

JUDGE FAHEY: A JUDGE’S JUDGE USING HIS POSITION TO
PROTECT THE VULNERABLE

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INTRODUCTION

Judge Eugene M. Fahey, during the hearing on his nomination to the New York Court of Appeals, was referred to as a “judge’s judge,” and has so far lived up to his reputation.¹

Judge Fahey, born in September 1951 in Buffalo, New York, spent much of his life in Buffalo before his appointment to the Court of Appeals.² Attending the State University of New York at Buffalo, Judge Fahey received “a B.A. in political science in 1974 (cum laude), a law degree in 1984 and an M.A. in European History in 1998.”³ Prior to graduating law school, between 1978 and 1983, Judge Fahey was a member on the Buffalo Common Council.⁴ Following his law school graduation, Judge Fahey clerked for Judge Edgar C. NeMoyer in the New York Court of Claims in Buffalo.⁵ After his clerkship, Judge Fahey served as house counsel for Kemper Insurance Company from 1985 to 1993, as well as rejoining the Buffalo Common Council between 1988 and 1994.⁶

In 1993, Judge Fahey ran in the Democratic Mayoral primary, but lost to Anthony Masiello.⁷ However, he won election to the Buffalo City Court the following year.⁸ Two years later, in 1996, Judge Fahey

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¹ See Colby Hamilton, *After a Delay, Cuomo Gets His Court*, POLITICO NEW YORK (Feb. 10, 2015), <https://www.politico.com/states/new-york/albany/story/2015/02/after-a-delay-cuomo-gets-his-court-019604>.

² See *Honorable Eugene M. Fahey*, STATE OF N.Y. CT. OF APPEALS, <https://www.nycourts.gov/ctapps/jfahey.htm> (last visited Apr. 25, 2018).

³ *Id.*

⁴ *See id.*

⁵ *See id.*

⁶ *See id.*

⁷ See James Fink, *Fahey Nominated to NYS Court of Appeals*, BUFF. BUS. FIRST (Jan. 15, 2015), <https://www.bizjournals.com/buffalo/news/2015/01/15/fahey-nominated-to-nys-court-of-appeals.html>.

⁸ *See id.*

was elected to become a New York State Supreme Court Justice.⁹ Following ten years of service on the Supreme Court, Judge Fahey was appointed to the Supreme Court, Appellate Division, Fourth Department by former Governor George Pataki in 2006; his appointment was later re-designated by both former Governor David Paterson and current Governor Andrew Cuomo.¹⁰

On January 15, 2015, Governor Cuomo nominated Judge Fahey to fill the retiring Judge Robert S. Smith's seat on the Court of Appeals.¹¹ On February 9, 2015, Judge Fahey was unanimously approved, alongside Judge Leslie Stein, by the State Senate to join the Court of Appeals.¹² The addition of Judges Fahey and Stein to the Court of Appeals shifted the balance of the court, "with five of the seven judges now having been appointed by Democratic governors," the first Democratic majority in many years.¹³

IMPORTANCE OF DISSENTS

While many might believe that analyzing a judge's majority opinions is the best way to get an understanding of the judge, it is actually the dissenting opinions that a judge authors that are most telling. When writing a majority opinion, a judge must consider the points of view of the other judges so that the opinion is joined by a majority; thus, a majority opinion is not a judge's full take on the matter, but a compromise.¹⁴ On the other hand, a dissenting opinion allows a judge to express his or her personal opinion without being burdened by what the other judges believe.¹⁵ Further, when a judge writes a dissenting opinion, they are doing so out of a need to share their personal conviction, so those dissents are the best reflection of the judge's "attitudes, views, and beliefs."¹⁶ Thus, with dissents being "the strongest indication . . . of the authors' strongest feelings, views,

⁹ *See id.*

¹⁰ *See id.*

¹¹ *See* James C. McKinley Jr., *Cuomo Selects Another Democrat for New York's Highest Court*, N.Y. TIMES (Jan. 15, 2015), <https://www.nytimes.com/2015/01/16/nyregion/cuomo-selects-another-democrat-for-new-yorks-highest-court.html>.

¹² *See* Hamilton, *supra* note 1.

¹³ *Id.*

¹⁴ *See* Vincent M. Bonventre, *New York's Chief Judge Kaye: Her Separate Opinions Bode Well for Renewed State Constitutionalism at the Court of Appeals*, 67 TEMP. L. REV. 1163, 1168 (1994).

¹⁵ *See id.* at 1169.

¹⁶ *See id.* ("Writing one is invariably a very personal effort, compelled by the author's own sense of principle, conscience, and need to assert a substantial or deeply felt difference with the majority.")

philosophies, tendencies, and ideological leanings,” analyzing a judge’s dissents is key towards understanding the judge and how they may vote in the future.¹⁷

JUDGE FAHEY’S HISTORY OF DISSENTS PRIOR TO JOINING THE COURT OF APPEALS

During his time serving as an appellate judge for the Fourth Department, Judge Fahey developed a history of being an avid dissenter; in the seven-year period between the beginning of 2008 and Judge Fahey’s nomination to the Court of Appeals in February 2015, Judge Fahey wrote over fifty dissenting opinions.¹⁸ By analyzing and identifying patterns in Judge Fahey’s dissents in the appellate division, it is possible to determine what his tendencies were in the appellate division and assess whether he brought those tendencies with him to the Court of Appeals.¹⁹

One area where a clear pattern emerged from Judge Fahey’s dissent was criminal cases, where he tended to favor the defendant and sought to protect defendants’ rights.²⁰ One right he attempted to protect was the right to effective counsel.²¹ Another defendants’ right that Judge Fahey would argue in favor of in his dissents is the need for sufficient evidence required to prove every element of the crime in order to uphold a conviction.²² Additionally, Judge Fahey also wrote several dissents at the appellate division to argue against harsh sentencing of convicted criminals.²³

Despite Judge Fahey’s tendency to author dissents arguing to

¹⁷ Vincent M. Bonventre, *New York Court of Appeals: More Dissents in Kaye Court (Part 2: Who? How Many? What?)*, N.Y. CT. WATCHER (July 10, 2008), <http://www.newyorkcourtwatcher.com/2008/07/new-york-court-of-appeals-more-dissents.html>.

¹⁸ See Vincent M. Bonventre, *Part 5 [Judge Fahey’s ‘Tendencies’]—NYCOA: Cuomo’s Latest Two Nominees*, N.Y. CT. WATCHER (Feb. 9, 2015), <http://www.newyorkcourtwatcher.com/2015/02/part-5-judge-faheys-tendencies-nycoa.html>.

¹⁹ See *id.*

²⁰ See *id.*

²¹ See, e.g., *People v. Parson*, 997 N.Y.S.2d 198, 200 (App. Div. 2014) (Fahey, J., dissenting) (“I respectfully dissent because in my view defendant was deprived of his right to effective assistance of counsel.”); see Bonventre, *supra* note 18.

²² See, e.g., *People v. Heatley*, 980 N.Y.S.2d 701, 714 (App. Div. 2014) (Fahey, J., dissenting) (“The People have not proved the charge of murder in the second degree beyond a reasonable doubt. The evidence is particularly deficient on the element of intent.”); See Bonventre, *supra* note 18.

²³ See, e.g., *People v. Maliszewski*, 876 N.Y.S.2d 266, 268 (App. Div. 2009) (Centra & Fahey, JJ., dissenting) (“Inasmuch as we previously concluded that the term of incarceration of 3 to 6 years originally imposed was illegal, plain logic does not support an unencumbered remittal permitting the court to impose the enhanced sentence that we concluded was illegal.”); see Bonventre, *supra* note 18.

protect the rights of defendants, however, he tended to make an exception to his pro-defendant views and issue dissents that were pro-prosecution when “a child or other vulnerable person [had] been victimized.”²⁴ Further, Judge Fahey’s tendency to side against those who victimize children has also extended to civil cases.²⁵

Thus, Judge Fahey’s tendency at the Fourth Department was to protect the rights of defendants in criminal cases, with the exception that he would side with the victims in any case where those victims were children or other vulnerable people.²⁶

STATISTICS OF JUDGE FAHEY’S DISSENTS

Between when he joined the Court of Appeals in 2015 and the end of 2017, Judge Fahey wrote dissenting opinions for fourteen cases.²⁷ Of those fourteen dissenting opinions, five of them were written in criminal cases,²⁸ and nine were written in civil cases.²⁹ Contrary to

²⁴ See, e.g., *People v. Jerge*, 935 N.Y.S.2d 396, 400 (App. Div. 2011) (Fahey, J., dissenting) (citations omitted) (arguing that the conviction of a defendant for sex abuse of a child should not be impeached due to jury actions that the defendant did not prove reached the level of juror misconduct); *People v. Groth*, 896 N.Y.S.2d 547, 548 (App. Div. 2010) (Fahey, J., dissenting) (citations omitted) (arguing that, based on the evidence, the jury was justified in convicting a defendant who was found guilty of reckless assault of a child and assault in the third degree for injuring his infant son); see *Bonventre*, *supra* note 18.

²⁵ See, e.g., *Hamilton v. Picardo*, 988 N.Y.S.2d 306, 308–09 (App. Div. 2014) (Fahey, J., dissenting) (citations omitted) (arguing that summary judgment should not have been awarded to a defendant who had a complaint brought against him for injuring a child by exposure to lead paint when the defendant was aware of the dangers of lead paint to children and there were issues of facts regarding the other elements of the claim); see *Bonventre*, *supra* note 18.

²⁶ See *Bonventre*, *supra* note 18.

²⁷ See *People v. Garvin*, 88 N.E.3d 319, 330 (N.Y. 2017) (Fahey, J., dissenting in part); *Burlington Ins. Co. v. N.Y.C. Transit Auth.*, 79 N.E.3d 477, 486 (N.Y. 2017) (Fahey, J., dissenting); *People v. Couser*, 68 N.E.3d 26, 34 (N.Y. 2016) (Fahey, J., dissenting in part and concurring in part); *In re Yoga Vida N.Y.C., Inc. (Comm’r of Labor)*, 64 N.E.3d 276, 279 (N.Y. 2016) (Fahey, J., dissenting); *Pasternack v. Lab. Corp. of Am. Holdings*, 59 N.E.3d 485, 493 (N.Y. 2016) (Fahey, J., dissenting); *Aetna Health Plans v. Hanover Ins. Co.*, 56 N.E.3d 213, 219 (N.Y. 2016) (Fahey, J., dissenting); *Kent v. Lefkowitz*, 54 N.E.3d 1149, 1154 (N.Y. 2016) (Fahey, J., dissenting); *Yaniveth R. v. LTD Realty Co.*, 51 N.E.3d 521, 526 (N.Y. 2016) (Fahey, J., dissenting); *People v. DiPippo*, 50 N.E.3d 888, 898 (N.Y. 2016) (Fahey, J., dissenting); *People v. Jorgensen*, 41 N.E.3d 778, 782 (N.Y. 2015) (Fahey, J., dissenting); *Eric M. Berman, P.C. v. City of New York*, 37 N.E.3d 82, 88 (N.Y. 2015) (Fahey, J., dissenting); *Doerr v. Goldsmith*, 35 N.E.3d 796, 816 (N.Y. 2015) (Fahey, J., dissenting); *In re Banos v. Rhea*, 33 N.E.3d 471, 479 (N.Y. 2015) (Fahey, J., dissenting); *People v. Carr*, 30 N.E.3d 865, 871 (N.Y. 2015) (Fahey, J., dissenting).

²⁸ See *Garvin*, 88 N.E.3d at 330 (Fahey, J., dissenting in part); *Couser*, 68 N.E.3d at 34 (Fahey, J., dissenting in part and concurring in part); *DiPippo*, 50 N.E.3d at 898 (Fahey, J., dissenting); *Jorgensen*, 41 N.E.3d at 782 (Fahey, J., dissenting); *Carr*, 30 N.E.3d at 871 (Fahey, J., dissenting).

²⁹ See *Burlington Ins. Co.*, 79 N.E.3d at 486 (Fahey, J., dissenting); *Yoga Vida*, 64 N.E.3d at 279 (Fahey, J., dissenting); *Pasternack*, 59 N.E.3d at 493 (Fahey, J., dissenting); *Aetna*, 56 N.E.3d at 219 (Fahey, J., dissenting); *Kent*, 54 N.E.3d at 1154 (Fahey, J., dissenting); *Yaniveth*

the tendency he demonstrated with the Fourth Department,³⁰ Judge Fahey has written in favor of the prosecution in three of the five criminal cases for which he has written dissents.³¹ Additionally, Judge Fahey has demonstrated that he is not afraid to stand against his fellow judges and share his opinion, even when he is the lone voice of his opinion: four of the judge's fourteen dissents were sole dissents, meaning that Judge Fahey was the lone holdout voting against the majority in those cases.³²

Despite his vigorous record of writing dissents at the Fourth Department³³ and despite a record of continuing to cast the second-most dissenting votes behind Judge Jenny Rivera,³⁴ Judge Fahey's fourteen dissenting opinions during his first three years constitutes an average of less than five dissents per year.³⁵ During his first year on the Court of Appeals in 2015, Judge Fahey issued five dissenting opinions.³⁶ However, the overall Court issued sixty-eight dissenting opinions in 2015, so Judge Fahey's five dissenting opinions are much less than the average amount of dissents issued by the seven judges, which would be around ten dissents.³⁷ Then in 2016, Judge Fahey

R., 51 N.E.3d at 526 (Fahey, J., dissenting); *Berman*, 37 N.E.3d at 88 (Fahey, J., dissenting); *Doerr*, 35 N.E.3d at 816 (Fahey, J., dissenting); *Banos*, 33 N.E.3d at 479 (Fahey, J., dissenting).

³⁰ See *supra* notes 20–23 and accompanying text.

³¹ See *DiPippo*, 50 N.E.3d at 900 (Fahey, J., dissenting) (arguing that the majority erred by interfering with the trial court's discretion to preclude evidence of third-party culpability); *Jorgensen*, 41 N.E.3d at 783 (Fahey, J., dissenting) (disagreeing with the majority opinion that the statutory definition of manslaughter in the second degree has a temporal qualification between when the reckless action occurs and the birth of the victim); *Carr*, 30 N.E.3d at 872 (Fahey, J., dissenting) (citations omitted) (arguing that an in camera inquiry to determine whether a witness is too ill to testify is a ministerial question and did not warrant overturning the conviction).

³² See *Kent*, 54 N.E.3d at 1154 (Fahey, J., dissenting); *Yaniveth R.*, 51 N.E.3d at 526 (Fahey, J., dissenting); *DiPippo*, 50 N.E.3d at 898 (Fahey, J., dissenting); *Jorgensen*, 41 N.E.3d at 782 (Fahey, J., dissenting).

³³ See Bonventre, *supra* note 18 (stating that in writing over fifty dissents for the Fourth Department between 2008 and his nomination to the Court of Appeals, Judge Fahey wrote an average of over seven dissents per year).

³⁴ See Vincent M. Bonventre, *Early DiFiore Court Patterns (Part 1[updated] - Who's Dissenting?)*, N.Y. CT. WATCHER (Oct. 4, 2016), <http://www.newyorkcourtwatcher.com/2016/10/early-difiore-court-patterns-part.html>; Vincent M. Bonventre, *Part 8 - Observations: Generally Conservative (Early DiFiore Court Patterns)*, N.Y. CT. WATCHER (Oct. 31, 2016), <http://www.newyorkcourtwatcher.com/2016/10/part-8-observations-generally.html>.

³⁵ See *supra* note 27 and accompanying text.

³⁶ See *Jorgensen*, 41 N.E.3d at 782 (Fahey, J., dissenting); *Eric M. Berman, P.C. v. City of New York*, 37 N.E.3d 82, 88 (N.Y. 2015) (Fahey, J., dissenting); *Doerr v. Goldsmith*, 35 N.E.3d 796, 814 (N.Y. 2015) (Fahey, J., dissenting); *In re Banos v. Rhea*, 33 N.E.3d 471, 479 (N.Y. 2015) (Fahey, J., dissenting); *Carr*, 30 N.E.3d at 871 (Fahey, J., dissenting).

³⁷ See JOHN P. ASIELLO, 2015 ANNUAL REPORT OF THE CLERK OF THE COURT TO THE JUDGES OF THE COURT OF APPEALS OF THE STATE OF NEW YORK 7 (2015), <https://www.nycourts.gov/ctapps/news/annrpt/AnnRpt2015.pdf>.

increased his number of dissents issued to seven³⁸ while the overall court decreased in dissenting opinions to fifty-three, so he issued the average amount of dissents that would be expected from each judge that year.³⁹ But then in 2017, Judge Fahey's number of authored dissents plummeted to only two dissenting opinions.⁴⁰ One possible reason for Judge Fahey's decrease in dissenting opinions from his time at the Fourth Department and his decrease in dissents from 2016 to 2017 is the makeup of the members of the court: Judge Fahey's appointment to the court had already shifted the balance to five of the seven judges being appointed by Democratic governors⁴¹ and with Judge Rowan D. Wilson being confirmed for the court in February 2017, every member of the court has been appointed by Governor Cuomo.⁴²

ANALYSIS OF JUDGE FAHEY'S DISSENTS

Criminal

While it may have been surprising that Judge Fahey, a notoriously pro-accused judge, would write his first three criminal case dissents in favor of the prosecution, a closer look at the facts of those three cases reveals that he was not diverting his past tendency, but using an exception he has always made.⁴³ In *People v. Carr*, Matharr Cham was beaten and strangled by five people, including the codefendants Lee Carr and Walter Cates, Sr.⁴⁴ The issue being heard by the Court

³⁸ See *People v. Couser*, 68 N.E.3d 26, 34 (N.Y. 2016) (Fahey, J., dissenting in part and concurring in part); *In re Yoga Vida N.Y.C., Inc. (Comm'r of Labor)*, 64 N.E.3d 276, 279 (N.Y. 2016) (Fahey, J., dissenting); *Pasternack v. Lab. Corp. of Am. Holdings*, 59 N.E.3d 485, 493 (N.Y. 2016) (Fahey, J., dissenting); *Aetna Health Plans v. Hanover Ins. Co.*, 56 N.E.3d 213, 219 (N.Y. 2016) (Fahey, J., dissenting); *Kent v. Lefkowitz*, 54 N.E.3d 1149, 1154 (N.Y. 2016) (Fahey, J., dissenting); *Yaniveth R. v. LTD Realty Co.*, 51 N.E.3d 521, 526 (N.Y. 2016) (Fahey, J., dissenting); *People v. DiPippo*, 50 N.E.3d 888, 898 (N.Y. 2016) (Fahey, J., dissenting).

³⁹ See JOHN P. ASIELLO, 2016 ANNUAL REPORT OF THE CLERK OF THE COURT TO THE JUDGES OF THE COURT OF APPEALS OF THE STATE OF NEW YORK 5 (2016), <https://www.nycourts.gov/ctapps/news/annrpt/AnnRpt2016.pdf>.

⁴⁰ See *People v. Garvin*, 88 N.E.3d 319, 330 (N.Y. 2017) (Fahey, J., dissenting in part); *Burlington Ins. Co. v. N.Y.C. Transit Auth.*, 79 N.E.3d 477, 486 (N.Y. 2017) (Fahey, J., dissenting).

⁴¹ See Hamilton, *supra* note 1.

⁴² See Casey Seiler, *Rowan Wilson Confirmed for Court of Appeals*, TIMES UNION (Feb. 6, 2017), <https://www.timesunion.com/local/article/Rowan-Wilson-confirmed-for-Court-of-Appeals-10913028.php>.

⁴³ *DiPippo*, 50 N.E.3d at 898 (Fahey, J., dissenting) (citations omitted); *People v. Jorgensen*, 41 N.E.3d 778, 782 (N.Y. 2015) (Fahey, J., dissenting); *People v. Carr*, 30 N.E.3d 865, 871 (N.Y. 2015) (Fahey, J., dissenting); see *supra* note 24 and accompanying text.

⁴⁴ See *Carr*, 30 N.E.3d at 866.

of Appeals was whether a trial judge could hold an in camera inquiry, without the presence of the defense attorneys, to determine when a witness for the prosecution would be available to testify after failing to appear due to illness.⁴⁵ The witness, Gary Rose, was a longtime drug user, who claimed “he was suffering from a migraine and needed a half day to recover.”⁴⁶ In addition to siding with the prosecution and attempting to get justice for the victim who was attacked and murdered, Judge Fahey also sought to protect the vulnerable witness from being forced to be the center of “a full-blown hearing” that would bring personal matters into question.⁴⁷ While Judge Fahey did side with the prosecution in this case, his dissent demonstrates that he believes in protecting the privacy of vulnerable witnesses.⁴⁸

In *People v. Jorgensen*, Jennifer Jorgensen was thirty-four weeks pregnant when, while driving over the speed limit and under the influence of drugs and alcohol, she hit a vehicle in the oncoming lane of traffic.⁴⁹ Following the accident, she gave birth through an emergency cesarean section.⁵⁰ The baby lived for six days, but then died due to injuries from the accident.⁵¹ The majority overturned the defendant’s conviction for second-degree manslaughter because they did not believe the statutory law was intended to hold a pregnant woman criminally responsible for reckless conduct that harmed herself or her fetus in utero, only intentional conduct.⁵² Judge Fahey dissented, arguing that regardless of when the reckless conduct occurred, the birth of the baby qualifies the baby as a person and the defendant’s actions fall under the definition of second degree manslaughter.⁵³ By addressing how the statutes fail to distinguish between violence against unborn children by the mother or by third parties, Judge Fahey is actually staying true to his tendency of voting against those who would hurt or kill a child.⁵⁴

⁴⁵ *See id.*

⁴⁶ *Id.*

⁴⁷ *Id.* at 871, 872 (Fahey, J., dissenting) (“Competent counsel will now invariably argue that a scheduling matter is not ministerial and that his or her client has a right to know why the witness claims to be unable to testify. This will occur even when the witness’s indisposition relates to a trivial, personal and private condition.”).

⁴⁸ *See id.* at 871.

⁴⁹ *People v. Jorgensen*, 41 N.E.3d 778, 779 (N.Y. 2015).

⁵⁰ *See id.*

⁵¹ *See id.*

⁵² *See id.* at 779–80 (citations omitted).

⁵³ *See id.* at 783 (Fahey, J., dissenting) (“Where, as here, the baby-victim is born alive but subsequently dies, the Penal Law allows for the conviction of a defendant mother of manslaughter in the second degree where the acts causing that baby’s death occurred before that infant was born.”).

⁵⁴ *See id.* (citations omitted).

In *People v. DiPippo*, the defendant was charged for the rape and murder of a twelve-year-old girl.⁵⁵ The trial court precluded the defendant's evidence of third-party culpability due to failure to present sufficient evidence against the third party.⁵⁶ While the court ruled that the trial court abused its discretion by precluding the evidence of third-party culpability and awarded the defendant a new trial, Judge Fahey dissented by arguing that the court should not overrule the trial court's discretionary decision unless it was a clear abuse of discretion.⁵⁷ Once again, Judge Fahey used his dissent to adopt a strong position against a defendant accused of victimizing a child.⁵⁸ Overall, while it might have been surprising that Judge Fahey's first three dissents in criminal cases all favored the prosecution, he was continuing his past tendency of siding against those who victimize children and attempting to protect the vulnerable.⁵⁹

In his other two criminal case dissents, Judge Fahey took positions in support of the defendant, with both dissents maintaining his position of fighting for the defendants' right against unfair and harsh sentencing.⁶⁰ In *People v. Couser*, the court found that a defendant could serve consecutive sentences for robbery and armed robbery, despite all counts arising from the single action of the defendant waving his gun around, because they found the kicking of the victim's purse to a companion constituted a taking and separate action.⁶¹ In his dissent, Judge Fahey argued that the kicking of the purse was not a separate act that would authorize consecutive sentences because it was the singular act of waving the gun that allowed the defendant to take the purse.⁶² He also warned about the disproportionate

⁵⁵ See *People v. DiPippo*, 50 N.E.3d 888, 890 (N.Y. 2016) (citation omitted).

⁵⁶ See *id.* at 889–90, 892.

⁵⁷ See *id.* at 890, 900 (Fahey, J., dissenting) (“This Court should not interfere in those discretionary determinations unless the evidence . . . is so compelling that the trial court clearly abused its discretion as a matter of law in precluding it. I conclude that the evidence offered by defendant here does not rise to that level.”).

⁵⁸ See *id.* at 900 (Fahey, J., dissenting) (citations omitted)(analyzing the evidence offered by the defendant for third-party culpability and finding that evidence too weak to overrule the discretion of the trial court).

⁵⁹ See *supra* note 24 and accompanying text.

⁶⁰ *People v. Garvin*, 88 N.E.3d 319, 330 (N.Y. 2017) (Fahey, J., dissenting in part) (citations omitted); *People v. Couser*, 68 N.E.3d 26, 34 (N.Y. 2016) (Fahey, J., dissenting in part and concurring in part); see, e.g., *People v. Maliszewski*, 876 N.Y.S.2d 266, 268 (App. Div. 2009) (Centra & Fahey, JJ., dissenting); see Bonventre, *supra* note 18.

⁶¹ See *Couser*, 68 N.E.3d at 28, 31.

⁶² See *id.* at 34, 37 (Fahey, J., dissenting in part and concurring in part) (“[I]f a single act or threat of force is used to accomplish a robbery of multiple victims, the mere taking or asportation of property, even if accomplished through separate ‘bodily movements,’ does not allow for consecutive sentencing.”).

sentences that would be given to defendants under the rule of considering each separate physical action of a defendant during a group robbery.⁶³ Meanwhile, in *People v. Garvin*, Judge Fahey used his dissent to discuss the unconstitutionality of New York's persistent felony offender sentencing scheme, which would subject a defendant to enhanced sentencing without the court finding that both statutory elements had been satisfied.⁶⁴ With these two dissents, Judge Fahey is demonstrating his belief in keeping the sentencing for defendants proportionate and fair considering the crimes they have committed.⁶⁵

Civil

While civil cases are more varied, three of Judge Fahey's positions emerge from an analysis of his nine civil case dissents: his desire to protect children and other victims of negligence,⁶⁶ his desire to protect individuals from corporations or others who hold the power in their relationship,⁶⁷ and an interest in extending insurance coverage to make things easier for the insured.⁶⁸

In his civil case dissents, Judge Fahey argues in favor of protecting children and victims of negligence by extending liability against those who cause the harm.⁶⁹ In *Doerr v. Goldsmith*, Judge Fahey argued that negligence should be restored as a claim for liability when a domestic animal causes injury to a victim, rather than limiting the plaintiff to only strict liability as a cause of action.⁷⁰ Additionally, in *Yaniveth R. v. LTD Realty Co.*, he argued in favor of interpreting "reside" as allowing a person to have more than one residence so that the company that owned a building where a child was exposed to lead-based paint could not escape liability for its

⁶³ See *id.* at 34 (Fahey, J., dissenting in part and concurring in part).

⁶⁴ See *Garvin*, 88 N.E.3d at 330, 332 (Fahey, J., dissenting in part) (citing *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000)) ("The statute is clear that a defendant is subject to enhanced sentencing—i.e., may have enhanced sentencing imposed on him—as a persistent felony offender only if *both* statutory necessary conditions are met.").

⁶⁵ See *supra* note 23 and accompanying text.

⁶⁶ See, e.g., *Hamilton v. Picardo*, 988 N.Y.S.2d 306, 308–09 (App. Div. 2014) (Fahey, J., dissenting) (citations omitted); see *Bonventre*, *supra* note 18.

⁶⁷ See *infra* note 76–77 and accompanying text.

⁶⁸ See *infra* note 78–80 and accompanying text.

⁶⁹ See *Yaniveth R. v. LTD Realty Co.*, 51 N.E.3d 521, 526 (N.Y. 2016) (Fahey, J., dissenting); *Doerr v. Goldsmith*, 35 N.E.3d 796, 816 (N.Y. 2015) (Fahey, J., dissenting) (citation omitted).

⁷⁰ See *Doerr*, 35 N.E.3d at 816 (Fahey, J., dissenting) ("We should return to the basic principle that the owner of an animal may be liable for failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation.").

failure to remove hazardous lead-based paint.⁷¹ With both of these dissents, Judge Fahey has adopted a position that would extend liability for the defendant's negligence in these cases,⁷² which would both provide the victims with compensation and deter those whose negligence might cause the harm in the first place.⁷³

In several of Judge Fahey's dissents, it is possible to perceive his tendency to protect vulnerable individuals from companies or people with power over them. One group of vulnerable people that Judge Fahey has a tendency to side with are tenants in cases against landlords or government agencies, arguing in favor of protecting the rights of the tenants.⁷⁴ Further, he has also sided against employers who were trying to take advantage of employees, either when the relationship between the employer and employee is not fully defined or when the employer tries to take advantage of the contract with the employees.⁷⁵

Judge Fahey's third tendency in his civil case dissents, to extend insurance and make things easier for the insured, is interesting when taken into consideration with his career experience as house counsel for Kemper Insurance Company.⁷⁶ In *Aetna Health Plans v. Hanover Ins. Co.*, Judge Fahey argued that the purpose of a no-fault insurance scheme should not prevent an insurance company from bringing an equitable subrogation cause of action when it pays the medical bills of the insured when the insured's no-fault insurer fails to pay all of the medical bills.⁷⁷ Further, when an insurance claim stemmed from

⁷¹ See *Yaniveth R.*, 51 N.E.3d at 528 (Fahey, J., dissenting) (citing *Bryant v. N.Y.C. Health & Hosps. Corp.*, 716 N.E.2d 1084, 1089 (N.Y. 1999)) (arguing that the purpose of the applicable law was to protect young children from the harm of lead-based paint).

⁷² See *Yaniveth R.*, 51 N.E.3d at 526 (Fahey, J., dissenting); *Doerr*, 35 N.E.3d at 816 (Fahey, J., dissenting) (citation omitted).

⁷³ See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 6 cmt. d (AM. LAW INST. 2010).

⁷⁴ See *Banos v. Rhea*, 33 N.E.3d 471, 479 (N.Y. 2015) (Fahey, J., dissenting) (citation omitted) (arguing that the majority opinion changes the three-step termination procedure for Section 8 rental subsidy benefits to a one-step procedure, thereby removing the protections for indigent tenants).

⁷⁵ See *In re Yoga Vida N.Y.C., Inc. (Comm'r of Labor)*, 64 N.E.3d 276, 279 (N.Y. 2016) (Fahey, J., dissenting) (arguing that the majority should not overturn the Unemployment Insurance Appeal Board's decision that non-staff yoga instructors are employees of the company when the company finds the customers, sets the fee, sets the schedule, and requires non-staff instructor to find a replacement when they missed a scheduled class); *Kent v. Lefkowitz*, 54 N.E.3d 1149, 1154 (N.Y. 2016) (Fahey, J., dissenting) (arguing that it is improper to suggest that the Public Employees Federation would implicitly agree to a twenty-five percent wage reduction just because the negotiated side letter agreement incorporated aspects from a previous collective bargaining agreement and did consider pay increases).

⁷⁶ See *Honorable Eugene M. Fahey*, *supra* note 2.

⁷⁷ See *Aetna Health Plans v. Hanover Ins. Co.*, 56 N.E.3d 213, 221–22 (N.Y. 2016) (Fahey, J., dissenting) (citation omitted) (“It is beyond dispute that the no-fault scheme was not

a personal injury action, he argued that the insurance company should be liable for extending its coverage to additional insureds because additional requirements, such as those of proximate cause or negligence by the named insured, should not be read into the policy; if the drafter of the contract intended those requirements, they should have written them in the contract.⁷⁸ These two dissents demonstrate that Judge Fahey, a former insurance company lawyer, has no issue with siding against insurance companies.

CONCLUSION

While not quite as prolific a dissenter he was at the Fourth Department, Judge Fahey has demonstrated in his first three years on the Court of Appeals that he will continue to use his position to argue on behalf of the same causes he did at the appellate division. While he currently has more criminal case dissents in favor of the prosecution than in favor of the accused, he has used those dissents to argue in favor of protecting victimized children and vulnerable witnesses. When he has written dissents in favor of the accused in criminal cases, he has done so with the intention of warning about the potential dangers and injustice of harsh and unfair sentencing. Additionally, his dissents in civil cases have demonstrated to further protecting children and victims of negligence, protecting individuals from companies and people who hold power over them, and extending insurance coverage to make things easier on the insured. Overall, Judge Fahey's dissents paint the picture of a man who uses his position to fight for and protect the vulnerable.

intended to impose upon an injured person such as Herrera either the significant additional burden of the lien in question or the toll associated with discharging that claim and seeking to hold defendant to its coverage obligations.”)

⁷⁸ See *Burlington Ins. Co. v. N.Y.C. Transit Auth.*, 79 N.E.3d 477, 486, 490 (N.Y. 2017) (Fahey, J., dissenting).