for Medicaid, cash assistance, or food stamps, against the former Mayor of NYC, among others.50 The plaintiffs alleged that the city engaged in illegal conduct for the purposes of discouraging plaintiffs from getting the above-listed benefits and did not properly oversee the administration of these programs, resulting in an injunction compelling the defendants to comply with these programs and requiring the state defendants to supervise and come up with statewide plans to implement these programs, which the state defendants have appealed.51 In this matter, the majority sided with the defendants and held that there is no support for the “imposition of liability on the state or [to] warrant the issuance of a permanent injunction against it.”52 The dissent concurs with the majority insomuch that they agree that imposing liability on the state for their failure to properly train or supervise the agencies, an administrative activity that they delegated to the assistance programs, would require the state’s “deliberate indifference to the rights of citizens and [such a failure to be] closely related to the ultimate injury suffered.”53 Otherwise, the claim would result in de facto respondeat superior liability for the state; yet, the District Court erred by failing to determine if there was the presence of any such “deliberate indifference” before imposing liability on the defendant.54

However, while the majority concludes that this error could be remedied by reversing the injunction and dismissing the complaint against the defendants,55 reasoning “that whatever their shortcomings, the [s]tate defendants were not deliberately indifferent,” Straub would prefer to instead remand the case for further factual findings as he did not find the record convincingly

49 See id. at 208.
50 Reynolds v. Giuliani, 506 F.3d 183, 186–87 (2d Cir. 2007).
51 Id. at 186, 188.
52 Id. at 187.
53 Id. at 199 (Straub, J., concurring in part, dissenting in part) (citing City of Canton v. Harris, 489 U.S. 378, 388, 391 (1989)).
54 Reynolds, 506 F.3d at 200.
55 Id. at 199 (majority opinion).
one-sided.\textsuperscript{56} Judge Straub reminds the court that this type of fact-finding is not within their jurisdiction,\textsuperscript{57} and in the remaining parts of his dissent, lists the various shortcomings of the state in administering their assistance programs in an effort to show that a full review of the record very well may reveal deliberate indifference on behalf of the defendants on remand.\textsuperscript{58}

Despite siding with opposing parties in each of the above opinions, the striking similarity between the two dissents in the class action cases discussed above is Straub’s ever-watchful eye on the boundaries of the judicial role and the jurisdiction of the Second Circuit. This is one of the over-arching themes of Judge Straub’s dissents that will be apparent in his later opinions as well.

\textit{C. Dissents that Favor the United States or the Individual States}

In \textit{Alliance for Open Society International, Inc. v. United States Agency for International Development}, the U.S. Agency for International Development, the U.S. Department for Health and Human Services, and the U.S. Centers for Disease Control and Prevention appealed a decision of the District Court that prevented them from enforcing 22 U.S.C. § 7631(f), a provision of the Leadership Act.\textsuperscript{59} This provision provided that no funds would be given to non-governmental organizations fighting HIV/AIDS internationally unless they had a policy explicitly opposing prostitution or any activities that may appear to support a pro-prostitution stance.\textsuperscript{60} The majority held that this requirement is beyond what is deemed as a permissible condition on the receipt of government funds under Congress’s Spending Clause and likely violates the First Amendment by compelling the plaintiffs to espouse a government viewpoint on the controversial issue of prostitution.\textsuperscript{61} However, Judge Straub dissented, authoring an opinion in which he pointed out that the provision in question did not compel anyone to affirmatively express the government’s viewpoint in violation of the First Amendment, as the non-governmental organizations are the groups \textit{seeking} the funds with

\textsuperscript{56} \textit{Id.} at 200 (Straub, J., concurring in part, dissenting in part).
\textsuperscript{57} \textit{Id.}
\textsuperscript{58} \textit{Id.} at 208.
\textsuperscript{59} \textit{Alliance for Open Soc’y Int’l, Inc. v. U.S. Agency for Int’l Dev.}, 651 F.3d 218, 223 (2d Cir. 2011).
\textsuperscript{60} \textit{Id.}
\textsuperscript{61} \textit{Id.} at 223, 230.
the requirement being merely a subsidy condition.\textsuperscript{62} Additionally, Straub reasoned that Congress’s purpose in enacting the Leadership Act with this provision was not to create a large public forum to express their views on prostitution, therefore, it did not constitute viewpoint discrimination under the First Amendment.\textsuperscript{63} Finally, Straub notes that under the Spending Clause, the government is allowed to insist that public funds are spent for the purposes Congress has authorized, which in this matter is the complete effort to fight the HIV/AIDS epidemic, including reducing all of its behavioral risks, such as prostitution.\textsuperscript{64}

In 2008, the Second Circuit rendered an opinion in United States v. Lee, in which two defendants appealed their prison sentences.\textsuperscript{65} Ibn Lee and Larry Williams were “convicted of murder for hire conspiracy in violation of 18 U.S.C. § 1958,” with Lee also being convicted for possession of a firearm as a felon, in violation of 18 U.S.C. § 922(g)(1).\textsuperscript{66} Both appellants argued that the trial court violated the Six Amendment’s Confrontation Clause by admitting a statement by a detective, recounting a statement made by another participant in the conspiracy who did not testify at trial, Maurice Clark; the U.S. conceded the error, but argued that it was harmless.\textsuperscript{67} The majority sided with the defendants, deciding it was not harmless error and vacating the conviction for murder for hire conspiracy for both defendants, because they believed that Clarke’s “statement almost certainly contributed” to the guilty verdict at trial.\textsuperscript{68} They concluded that “[a] reasonable juror “could have inferred” Lee and William’s connection to the crime from this statement, or “may have relied [on it] to some degree,” thereby making the government unable to establish beyond a reasonable doubt that the Clark statement did not contribute to the jury’s verdict.\textsuperscript{69} However, Judge Straub was “convinced beyond a reasonable doubt” otherwise.\textsuperscript{70} He concluded that the Clarke statement was never a smoking gun in the first place, therefore

\textsuperscript{62} Id. at 254–55, 259 (Straub, J., dissenting). Judge Straub also notes that even if the non-governmental organizations accept these funds and are forced to adopt a policy against prostitution, they can merely set up a subsidiary agency that will adopt this policy, and are not being coerced to change the policy of their entire organization. Id. at 267.
\textsuperscript{63} Id. at 263.
\textsuperscript{64} Id. at 257.
\textsuperscript{65} United States v. Lee, 549 F.3d 84 (2d Cir. 2008).
\textsuperscript{66} Id. at 86.
\textsuperscript{67} Id.
\textsuperscript{68} Id. at 90, 96.
\textsuperscript{69} Id. at 91.
\textsuperscript{70} Id. at 96 (Straub, J., dissenting).
“added relatively little” to the existing evidence; accordingly its admission constituted harmless error.\textsuperscript{71}

Although both pro-government decisions, the jurisprudence in these cases could not be more dissimilar, mostly based on the differences in the legalities discussed, with the first matter taking on heavy constitutional issues and mainly involving the consideration of legal precedent, while the latter is a harmless error analysis in a criminal matter, mostly requiring intense consideration of the factual record.

\textbf{D. Dissents that Favor Criminal Defendants/Prisoners}

In \textit{United States v. Miller}, the Appellant, Michelle Favreau, appealed her conviction for one count of international parental kidnapping, in violation of 18 U.S.C. § 1204, to the Second Circuit.\textsuperscript{72} Favreau's appeal was partially based on the fact that the District Court excluded evidence of her additional appeal pending in the Vermont Supreme Court for custody of her son,\textsuperscript{73} which would go to show that she did not have the intent to obstruct the father’s parental rights in “kidnapping” her son and bringing him into Canada.\textsuperscript{74} The majority held that “the pendency of the appeal could not itself negate the existence of [the father’s] parental rights while the order was still in effect,” but only that “the pending appeal could, at most, express Favreau’s disagreement with those rights.”\textsuperscript{75} Additionally, they reasoned that the existence of an appeal did not amount to evidence that she lacked the requisite intent to frustrate the father's parental rights, because when she took her son to Canada, she had knowledge that it prevented the father from exercising his visitation rights and violated the Vermont order granting full custody rights to the father.\textsuperscript{76} The court held that the evidence of Favreau’s knowledge of such would allow a reasonable jury to infer that she intended to obstruct the father's parental rights.\textsuperscript{77}

Judge Straub disagreed with the majority holding that such a “reasonable inference” might be made, because in determining the relevance of this evidence, the question should be whether the

\begin{itemize}
  \item \textsuperscript{71} Id. at 97–98.
  \item \textsuperscript{72} United States v. Miller, 626 F.3d 682, 685 (2d Cir. 2010).
  \item \textsuperscript{73} Id.
  \item \textsuperscript{74} Id. at 688.
  \item \textsuperscript{75} Id. at 689 (citing United States v. Kraeger, 711 F.2d 6, 7 (2d Cir. 1983)).
  \item \textsuperscript{76} Id. at 686.
  \item \textsuperscript{77} Id. at 691.
\end{itemize}
admitting evidence affects the material information given to the jury on the question of intent, not questioning “what relative weight” they might give to it, as this is the role of the jury, not of the appellate court.\footnote{Id. at 693 (Straub, J., dissenting).} Additionally, Straub noted that the evidence of the Vermont appeal may suggest that Favreau had an alternative motive when taking her child to Canada, such as her quest to “vindicate” her parental rights in the Canadian courts, therefore being relevant evidence as it could show her lack of intent, which, again, is a question that should be left to the jury.\footnote{Id.}

A prisoner’s habeas corpus petition was denied on procedural grounds by the Second Circuit in \textit{Garvey v. Duncan}, who asserted that he had not preserved the issue at hand for appeal.\footnote{Garvey v. Duncan, 485 F.3d 709, 711 (2d Cir. 2007).} In this matter, Thomas Garvey sought habeas corpus relief because the trial court denied his motion to suppress identification evidence at his trial that he argued was suggestive and orchestrated by police, yet the trial court had reasoned that since Garvey was not in police custody at the time of identification, this argument was groundless.\footnote{Id. at 715.} In his appeal, he argued that the identification should have been suppressed at trial because it was obtained under suggestive circumstances created by civilians.\footnote{Id. at 716.} The appellate courts, as well as the Second Circuit, held that the claim was barred because the defendant’s suppression motion at trial “did not expressly challenge his identification based upon civilian [mis]conduct,” rather was based solely on the suggestiveness of police conduct, therefore, since the trial court never expressly decided this issue, it was not preserved for appeal.\footnote{Id. at 716, 718 (emphasis added).}

However, in a dissent authored by Judge Straub, he noted that the majority’s requirement that Garvey lodge “pinpoint objections,”\footnote{Id. at 721 (Straub, J., dissenting).} with “near-surgical precision”\footnote{Id. at 720.} was a rather strict interpretation of the barring statute, New York Criminal Procedure Law section 470.05(2), but even if accepting such an exorbitant requirement, the suppression motion papers, read fairly, were broad enough to challenge \textit{all} unconstitutionally suggestive conduct, not just that by the police.\footnote{Id. at 722, 724.} Initially, Straub argued that such a
requirement was especially exacting given that the trial court did not allow the defendant’s counsel to fully explain the grounds of his motion at trial and instructed him to rest on the record, creating the procedural bar to his appeal. 87 Finally, Judge Straub went beyond the majority’s ruling and proceeded to address the appeal of the case on its merits, finding that the identification in question had “an extraordinary ‘degree of suggestiveness,’” 88 and the acceptance of such as reliable evidence contradicts the basic goal “to avoid the ‘primary evil’ of ‘a very substantial likelihood of irreparable misidentification.’” 89

In 2009, in Brown v. Greene, the Second Circuit denied an appeal for habeas corpus by a petitioner, Dwayne Brown, who alleged that he had received ineffective assistance of counsel at trial because his counsel failed to object to a jury charge that purported the defendant may be convicted under the preponderance of the evidence standard, rather than the beyond a reasonable doubt standard. 90 The majority held that, although it may be possible that the jury charge here is somewhat distinguishable from charges previously upheld in the past, 91 and might not be upheld if it came before the court “in a different posture,” 92 they could not fault defendant’s counsel as inadequate for failing to detect the problem. 93 However, the majority also took the time to emphasize that trial judges should use model jury instructions in the future, as “[i]mprovised definitions of the beyond a reasonable doubt standard may be confusing or misleading.” 94

In his lengthy dissent, Judge Straub found that “[t]his case illustrates the perils of instructing a criminal jury that not every fact must be proved beyond a reasonable doubt,” but instead by a fair reading, a preponderance of the evidence, as this court did with respect to the issue of whether the defendant was accurately identified, which also happened to be the only fact in dispute at the trial. 95 Straub distinguishes between the following: permissible instructions that been upheld in the past, those that state some

87 Id. at 721.
88 Id. at 728 (quoting Solomon v. Smith, 645 F.2d 1179, 1185 (2d Cir. 1981)).
89 Garvey, 485 F.3d at 729 (quoting Neil v. Biggers, 409 U.S. 188, 199 (1972)).
90 Brown v. Greene, 577 F.3d 107, 108 (2d Cir. 2009).
91 Id. at 112.
92 Id. at 120 n.7 (Straub, J., dissenting).
93 Id. at 112 (majority opinion).
94 Id. at 113 (citing United States v. Viafara-Rodriguez, 729 F.2d 912, 913–14 (2d Cir.1984)).
95 Id. at 114 (Straub, J., dissenting).
facts need not be proven beyond a reasonable doubt; and the convoluted and constitutionally deficient instructions given in the case at hand, which effectively charge that all facts may be proved by a preponderance of the evidence, including identification. Straub reasoned that even in light of such a constitutionally deficient charge on the critical issue of identity, counsel should not have been expected to object immediately once the improper instruction was given, but had a duty to make sure that the correct standard was properly conveyed to the jury, and to not do so was unreasonable.

In United States v. Quinones, appellants Antonio and Herman Quinones appealed their convictions to the Second Circuit, alleging that a conscious avoidance jury instruction given at trial was prejudicial, therefore entitling them to a retrial. In this case, the defendants had set up an online pharmacy where customers were allowed to submit requests for medicines, that doctors then provided prescriptions for, generating up to 1,000 orders per day, but never allowing any actual contact between doctor and patient. The general rule is that a person may be convicted of unlawful distribution of a controlled substance if the defendant relies upon a prescription that he knows or reasonably should have known was invalid and made in bad faith by a doctor. The majority held that any error in instructing the jury was not prejudicial to the defendants, because the other overwhelming evidence at trial indicated that the defendants know or should have known that the doctors and pharmacists they relied on were acting in bad faith, as “[a]ny actual belief to the contrary would have been unreasonable.”

“With today’s decision the majority blurs the once distinct and enforces parameters of our conscious avoidance jurisprudence.”

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96 Id. 123–24, 127. The instructions in this case stated: “What your concern is: Did the People prove beyond a reasonable doubt the elements of a robbery; and equally, if not more importantly, the accuracy of the identification of Mr. Burwell and Mr. Brown [the petitioner] as the person or persons involved in the crime.” Id. at 115 n.1.

97 Id. at 132.

98 United States v. Quinones, 635 F.3d 590, 592 (2d Cir. 2011). “A conscious avoidance [jury] instruction permits a jury to find that a defendant had culpable knowledge of a fact when the evidence shows that the defendant intentionally avoided confirming the fact.” Id. at 594 (quoting United States v. Ferrarini, 219 F.3d 145, 154 (2d Cir. 2000)) (citing United States v. Gabriel, 125 F.3d 89, 98 (2d Cir.1997)).

99 Quinones, 635 F.3d at 592–93, 596.

100 Id. at 594–95.

101 Id. at 595, 597.

102 Id. at 600 (Straub, J., dissenting).
Judge Straub criticized the majority opinion in his dissent, instead finding that the jury instruction’s language was “fundamentally flawed” and constituted a “plain and prejudicial” error. A critical element of the conscious avoidance instruction is that the jury can infer actual knowledge of the defendant, unless the defendant has an actual belief that he was not doing anything illegal and that belief need not be reasonable. Straub reasons that the conscious avoidance doctrine is not meant to be an alternative basis on which the jury can find the knowledge element of the crime to be satisfied. In his dissent, he is “convinced” that the jury might have convicted the defendants solely on a conscious avoidance theory. “Thus, the [instructional] error ‘seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings.’”

In *Rosario v. Ércole*, Richard Rosario made a petition for habeas corpus, arguing that the state court misapplied federal law in deeming that he had effective assistance of counsel, because his right to such was violated due to his counsel’s failure to investigate and contact everyone on his list of thirteen alibi witnesses and to investigate his alibi defense otherwise. The majority found that after a month-long hearing was conducted on Rosario’s motion to vacate his conviction, they cannot say that the judge misapplied federal law, as the judge deemed that Rosario’s counsel provided effective representation and a credible and strategic alibi defense, because the sole two witnesses called on at trial were the best witnesses for his alibi defense, and the others, had they testified, would have been far less convincing.

Judge Straub strongly disagreed, calling the trial counsel’s failure to investigate Rosario’s alibi defense a “colossal failure,” and his actual alibi defense presented at trial weak at best, as the those two witnesses were subject to impeachment for having a conflict of interest, because they were good friends with the defendant. While the majority seemed to agree with at least this much, Judge Straub took it a step further and found that this was not merely an error, but counsel’s failure undermined all confidence in the jury’s

103 Id. at 601.
104 Id. at 601–02.
105 Id. at 603.
106 Id.
107 Id. (quoting United States v. Marcus, 130 S. Ct. 2159, 2164 (2010)).
108 Rosario v. Ércole, 601 F.3d 118, 122–23 (2d Cir. 2010).
109 Id. at 128–29.
110 Id. at 128–29 (Straub, J., dissenting).
111 Id. at 129.
verdict.\textsuperscript{112} He also took issue with the state court’s finding that the defense actually presented by counsel was “strategic,” and reminded readers that the counsel on this case admitted that their failure to follow up on the defendant’s alibi was a mistake, and would have “loved to” call additional witnesses if they had them, further showing that their counsel was constitutionally deficient under the Sixth Amendment.\textsuperscript{113} Finally, he deemed that there was a reasonable probability that the outcome at trial would have been different, and the error therefore prejudicial, because the prosecution easily decimated the two defense alibi witnesses that were able to testify, and even given “the paucity of the prosecution’s case,” they were able to secure a conviction.\textsuperscript{114}

In \textit{United States v. Cavera}, defendant Cavera appealed the District Court’s imposition of his sentence for a firearm trafficking offense, which was above-Sentencing Guidelines because the court believed “that the Sentencing Guidelines failed to take into account the need to punish more severely those who illegally transport guns into areas like New York City.”\textsuperscript{115} The Second Circuit reviewed the sentencing decision for a procedural error by looking at the overall reasonableness of the sentence, partially accomplished by looking at the District Court’s rationale in its sentencing.\textsuperscript{116} The majority found that the District Court’s decision was independently reasonable and justifiable because in areas with strict local gun laws, such as New York City, gun ownership is low, and there is more of a profit to be made for people in the south seeking to sell them up north, therefore the penalty in those areas should be higher as a deterrent.\textsuperscript{117} However, Judge Straub found that there was little factual support to the notion that firearms trafficking into New York City is more profitable than in the rest of the county, although if there was support for this belief, it would be a reasonable basis for a greater deterrent.\textsuperscript{118} Judge Straub found that because of this, and other tenuous links between facts and conclusions made by the District Court, the sentence did not pass the reasonableness review.\textsuperscript{119}

Judge Straub’s most passionate dissents arise in this category of

\textsuperscript{112} \textit{Id.} at 128.
\textsuperscript{113} \textit{Id.} at 130–31.
\textsuperscript{114} \textit{Id.} at 132, 135–36.
\textsuperscript{115} \textit{United States v. Cavera}, 550 F.3d 180, 184 (2d Cir. 2008).
\textsuperscript{116} \textit{Id.} at 190–91.
\textsuperscript{117} \textit{Id.} at 196.
\textsuperscript{118} \textit{Id.} at 214 (Straub, J., dissenting in part, concurring in part).
\textsuperscript{119} \textit{Id.} at 216.
cases, and he is not quick to dismiss a case involving significant issues or grave errors that are critical to determining a defendant or prisoner’s guilt. These cases also involve significant consideration of the facts in the record, and, as demonstrated in the cases above, Judge Straub does not frequently find that the accumulation of evidence presented at trial is sufficient to determine guilt if a single key issue in the case is later proved to be wrongly decided, especially if the issue in question is the reliability of identification evidence. Another significant theme we see is the emphasis Straub places on the clarity of jury instructions, typically finding that it is impossible to ensure a proper jury verdict without them. Finally, Judge Straub spends a great deal of time analyzing the alleged errors in jury trials that call into question the effectiveness of the assistance of counsel, always questioning his overall confidence in verdicts. The issues of identification, proper jury instructions, and effectiveness of the assistance of counsel seem to be essential elements in Judge Straub’s analysis, and while the majority in the reviewed cases has been quick to acknowledge errors with these elements and dismiss them as harmless just as quickly, one would be hard-pressed to find Judge Straub jumping on the bandwagon in those types of cases.

E. Dissents that Favor the Employee

In Taravella v. Town of Wolcott, the Defendant, Mayor Thomas Dunn, was sued, along with other defendants, by an employee he had terminated, Taravella, but his motion for summary judgment was denied, along with his qualified immunity defense, in her procedural due process claim, on the ground that questions of fact regarding Taravella’s employment contract still existed, suggesting that Taravella had a constitutional right to a pretermination hearing.120 The Second Circuits majority opinion determined that Dunn was entitled to qualified immunity121 because his conduct in terminating Ms. Taravella’s employment was objectively reasonable in light of the circumstances.122 Taravella alleged that she had signed a contract with the previous mayor guaranteeing that she

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120 Taravella v. Town of Wolcott, 599 F.3d 129, 131 (2d Cir. 2010).
121 “Qualified immunity protects officials from liability for civil damages as long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” Id. at 133 (quoting Gilles v. Repicky, 511 F.3d 239, 243 (2d Cir. 2007)).
122 Taravella, 599 F.3d at 134.
would not be terminated without cause and a pretermination hearing, and that she also had been given an oral promise to that effect.  However the majority held that it was objectively reasonable to terminate Taravella without a meeting because Dunn had no knowledge of the oral promise and, after seeking legal counsel, found the contract to be ambiguous; merely because Dunn interpreted the contract one way and not the other, did not make his conduct unreasonable.

Judge Straub firmly disagrees that this case should even be within the jurisdiction of the Second Circuit. He refers to well-established, black letter law of the Second Circuit that if the District Court denies summary judgment for qualified immunity because there are material facts in dispute, there cannot be a direct appeal because only the District Court can decide whether there is sufficient evidence to support the plaintiff’s version of the facts. However, going beyond this, and several other issues Straub addresses, he and the majority primarily disagree as to how to address the contract ambiguity in question, with Straub saying that an ambiguity in the contract only arises due to material issues of fact. He does not disregard that Dunn could have acted reasonably, but this cannot be determined based on the disputed facts in the record, which need to be looked at in the light most favorable to the plaintiff, tasks that should not be performed by an appellate court.

In Matson v. Board of Education of the City School District of New York, Dorrit Matson, a public school music teacher, appealed from a judgment dismissing her 42 U.S.C. § 1983 civil rights action that alleged a violation of her right to privacy after the Board of Education had disclosed her medical condition on a public website in connection to an investigation of her sick leave. The District Court dismissed her case, finding that her medical conditions—

\[123\] Id. at 135.
\[124\] Id.
\[125\] Id. at 136, 141 (Straub, J., dissenting).
\[126\] Id. at 141. Judge Straub condemns the court’s actions in this case, stating: The majority chooses not to follow these well-settled rules by doubting conclusions that are uniquely the province of the District Court. Having proceeded to decide an issue that it should not, the majority then, in the face of ambiguity, credits the defendant’s version of the facts with respect to whether Dunn acted reasonably. This reverses well-established case law.
\[127\] Id. at 141–42 (emphasis in original).
\[128\] Id. at 146.
\[129\] Matson v. Bd. of Educ. of the City Sch. Dist. of N.Y., 631 F.3d 57, 58 (2d Cir. 2011).
fibromyalgia and a bacterial infection—were not serious medical conditions giving rise to a privacy right and therefore barring disclosure. In examining this question, the majority finds that while fibromyalgia is a serious medical condition, there are no objective tests that can confirm the presence of the disease, it is not fatal, only debilitating in certain situations, does not carry an associated stigma, the revelation of the condition does not provoke societal discrimination or intolerance, and, finally, Matson has not claimed embarrassment or humiliation by the disclosure and there is no reason to suggest it would affect her employability. Based on all of the forgoing, the majority concluded that Matson had a diminished right to privacy in her medical information due to the lack of seriousness of her condition and the absence of a social stigma associated with it.

Judge Straub worried about the implication of the Second Circuits ruling, fearing it would open the doors to the government having “substantial reign” to publish anyone’s medical information without just cause. In his view, fibromyalgia is a growing and serious condition that can be debilitating, but more importantly, the majority’s suggestion that a medical condition should be fatal in order to be considered personal and deserve a right to privacy is nonsensical. Additionally, he argued that Matson should not be faulted for failing to provide specific evidence of past societal discrimination and intolerance of her condition in her complaint, as this is a requirement that violates Federal Rule of Civil Procedure 8(a), which only mandates that a short and plain statement of a claim is needed to satisfy the notice requirement of the claim.

F. Other Dissents

In National Abortion Federation v. Gonzales, the Second Circuit stayed the issue of remedy in light of a Supreme Court decision contradicting their holding that the the Partial-Birth Abortion Ban Act of 2003 was unconstitutional, instead allowing the parties to
submit supplemental briefs to comment on the recent Supreme Court case. In the original matter, Judge Straub had dissented, personally finding that the act was constitutional but agreeing that per the majority’s holding, a remedy needed to be decided upon after further briefing from the parties. However, Straub’s brief dissent to the subsequent order for additional briefing points out that in light of the Supreme Court decision of the constitutionality of the act, there should be no reason for further briefing, as the Supreme Court’s decision was “the mirror image of this case.” Therefore, Judge Straub opined, the Supreme Court precedent, *Gonzales v. Carhart*, acted as a firm guideline in this matter, mandating that the Second Circuit vacate their original opinion, declare the stay originally granted for further briefing as moot because the constitutionality of the act leaves no remedy available, and remand the case to the District Court to enter judgment pursuant *Carhart*.

V. CONCLUSION: CONSISTENT THEMES IN STRAUB’S DISSENTS

There are several general themes we see in these dissents that cross the division of categories that I have created. In general, Judge Straub placed heavy emphasis on not only maintaining clarity in jurisprudence, but also keeping the lines of precedent well-defined and the interpretation of such precedents uncomplicated. Additionally, as has already been mentioned, Straub is always quick to note when the issue on appeal or the suggested remedy by the court is not within the province of the Second Circuit, usually when he determines that the Second Circuit

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141 *Gonzales*, 489 F.3d at 126 (Straub, J., dissenting).

142 *Id.*

143 See, e.g., *Literary Works in Elec. Databases Copyright Litig. v. Thomson Corp.*, 654 F.3d 242, 261 (2d Cir. 2011) (Straub, J., dissenting) (noting that the creation of subclasses in the class action would only complicate matters further); *United States v. Quinones*, 635 F.3d 590, 600 (2d Cir. 2011) (Straub, J., dissenting) (noting that the majority decision blurs well-established precedent); *Matson v. Bd. of Educ. of the City Sch. Dist. of N.Y.*, 631 F.3d 57, 72 (2d Cir. 2011) (Straub, J., dissenting) (arguing that the plaintiff should not have to provide specific evidence in her complaint that surpasses federal requirements); *Garvey v. Duncan*, 485 F.3d 709, 720–21 (2d Cir. 2007) (Straub, J., dissenting) (noting that the requirement of defendant’s counsel at trial to object to the inclusion of identification evidence with pinpoint precision in order to preserve the issue on appeal is nonsensical and unrealistic).
has wrongfully taken on the task of assessing the relevance of material facts, a job that should be left to the jury, or that the majority has disregarded situations in which material facts or evidence were not known to the jury, yet should have been introduced at trial or on remand.\[^{144}\] This particular theme is seen across the board in this study, with seemingly no link to the type of party Straub has sided with in his dissent, as it is present in his dissents for pro-defendant as well as pro-plaintiff class action matters, and cases in which Straub sided with criminal defendants or prisoners as well. In this study, the characterization and organization of Straub’s dissents by the type of party sided with, revealed far less about Judge Straub’s jurisprudential trends than expected, as the themes end up bleeding together, bypassing the narrowly defined and categorized constraints of this study. If the cases were instead categorized by area of law examined, we would likely get the same result, because even though many different areas of law are discussed in these matters, ranging from contract law to civil liberties, there is no real link between the themes and areas of law discussed.\[^{145}\] Nonetheless, the examination Judge Straub’s dissents do not leave us wanting in revealing details about his personal character and method of analysis, and no matter how the cases are categorized and broken down, Straub’s general jurisprudential principles are easily identifiable and almost predictable across the board.

\[^{144}\] See, e.g., Literary Works in Elec. Databases Copyright Litig., 654 F.3d at 261 (noting that the majority’s suggestion for the creation of additional subclasses is not within the province of the Second Circuit); United States v. Miller, 626 F.3d 682, 693 (2d Cir. 2010) (Straub, J., dissenting) (asserting that the Second Circuit should not attempt to determine how much weight a jury would have given evidence as this is a fact-finding not in the province of the Second Circuit because there were material facts that still had to be issue); Rosario v. Ercole, 601 F.3d 118, 128 (2d Cir. 2010) (arguing that the failure of the attorneys to investigate the defendant’s alibi and present those facts at trial amounted to a failure, as those were material facts that may have changed the verdict); Tarvella v. Town of Wolcott, 599 F.3d 129, 141, 146 (2d Cir. 2010) (Straub, J., dissenting) (holding that in order to interpret the contract to resolve its ambiguity the material facts in issue must be decided); United States v. Cavera, 550 F.3d 180, 214 (2d Cir. 2008) (Straub, J., dissenting) (asserting that the tenuous links between the facts and conclusions in the record provide no basis for why a heightened sentence was imposed and therefore rendered the sentence unreasonable); Reynolds v. Giuliani, 506 F.3d 183, 200 (2d Cir. 2007) (Straub, J., dissenting) (arguing that the determination of whether the State has engaged in deliberate indifference is a fact-finding matter for the lower courts).

\[^{145}\] The one exception to this proposition might be criminal and habeas corpus cases, as several themes are consistent throughout Straub’s dissents emphasizing the importance of evidence being properly admitted at trial. See discussion supra Part IV.D.