

RICHARD C. WESLEY: VOTING AND OPINION
PATTERNS ON THE NEW YORK COURT*

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I. INTRODUCTION

Judge Richard C. Wesley's record in criminal cases is strongly pro-prosecution.¹ As a member of the New York State Court of Appeals,² the state's highest tribunal, he has been a consistent vote

* Judge Richard C. Wesley of the New York State Court of Appeals was nominated by President Bush to the United States Court of Appeals for Second Circuit on March 5, 2003, and confirmed by the Senate on June 11, 2003.

** The Center for Judicial Process is an independent, nonpartisan, nonprofit organization devoted to the interdisciplinary research and study of courts and judges, including decision making and voting, the judicial role and selection, and other facets of the nature of the judicial process.

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¹ See *infra* Part II and Chart 1 (discussing and graphing Judge Wesley's voting record in criminal cases).

² Judge Wesley was appointed to the New York State Court of Appeals by Governor George Pataki on January 3, 1997. See Hon. Richard C. Wesley, at <http://www.courts.state.ny.us/ctapps/rcw.htm> (last visited June 5, 2003). See also Press Release, Office of the Governor, New York State, Governor Pataki to Nominate Wesley to Court of Appeals (Dec. 3, 1996), available at http://www.state.ny.us/governor/press/dec3_2.html (last visited May 15, 2003) (noting that Wesley was selected for the Court of Appeals because his "great common sense will help ensure that the rights of victims will be respected" and because he "will take a back seat to no one when it comes to ensuring that a defendant receives a fair trial").

for the prosecution in appeals that divided his colleagues.³ In common parlance, he has been a very *conservative*⁴ judge in criminal cases, almost invariably siding with the interests of law enforcement against those of the accused. Moreover, his record is quite conservative whether viewed alone or in comparison with those of the other members of the New York court.

Judge Wesley's record in civil cases is considerably less amenable to such labeling.⁵ Indeed, his voting has been more than three times as supportive of individual claims of right or entitlement in divided civil decisions as in criminal ones.⁶ Some of the difference

³ This study is based on an examination of those cases decided by the New York Court of Appeals throughout Judge Wesley's tenure, where at least one member of the court disagreed with the result or reasoning of the court, and where at least one member of the court publicly expressed that disagreement in a dissenting or concurring opinion. The traditional reliance on divided decisions in judicial studies has its genesis in Herman Pritchett's seminal works on the Supreme Court. See C. Herman Pritchett, *Divisions of Opinion Among Justices on the U.S. Supreme Court, 1939-41*, 35 AM. POL. SCI. REV. 890 (1941); C. HERMAN PRITCHETT, *THE ROOSEVELT COURT: A STUDY IN JUDICIAL POLITICS AND VALUES, 1937-47* (1948) [hereinafter PRITCHETT, *THE ROOSEVELT COURT*]; C. HERMAN PRITCHETT, *CIVIL LIBERTIES AND THE VINSON COURT* (1954). The reasoning, some of which is self evident, has been restated countless times. See, e.g., PRITCHETT, *THE ROOSEVELT COURT 1937-47* (recognizing that divided decisions supply a window through which a court's "inner sanctum" may be viewed); see also, e.g., DAVID M. O'BRIEN, *STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS* 247 (6th ed. 2003) (maintaining that a court's unanimous opinion is likely to be a "result of negotiations and compromises among the justices"); HENRY J. ABRAHAM, *THE JUDICIAL PROCESS* 237 (7th ed. 1998) (asserting that even where a decision is signed by one member of the court it is more likely "the product of many minds"); Vincent Martin 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, 1167 (1994) [hereinafter Bonventre, *Chief Judge Kaye*] (suggesting that unanimous decisions are "more compromise than conviction"). Judge Wesley himself has explained that divided decisions represent those cases "when matters of high principle are at stake and deeply held differences need to be aired." See Hon. Richard C. Wesley, *Hugh Jones and Modern Courts: The Pursuit of Justice Then and Now*, 65 ALB. L. REV. 1123, 1126 (2002).

⁴ "The terms 'conservative,' 'pro-government,' and 'pro-prosecution,' as well as 'liberal,' 'pro-individual,' and 'pro-individual rights,' are used here as they are commonly used by political scientists and legal commentators in judicial studies, such as the National Science Foundation's United States Supreme Court database project." See Bonventre, *Chief Judge Kaye*, *supra* note 3 at 1165 n.11 (citing Jeffrey A. Segal & Harold J. Spaeth, *Decisional Trends on the Warren and Burger Courts: Results from the Supreme Court Data Base Project*, 73 JUDICATURE 103, 104 (1989) and Vincent Martin Bonventre, *Court of Appeals—State Constitutional Law Review*, 1990, 12 PACE L. REV. 1, 48 n.331 (1992)).

Hence, 'conservative' signifies support for the government or prosecution against claims of civil rights and liberties, equal protection, or rights of the accused. Additionally, 'conservative' might signify a preference for limiting the scope of protection provided for rights and liberties. In contrast, 'liberal' indicates support for civil rights and liberties, equal protection, or rights of the accused. In addition, 'liberal' might indicate a preference for extending the scope of protection provided for such rights and liberties. Bonventre, *Chief Judge Kaye*, *supra* note 3 at 1165 n.11.

⁵ See *infra* Part III and Chart 2 (discussing and graphing Judge Wesley's voting record in civil cases).

⁶ See *infra* Chart 3 (reflecting the percentages of pro-individual rights votes in civil

between his civil and criminal records is attributable to his strong support in civil appeals for private property rights against local government restrictions.⁷ But closer examination of his record also reveals votes—and even voting patterns—that are typically associated with *liberal* jurists.

Even in appeals presenting strong competing arguments, he sided with workers over their government employers, tenants over landlords, discrimination claimants over defenders of an institutional system, and tort plaintiffs over civil defendants or insurance companies.⁸ While his overall voting record in civil cases can hardly be classified as liberal, neither can it fairly be characterized as strongly conservative, pro-government, or unsympathetic to individual rights, liberties, analogous public protections, or tort claims.

An examination of the specifics that add up to these general observations about Judge Wesley's record is instructive. The context provided by the positions Wesley took in particular cases, as well as by overall voting statistics for him and his colleagues on the New York court, helps illuminate the foregoing broad outlines.

II. CRIMINAL APPEALS⁹

Since Judge Wesley took his seat on the New York Court of Appeals, he has compiled an overwhelmingly pro-prosecution voting record. He sided with the position more favorable to law enforcement, and thus less favorable to the accused, in 88% of the divided decisions. Stated otherwise, in only 12% of the divided appeals raising a criminal issue—or in only five out of the forty-three such appeals—did Wesley take the position adopted by at least one of his colleagues that was more favorable to the defendant.¹⁰

appeals and pro-defendant votes in criminal appeals for Judge Wesley and his colleagues on the New York court).

⁷ See, e.g., *Anello v. Zoning Bd. of Appeals*, 678 N.E.2d 870, 872 (N.Y. 1997) (Wesley, J., dissenting) (criticizing the majority's view that the enforcement of a local ordinance does not establish a taking where the ordinance was enacted prior to the purchaser's acquisition of the property).

⁸ See *infra* Chart 4 (reflecting the tort appeals voting percentages of Judge Wesley and his colleagues on the New York court).

⁹ Between January 1997 and February 2003—when Richard C. Wesley joined the New York Court of Appeals through the last month covered in this study—the court divided on an issue of criminal law or procedure in forty-three appeals. The statistics, charts, and corresponding discussions herein reflect all of those appeals.

¹⁰ See *infra* Chart 1.

Moreover, his record places him at the pro-prosecution end of the Court of Appeals' spectrum for the six-plus year period from the time of his appointment.¹¹ In fact, most members of the court with whom he served, both current and retired, compiled voting records that are at least twice as supportive of the rights of the accused.¹² No colleague of his, retired or current, voted more consistently to reject the claims of criminal defendants.¹³

None of the foregoing necessarily suggests anything about the substantive merits of Judge Wesley's record or of his votes in particular cases. Rather, the point is simply that his record is decidedly pro-prosecution, both absolutely and relatively. Moreover, an examination of individual appeals substantiates precisely what the numbers strongly suggest. As is evident from a review of Wesley's opinions and votes in several illustrative cases, the judgment he has exercised in criminal appeals—his weighing of competing interests—has almost invariably been inclined in favor of law enforcement.

In his first year on the court, Judge Wesley penned a lone dissent in *People v. Burdo*,¹⁴ arguing against the application of New York's state constitutional right to counsel rule, which in many respects is more protective of the accused than corresponding federal case law.¹⁵ Court of Appeals precedent prohibits police questioning on any charge when the accused is in custody on a charge for which he has an attorney.¹⁶ Wesley took issue with the majority's suppression of statements made in response to custodial questioning conducted in the absence of the accused's attorney. He

¹¹ In fact, his voting has been the *most* pro-prosecution on the court; while a more recent appointee, Victoria Graffeo, has a record that appears more pro-prosecution, Wesley's record in criminal appeals is actually identical to Graffeo's for the two-plus year period from the time of her appointment.

¹² See *infra* Chart 1. The records of retired Vito J. Titone and current member George Bundy Smith are more than five times as supportive of the accused; the records of Judith S. Kaye, Carmen Beauchamp Ciparick, and retired Stewart F. Hancock, Jr. are each approximately three times as supportive of the accused as Wesley's. See *id.*

¹³ As previously explained, Victoria Graffeo's record reflects her briefer tenure on the court; Graffeo and Wesley's voting records are identical during that time period.

¹⁴ 690 N.E.2d 854 (N.Y. 1997).

¹⁵ See *id.* at 856, 860–62 (Wesley, J., dissenting).

¹⁶ See *People v. Rogers*, 397 N.E.2d 709, 710–11 (N.Y. 1979) (holding “that once an attorney has entered the proceeding, thereby signifying that the police should cease questioning[,] a defendant in custody may not be further interrogated in the absence of counsel”); see also *People v. Bing*, 558 N.E.2d 1011, 1016 (N.Y. 1990) (reaffirming the *Rogers* rule that where a defendant is “represented on the charge on which he [i]s held in custody, he [c]an not be interrogated in the absence of counsel on any matter, whether related or unrelated to the subject of the representation”).

urged adoption of the narrower federal constitutional right to counsel which, as construed by the Supreme Court, would have been offense-specific under the circumstances of the case.¹⁷ In short, the federal rule would have prohibited questioning only about the offense for which the defendant was specifically represented by counsel; questioning on any unrelated charge would have been permissible.

Similarly, in the 2001 case of *People v. Diaz*,¹⁸ Judge Wesley again authored a dissent taking his court to task for restricting law enforcement. A bare four-to-three majority ruled that a defendant's right to confront adverse witnesses should have precluded the prosecution's use of the prior testimony of a witness who was absent from the trial; the efforts to obtain his presence, in the majority's view, were inadequate.¹⁹ Wesley argued that there was some evidence in the record that the efforts were reasonably diligent. Consequently, in his view, the Court of Appeals had no business overruling such a fact-based conclusion reached by the court below.²⁰

In the year 2000 case of *People v. Johnson*,²¹ Wesley joined a dissent objecting to the five-to-two majority ruling that the judges in the trials below each committed reversible error by failing to excuse jurors who had equivocated about their ability to be impartial.²² The dissenting opinion conceded that the trial records indicated some uncertainty on the part of the jurors and that the uncertainty could have been handled more prudently.²³ Nevertheless, the dissenters argued against overturning the

¹⁷ See *Burdo*, 690 N.E.2d at 861 (Wesley, J., dissenting) ("Someday, perhaps we will recognize that the right to counsel at a custodial interrogation is similarly dependent upon whether the source of that right is an offense-specific right to counsel or a more encompassing privilege against self-incrimination."); *McNeil v. Wisconsin*, 501 U.S. 171, 175-76 (1991) (declaring that the Sixth Amendment right to counsel is offense-specific and stating that "[i]t cannot be invoked once for all future prosecutions, for it does not attach until a prosecution is commenced"). The Supreme Court continued to explain that "[i]ncriminating statements pertaining to other crimes, as to which the Sixth Amendment right has not yet attached, are, of course, admissible at a trial of those offenses." *Id.* (citing *Maine v. Moulton*, 474 U.S. 159, 180 n.16 (1985)).

¹⁸ 761 N.E.2d 577 (N.Y. 2001).

¹⁹ See *id.* at 582-83 (criticizing the prosecution's attempts to secure a witness' presence at trial as lacking "due diligence," and thus, falling below the settled standard).

²⁰ See *id.* at 583 (Wesley, J., dissenting).

²¹ 730 N.E.2d 932 (N.Y. 2000).

²² See *id.* at 940.

²³ See *id.* at 945 (Bellacosa, J., dissenting) (acknowledging the presence of some juror irresolution and asserting that had the two dissenters served in the trial judge capacity, they "might have ruled differently or pressed the challenged jurors harder").

convictions on the ground that the Court of Appeals should defer to the discretion exercised by trial judges.²⁴

Notably, throughout his tenure on New York's high tribunal, Judge Wesley never dissented—or joined a dissent—in order to take a position more favorable to the accused than that taken by a majority of the court. Rather, he was always with the majority, whether as the author of its opinion or as a concurring member, when the court took a position more favorable to law enforcement. Several of those cases, where his vote was part of a bare four-to-three majority and, thus, was decisive in determining the outcome, are particularly telling. In those cases, the court was deeply divided, with forceful positions being taken by both sides, each reflecting emotional commitment to philosophical views about criminal justice rather than mere legal disagreement.

In the 2001 case of *People v. Robinson*,²⁵ Judge Wesley joined the majority to permit pretextual stops of automobiles whenever the police can identify some traffic infraction that would otherwise justify a stop.²⁶ With Wesley's vote, a bare majority of the court adopted Supreme Court case law allowing such stops regardless of the actual underlying motivations.²⁷ The dissenters, on the other hand, argued that a more protective state constitutional standard was necessary to prevent arbitrary stops, such as those involving racial profiling.²⁸

In *Johnson v. Pataki*,²⁹ an appeal decided in 1997, Wesley's first year on the New York Court of Appeals, he was part of another four-to-three majority, this one permitting the pro-death penalty

²⁴ See *id.* (Bellacosa, J., dissenting) (maintaining that the instant issues are not of the kind that should be "measured through the sharper prism of later appellate scrutiny," but rather, are issues of the type that remain "rightly entrusted to a trial court's in-the-trenches balancing resolution").

²⁵ 767 N.E.2d 638 (N.Y. 2001).

²⁶ See *id.* at 646 ("Because the Vehicle and Traffic Law provides an objective grid upon which to measure probable cause, a stop based on that standard is not arbitrary in the context of constitutional search and seizure jurisprudence.").

²⁷ In *Whren v. United States*, 517 U.S. 806 (1996), the Supreme Court held that when a police officer possesses probable cause to briefly detain a person for a traffic violation and then stops that individual, the stop does not violate the Fourth Amendment's protection against unreasonable seizures even if the primary reason for the stop was to investigate another matter, however unrelated. See *id.* at 810. The Court explained that "[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis." *Id.* at 813.

²⁸ See *Robinson*, 767 N.E.2d at 650 (Levine, J., dissenting) (arguing that *Whren* inadequately protects the central ideals of the Fourth Amendment and article I, § 12 of the New York Constitution—the State's corresponding protection—by allowing "arbitrary exercises of discretion on the part of police officers to conduct investigative stops of vehicles on the pretext of pursuing violations of the Vehicle and Traffic Law").

²⁹ 691 N.E.2d 1002 (N.Y. 1997).

Governor to remove a locally elected anti-death penalty District Attorney from the prosecution of a capital murder case.³⁰ Wesley joined in the argument that the Governor's action was appropriate to ensure that the death penalty—an authorized punishment under state statute—was given serious consideration by the prosecution.³¹ The competing argument made by the dissenters, and necessarily rejected by Wesley, was that the Governor had acted arbitrarily and contrary to the state's death penalty law by removing a District Attorney who was unconditionally free under the statute to choose not to seek a capital sentence.³²

In the 2002 case of *People v. Sanchez*,³³ the Wesley-included bare majority rejected the contention of the defendant, the three dissenters, and a recent federal decision³⁴ that New York's depraved indifference murder statute—as construed in Court of Appeals precedent—was unconstitutional.³⁵ According to that contention, New York's high court had hopelessly blurred the distinction between depraved indifference murder and the lesser offense of reckless manslaughter.³⁶ As a result, prosecutors could obtain

³⁰ See *id.* at 1007 (reasoning that the Governor's statutory authority to supersede a District Attorney could be exercised where "there was a threat to faithful execution of the death penalty law").

³¹ See *id.* at 1008.

³² See *id.* at 1009 (Titone, J., dissenting) (stating that the sole motivation for the Governor's superseder in the instant matter was a desire to replace the District Attorney's policy choices with those of his own). Titone continued that "this motive flies in the face of the evident legislative intent that the fundamental policy choice as to whether or not to seek the death penalty be made solely by the locally elected District Attorney." *Id.* (Titone, J., dissenting). The second dissenter in the case, George Bundy Smith, argued that "[s]upercession here undermines and effectively nullifies the legislative policy to give prosecutors, as representatives of the people, the discretion to seek the ultimate penalty." *Id.* at 1016 (Smith, J., dissenting).

³³ 777 N.E.2d 204 (N.Y. 2002).

³⁴ See *Jones v. Keane*, N.Y.L.J., June 7, 2002 at 25 (S.D.N.Y. 2002) (Brieant, J.) (criticizing the New York Court of Appeals' attempts to differentiate depraved indifference murder from reckless manslaughter as circular and unsuccessful).

³⁵ See *Sanchez*, 777 N.E.2d at 212 (upholding the constitutionality of the statute and asserting that on the facts of this case a "jury could reasonably have concluded that defendant's conduct was either reckless and depraved, or intentional").

³⁶ The respective dissenting opinions of Judges Smith, Rosenblatt, and Ciparick clearly presented this position. In his separate opinion, Judge Smith stated that "[t]o uphold the conviction of depraved indifference murder in this case is to authorize the substitution of depraved indifference murder for intentional murder at any time that a person shoots and kills another." *Id.* at 218 (Smith, J., dissenting). Judge Rosenblatt, in his dissenting opinion, wrote, "[u]ndeniably, the two crimes—intentional murder and depraved indifference murder—are now merged, fully and inseparably." *Id.* (Rosenblatt, J., dissenting). In her separately penned opinion, Judge Ciparick declared "that after today the once prominent distinction between depraved indifference murder . . . and intentional murder . . . has been regrettably obscured." *Id.* at 235 (Ciparick, J., dissenting).

convictions for depraved indifference, a crime as serious as intentional murder, by simply proving the lesser reckless offense. By contrast, the four-to-three majority, including Wesley, concluded that a magnified degree of recklessness was required by the statute and had been proven in this case.³⁷

In other appeals, whether or not the division on the New York court was close, Wesley virtually always sided with law enforcement and against the accused. Indeed, he did so in every case in which the majority issued a pro-prosecution, pro-law enforcement opinion. In some of these opinions, though the vote was not close, the issue was, and the majority's position drew a forceful dissent.

For example, in the 1999 case of *People v. Tortorici*,³⁸ the Court of Appeals majority, which included Wesley, held that it was within the trial judge's discretion to decide against conducting a competency hearing to determine whether the defendant was fit to stand trial.³⁹ The Court of Appeals dissenter argued that a hearing was mandated because of the defendant's long history of mental illness, especially considering the prosecution's own forensic psychiatrist's report that the defendant was "incapable of rational participation in court proceedings."⁴⁰

Likewise, in the 2001 appeal in *People v. Vernace*,⁴¹ Wesley joined the majority's holding that the Court of Appeals should not disturb the intermediate appellate decision that there was some good cause for the prosecution's delay of nearly seventeen years in bringing charges against the defendant.⁴² The dissenter argued that there

³⁷ The majority opinion approved the trial judge's charge to the jury concerning the severity and gradations of the reckless conduct involved. As explained in those instructions, reckless criminal conduct is commonly considered "less serious and blameworthy than a crime committed intentionally, but when reckless conduct is engaged in under circumstances evincing a depraved indifference to human life, the law regards that conduct as so serious, so egregious, as to be the equivalent of intentional conduct." *Id.* at 212.

³⁸ 709 N.E.2d 87 (N.Y. 1999).

³⁹ *See id.* at 93-94 (upholding the trial judge's determination that "regardless of defendant's undeniable psychiatric problems, defendant did indeed have 'capacity to understand the proceedings against him [and] to assist in his own defense'"). The majority stated, "[i]n light of all the evidence before him, including . . . [the prosecution's own psychiatric examiner's] report, the Trial Judge was within his discretion in making the requisite *judicial* determination that no competency hearing was required." *Id.* at 94.

⁴⁰ *See id.* at 97 (Smith, J., dissenting) (categorizing the state's forensic psychiatrist's nine-page report as "sufficient to establish a reasonable ground to believe that defendant was incapable of understanding the charges or proceedings against him or of assisting in his defense").

⁴¹ 756 N.E.2d 66 (N.Y. 2001).

⁴² *See id.* at 68 (acknowledging the lengthy prosecutorial delay, but reasoning that "a determination made in good faith to delay prosecution for sufficient reasons will not deprive defendant of due process even though there may be some prejudice to defendant").

was no evidence justifying such an extended delay and, thus, that the court should reinstate the decision of the trial judge who had rejected all the prosecution's excuses for inaction.⁴³

While the preceding specific examples accurately reflect Judge Wesley's overall voting record as strongly favoring the prosecution and criminal law enforcement, it would be inaccurate to deduce that his voting and opinion writing has been entirely one-sided. Indeed it has not. In some divided cases, albeit not with great regularity, he sided with the accused. Even though Wesley never decided in the accused's favor in opposition to a majority of his colleagues on the Court of Appeals, he did cast a vote for the accused in a few appeals in the face of strong arguments adopted by at least one dissenting colleague siding with the prosecution.

For example, in the 1999 case of *In re Muhammad F.*,⁴⁴ Wesley voted with the majority to invalidate a New York City police safety program involving the stop and search of taxicabs.⁴⁵ On the one hand, the stops were not supported by probable cause or suspicion. On the other, as the dissenter argued, the program was uniform, non-discriminatory, and not a pretext for arbitrarily targeting innocent citizens, especially since a predetermined percentage of passing taxis were stopped.⁴⁶ In the 2001 appeal in *Attorney General v. Firetog*,⁴⁷ the Court of Appeals reversed the intermediate appeals tribunal which had prohibited a trial judge from disclosing grand jury minutes to the defense counsel.⁴⁸ Wesley joined in the majority's holding to permit trial judges the discretionary authority to release grand jury minutes to help defense counsel prepare motions to dismiss indictments.⁴⁹ The majority was unswayed by

⁴³ See *id.* at 70 (Levine, J., dissenting) (regarding the prosecution's delay as impermissible and noting "a total absence of any justification whatsoever for the pre-accusatory prosecutorial delay . . . for certainly the better part of the 14 years immediately preceding the indictment of defendant").

⁴⁴ 722 N.E.2d 45 (N.Y. 1999).

⁴⁵ See *id.* at 51-52 (finding that the taxicab stops were unreasonable due to the absence of a "showing of the unavailability of less intrusive or discretionary means to prevent violent crime directed at the drivers of livery vehicles" and because there was a failure "to satisfy the constitutional requirement that the stops were 'carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers'").

⁴⁶ See *id.* at 52 (Smith, J., dissenting) (arguing that the program was justified as a measure to thwart crimes committed against taxicab operators and because, in the instant case, the search conducted after the stop was reasonable).

⁴⁷ 727 N.E.2d 1220 (N.Y. 2000).

⁴⁸ See *id.* at 1224 (referencing an amendment to the provision in the New York Law that "expressly empowered trial courts to release [g]rand [j]ury minutes as a matter of discretion on certain showings and findings").

⁴⁹ See *id.* at 1223 (stating that the trial "court's statutorily invested authority [to release

the dissenter's argument that the ruling in the case subordinated the internal secrecy of grand jury proceedings to other interests; moreover, the majority's ruling was possible only by avoiding a strict reading of the governing statute.⁵⁰

In addition to his votes in such cases, a number of opinions for the court authored by Wesley, although not typical for him, would likewise seem to belie a notion that his evident pro-prosecution bent is impervious to persuasion. In the 2002 capital case of *People v. Harris*,⁵¹ for example, Wesley wrote the opinion for the court vacating a death sentence.⁵² Applying a prior—and somewhat overruled and confused—decision,⁵³ Wesley concluded that the sentence could not stand because it was imposed under a statutory provision that disallowed the death penalty for defendants who plead guilty, thereby permitting that penalty only for defendants

grand jury minutes] should not be hamstrung” when the judge reasons that she could profit from the defendants’ examination of the prosecution’s case in assessing their motions to dismiss the indictment or lessen the counts).

⁵⁰ See *id.* at 1227 (Smith, J., dissenting) (noting that, under the terms of the controlling provision, a trial court has neither the express authority to direct the issuance of grand jury minutes for the sole purpose of aiding a defendant in preparing a motion to dismiss, nor the authority to sanction the release of grand jury minutes *unless* a written motion to dismiss or motion to reduce an indictment is pending before the court).

⁵¹ 779 N.E.2d 705 (N.Y. 2002).

⁵² See *id.* at 728–29. Just as notably, Wesley’s opinion for the six-to-one majority was the more pro-prosecution of the two opinions written in that case. The dissenter, Judge George Bundy Smith, argued that the conviction, as well as the sentence, should have been vacated. Hence, Wesley did take the pro-prosecution side of the division within the court, albeit a side that was more sympathetic to the claims of the defendant than one that Wesley could reasonably have taken—i.e., to sustain the death sentence.

⁵³ In vacating the death sentence in *Harris*, Wesley relied on the Court of Appeals decision in *Hynes v. Tomei*, 706 N.E.2d 1201 (N.Y. 1998). In *Hynes*, the court invalidated provisions of New York’s death penalty statute that allowed a sentence of death *only* after a jury conviction; the death penalty was unavailable if a defendant pleaded guilty. See *id.* at 1208–09. The court reasoned that guilty pleas were, thus, being “‘needlessly’ encourage[d].” *Id.* *Hynes* was, in some sense, reformulated in *People v. Edwards*, 754 N.E.2d 169 (N.Y. 2001) where the Court of Appeals relied on the Supreme Court decision in *Brady v. United States*, 397 U.S. 742 (1970) (holding that a defendant’s guilty plea will be upheld as long as it is voluntarily, knowingly, and intelligently given). *Edwards* involved the same issue the Court of Appeals addressed in *Hynes*—i.e., the validity of a guilty plea entered in exchange for a prosecutorial agreement not to seek the death penalty. But in *Edwards*, the Court of Appeals declined to give retroactive effect to its *Hynes* decision or its *needlessly encouraged* rationale, stating that “guilty pleas need not be vacated ‘simply because they were agreed to pursuant to statutes subsequently invalidated,’” as long as the guilty pleas were otherwise voluntary, knowing, and intelligent. See Vincent Martin Bonventre & Kelly M. Galligan, *Court of Appelas Update, 2000 & 2001: Conservative Voting, Narrow Rulings*, 65 ALB. L. REV. 1085, 1093–94 (2002) (citing *Edwards*, 754 N.E.2d at 175). For further discussion on the *Hynes* and *Edwards* decisions and the implications of each, see VINCENT MARTIN BONVENTRE, “STREAMS OF TENDENCY” ON THE NEW YORK COURT: IDEOLOGICAL AND JURISPRUDENTIAL PATTERNS IN THE JUDGES’ VOTING AND OPINIONS (forthcoming 2003) (Ph.D. dissertation, University of Virginia, on file with author) [hereinafter BONVENTRE, “STREAMS OF TENDENCY”].

who exercise their rights to a jury trial.⁵⁴

In the 1999 appeal in *People v. Owusu*,⁵⁵ Wesley's opinion for the court limited the reach of a penal statute which makes the use of a "dangerous instrument" an aggravating factor for certain crimes.⁵⁶ The intermediate appeals court, as well as the Court of Appeals dissenter, adopted the position that the defendant's teeth, under the circumstances of the case, were such an instrument because they had been used to inflict serious injury.⁵⁷ Wesley rejected this expansive "use-oriented" interpretation urged by the prosecution. Instead, he restricted the reach of the aggravating factor to non-bodily external objects in accord with his review of legislative history.⁵⁸

As previously noted, these pro-defendant opinions and votes are uncharacteristic of Judge Wesley. They do, however, represent a significant aspect of his overall record in criminal cases. While clearly sympathetic to the interests of prosecution and law enforcement, that record cannot fairly be classified as one-dimensional. His 88% pro-prosecution voting in divided criminal cases does reflect a strong affinity for arguments favorable to the prosecution and law enforcement. This record does not, however, seem to reflect a rigid unwillingness to seriously consider, join, and even adopt as his own, arguments in favor of the accused.

⁵⁴ See *Harris*, 779 N.E.2d at 727–28 (reaffirming so much of *Hynes* as held that "a procedure which offers an individual a reward for waiving a fundamental constitutional right, or imposes a harsher penalty for asserting it, may not be sustained").

⁵⁵ 712 N.E.2d 1228 (N.Y. 1999).

⁵⁶ See *id.* at 1230 (referencing Section 10.00 (13) of New York's Penal law and asserting that under a plain meaning analysis "[o]ne's hands, teeth and other body parts are not, in common parlance, 'instruments'" for purposes of the statute's aggravating factor classification).

⁵⁷ See *id.* at 1234 (Bellacosa, J., dissenting) ("Anything that can be *used* to cause death or serious injury fits within the meaning of the sweeping statutory words, the only controlling definition. Undeniably, too, the statutory formula contains no exclusion for parts of the human body.").

⁵⁸ See *id.* at 1232 (noting that by adopting the prosecution's reading of the statute, "any person of substantial size or physical strength faces significantly enhanced criminal liability with the mere threat of a blow, or a bite"). Wesley continued that the *plain* statutory language has "consistently been understood by this Court (and the courts of many other States) and the Legislature to mean that an *instrument* is not one's arm, hand, teeth, elbow or any other body part." *Id.* at 1233.

III. CIVIL APPEALS⁵⁹

Judge Wesley's record in civil appeals is different than it is in the criminal realm. His record is still conservative, typically writing and voting in the divided public law cases to reject claims of right, liberty, or analogous public protection or entitlement. But the record that he compiled in his six-plus year tenure on the New York Court of Appeals discloses considerably more sympathy for civil claimants than for criminal defendants. Indeed, Wesley's record reveals that in divided public law cases he favored civil claimants 38% of the time, as opposed to favoring criminal defendants in 12% of the appeals.⁶⁰

To be sure, this also means that Judge Wesley usually voted against civil claimants, specifically, in 62% of the divided cases.⁶¹ Whether that is a positive or negative, it does not amount to a liberal voting record. His record in civil appeals does not place him at the conservative end of the Court of Appeals' spectrum, as his record in criminal appeals does.⁶² But that civil record does not place him within the New York court's liberal wing either. Rather, his voting in civil appeals places him within the court's broad center—significantly distant from either of the court's ideological poles. His 38% voting in support of civil claimants in divided public law cases contrasts with that of his colleagues Judge Levine, at 18%, and Judge Graffeo, at 0%, at one end of the Court of Appeals' spectrum.⁶³ It also contrasts with the voting records of Judge Smith, at 62%, and Judge Titone, at 73%, at the other end of the court's spectrum.⁶⁴

Moreover, particular cases in which Judge Wesley sided with or against civil claimants are also instructive. In a series of property

⁵⁹ Between January 1997 through February 2003—from Wesley's appointment through the last month covered in this study—the New York Court of Appeals divided on an issue of civil rights, liberties, and analogous public protections (e.g., anti-discrimination against private employers) in thirty-four appeals. During that same period, the court divided on eighteen appeals in tort cases. The statistics, charts, and corresponding discussions herein reflect all of those appeals.

⁶⁰ See *infra* Chart 2 (reflecting the voting records of Judge Wesley and his New York Court of Appeals colleagues in civil public law appeals); see also *infra* Chart 3 (comparing the pro-defendant voting percentages in criminal appeals and the pro-individual rights voting percentages in civil appeals for Wesley and his colleagues).

⁶¹ See *infra* Chart 2 (providing the percentage for each Judges' pro-government vote).

⁶² See *supra* Part II and *infra* Chart 1 (showing Judge Wesley's criminal appeals voting to be strongly pro-prosecution and pro-law enforcement).

⁶³ See *infra* Chart 2.

⁶⁴ See *id.*

rights cases, for example, Wesley supported the contentions of landowners opposing alleged confiscatory takings by local government. In his first year on the New York court, in *Anello v. Zoning Bd. of Appeals*,⁶⁵ Wesley authored a lone dissent disagreeing with his colleagues who ruled that a preexisting statutory restriction on land cannot constitute an unconstitutional taking entitling a purchaser of that property to compensation.⁶⁶ In an argument subsequently adopted by the Supreme Court in *Palazzolo v. Rhode Island*,⁶⁷ Wesley rejected the notion that a subsequent purchaser simply acquired fettered property; instead, he took the position that a purchaser acquires all the rights the seller might have had to compensation for a confiscatory taking.⁶⁸

An opinion by Wesley several years later, in *Gilman v. State Division of Housing and Community Renewal*,⁶⁹ suggests that his view of property rights does not uniformly support the landowner, but may in fact support a more vulnerable, non-owning claimant. In *Gilman*, Wesley joined his three most liberal colleagues in civil appeals to form a four-to-three majority to sustain a tenant's claim against a landlord. In a decision reversing the ruling of the intermediate appeals court, as well as annulling the determination of the governing administrative agency, the New York Court of Appeals, speaking through Judge Wesley, agreed with the tenant that the landlord's rent increase for controlled housing had not been properly justified and, thus, had to be disallowed.⁷⁰

⁶⁵ 678 N.E.2d 870 (N.Y. 1997).

⁶⁶ See *id.* at 872 (Wesley, J., dissenting).

⁶⁷ 533 U.S. 606 (2001).

⁶⁸ See *id.* at 872–73 (Wesley, J., dissenting); see also *Gazza v. New York State Dep't of Envtl. Conserv.*, 679 N.E.2d 1035, 1043 (N.Y. 1997) (Wesley, J., concurring) (agreeing with the majority that “a subsequent purchaser may attack previously enacted regulations that affect the purchased property as beyond government’s legitimate police power,” but adding that “then a subsequent purchaser should also be able to challenge an otherwise valid regulation if it results in a taking without compensation”); *Basile v. Town of Southampton*, 678 N.E.2d 489, 491 (N.Y. 1997) (Wesley, J., concurring) (restating his disagreement with the majority’s position that a “claimant is prevented from claiming the value of her property without the . . . [applicable] regulations solely because she took title after the enactment of those regulations”). In *Kim v. City of New York*, 681 N.E.2d 312 (N.Y. 1997) (Smith, J., dissenting), Wesley joined the dissent criticizing the majority for “expand[ing] the existing obligations [of the owner] under State property law beyond the limits that such law has heretofore been interpreted” and found that the plaintiffs involved—who, by city decree, had side fill placed on their property “to shore up a roadway” for public use—“suffered a permanent physical occupation which constitutes a taking.” See *id.* at 320, 326.

⁶⁹ 782 N.E.2d 1137 (N.Y. 2002).

⁷⁰ See *id.* at 1140 (agreeing with the dissenters at the intermediate appellate level and asserting that the Division of Housing and Community Renewal “acted irrationally in allowing new comparability data” in support of the higher rent at the time of administrative

Other especially revealing cases include those in which Judge Wesley did not author an opinion, but did cast a vote strongly suggesting the absence of a hard-line ideological bent. For example, in the 2001 appeal in *Clara C. v. William L.*,⁷¹ Wesley joined a separate concurring opinion criticizing the majority's refusal to invalidate a state statute discriminating against children born out of wedlock. The four-to-three majority did sustain the claim in question for additional child support; but it did so solely on the basis on a narrow procedural technicality specific to the particular facts of this one case.⁷² Wesley joined the concurring opinion decrying the majority's failure to address and invalidate the plainly discriminatory statute which, consequently, remains in force in New York to permit continuing discrimination against "nonmarital" children.⁷³

In the year 2000 of *Galapo v. City of New York*,⁷⁴ Wesley again joined a separate opinion criticizing the majority for another perceived callous ruling. The Court of Appeals, in a five-to-two decision, denied recovery to the family of a police officer who was

review "without any showing that this owner could not have earlier provided that information").

⁷¹ 750 N.E.2d 1068 (N.Y. 2001).

⁷² See *id.* at 1071-72 (identifying the law that governed the case as requiring a "compromise agreement" between the parties that needed to receive court approval and a determination that "adequate provision for the child's support has been made"). The majority found that the "compromise agreement" in the case was invalid because it was not adequately reviewed by the trial court prior to approval, as required by the governing statute; hence, there was no need to address the validity of the statute itself. See *id.* at 1072. The reason given by the majority for not undertaking the constitutional review was judicial restraint; addressing the statutory discrimination was unnecessary inasmuch as the appeal could be resolved, according to the majority, by the alternate "compelling unconstitutional ground." See *id.*

⁷³ See *id.* at 1073, 1074 (Levine, J., concurring) (urging an exception to traditional canons of judicial restraint where "the constitutional issue is 'fairly presented . . . and public interests require that it should be determined"). Levine, joined by Wesley, argued that the court should have addressed the constitutionality of a law that "treats the support rights of nonmarital children whose mothers have entered into court-approved compromises of paternity disputes *differently* from the support rights of children born of married parents"). *Id.* at 1074 (Levine, J., concurring) (emphasis added).

In another appeal involving a complaint of discrimination, *Levin v. Yeshiva University*, 754 N.E.2d 1099 (N.Y. 2001), Wesley joined the court's opinion sustaining the complaint of sexual orientation discrimination in violation of local New York City law where the school's policy restricted housing to students and their spouses and children. See *id.* at 1106. The court was unanimous on that point, but it divided five-to-two on the claim of marital status discrimination under state and local law. Wesley voted with the majority to reject that claim. See *id.* at 1102. Hence, Wesley did join the more conservative position of the two taken in the appeal by his colleagues; perhaps more significantly, however, he did not part with the unanimous half of the court's holding to reverse the intermediate appeals court and revive the complaint of sexual orientation discrimination.

⁷⁴ 744 N.E.2d 685 (N.Y. 2000).

killed when his partner's gun accidentally discharged.⁷⁵ Wesley concurred in the dissenting opinion arguing that the court should have viewed the partner's violation of procedures contained in the police department patrol guide as tantamount to a regulatory violation; such a view would have allowed the family to be compensated.⁷⁶

In another vote that same year supporting claims on behalf of municipal workers, Wesley was part of a bare majority in *City of Watertown v. State Public Employment Relations Board*,⁷⁷ requiring the municipality to submit to collective bargaining. Wesley provided the deciding vote to reverse the intermediate appeals court and to hold that the procedures for police officers to contest eligibility determinations for injury benefits were a mandatory subject for bargaining.⁷⁸

As the foregoing demonstrates, Wesley's opinions and votes in divided public law cases in the civil realm have evinced a considerable flexibility within a generally conservative record. Nevertheless, his overall record *is* conservative. His voting is usually—though not overwhelmingly—opposed to individual claims of right, liberty, and analogous public protections and entitlements. For example, in the 2002 appeal in *Sanchez v. New York*,⁷⁹ Wesley joined a dissent against the five-to-two majority's decision that sustained a claim of negligence brought by an inmate who was assaulted by fellow prisoners, allegedly as a result of inadequate supervision by correction officers.⁸⁰ In the 1997 case of *Raritan Development Corp. v. Silva*,⁸¹ he similarly joined a dissent to oppose another five-to-two majority which, in this appeal, sustained a

⁷⁵ See *id.* at 689 (holding that a well established provision in the New York City Police Department Patrol Guide was insufficient as a predicate for a cause of action under a New York law that, as stated by the majority, "was not intended to allow suits by fellow officers or their survivors for 'breaches of any and all governmental pronouncements of whatever type'").

⁷⁶ See *id.* at 692–93 (Smith, J., dissenting).

⁷⁷ 733 N.E.2d 171 (N.Y. 2000).

⁷⁸ See *id.* at 174. Wesley similarly cast his vote to support workers' claims in other divided appeals. See, e.g., *Cammon v. City of New York*, 744 N.E.2d 114, 119 (N.Y. 2000) (siding with the majority in a five-to-two vote, which held that an injured dock worker's claim under state labor law was not preempted by federal maritime law); *Speichler v. Bd. of Cooperative Services*, 681 N.E.2d 366, 372 (N.Y. 1997) (joining the majority for a five-to-two vote holding that a teacher gained tenure by estoppel due to a school board's failure to take contrary action in timely fashion).

⁷⁹ 784 N.E.2d 675 (N.Y. 2002).

⁸⁰ See *id.* at 681 (Grafteo, J., dissenting) (arguing the absence of "actual or constructive notice [to the state] of an unreasonable risk of attack," which, according to the dissenters, is a precondition to an inmate's suit against the state).

⁸¹ 689 N.E.2d 1373 (N.Y. 1997).

complaint of arbitrary local government action. Wesley voted to uphold the challenged restrictive residential zoning decision even though, as both the majority and dissent agreed, that zoning decision contravened the governing statute's plain language.⁸²

In the year 2000 appeal in *Lauer v. City of New York*,⁸³ Wesley was part of a five-to-two majority that dismissed the complaint of municipal wrongdoing—a father had been investigated for the murder of his daughter because the city's medical examiner knowingly failed to correct his erroneous autopsy report. Wesley voted with the majority to reject the claim for compensation on the ground that the medical examiner owed no special duty to an individual citizen.⁸⁴ Likewise, in the 1997 case of *Garcia v. Bratton*,⁸⁵ Wesley sided with the Court of Appeals majority to reject a police officer's complaint that she was discharged without a hearing. Wesley provided the deciding vote in the four-to-three decision for the proposition that the officer was not entitled to notice that her probationary period, within which she could be summarily fired, had been extended.⁸⁶

Judge Wesley's votes in these cases typify—but do not categorically define—his record in the civil public law appeals. Again, that record *is* conservative, but not nearly so as in the criminal cases. The votes to reject civil claims must be viewed in the light of the somewhat counter-balancing votes in support of such claims. Interestingly, Wesley's record in tort appeals—purely private as well as those involving suits against government—is very similar. In most divided tort appeals, he voted to reject civil complaints. But in a not insubstantial 39% of those appeals, he sided with the plaintiff.⁸⁷

As previously noted, Wesley joined the dissent in *Sanchez*⁸⁸ against the inmate's claim of negligent supervision by correction officers. But he was also part of the dissent in *Galapo*,⁸⁹ supporting

⁸² See *id.* at 1381–82 (Levine, J., dissenting).

⁸³ 733 N.E.2d 184 (N.Y. 2000).

⁸⁴ See *id.* at 188 (stating that in order for plaintiff to recover he must demonstrate the existence of a duty that exceeds what is generally owed to society; the nonexistence of such a duty will defeat a claim against a municipal entity).

⁸⁵ 688 N.E.2d 495 (N.Y. 1997).

⁸⁶ See *id.* at 497 (asserting that “[n]o constitutional, statutory or regulatory provision requires such notice”).

⁸⁷ See *infra* Chart 4 (reflecting the voting percentages for Judge Wesley and his colleagues' records in divided tort appeals).

⁸⁸ *Sanchez v. New York*, 784 N.E.2d 675, 681 (N.Y. 2002) (Grafteo, J., dissenting).

⁸⁹ *Galapo v. City of New York*, 744 N.E.2d 685, 689 (N.Y. 2000) (Smith, J., dissenting).

a family's claim for compensation for the accidental death of a police officer. Similarly, while Wesley sided with the majority in *Lauer*⁹⁰ to dismiss the lawsuit based on the malpractice of the city's medical examiner, he also joined the majority's opinion in *Cammon*,⁹¹ to permit a dock worker's claim under the state's highly worker-protective labor law.

Wesley's tort record, as reflected in these and other appeals involving governmental defendants, is mirrored in those cases involving exclusively private parties. That record is neither overwhelmingly pro-defendant, nor overwhelmingly pro-plaintiff. To be sure, it is more pro-defendant than not. But it could not be fairly characterized as lopsidedly pro-defendant or hostile to plaintiffs. This point is well illustrated by two divided appeals in which Wesley authored an opinion.

In the 2002 case of *Pierre v. Providence Washington Insurance Co.*,⁹² Wesley penned a dissent against a bare majority that sustained an injured motorist's action to recover a judgment he had obtained against the negligent driver of a tractor-trailer. The Court of Appeals majority held that the insurer was obligated under a policy endorsement to pay any judgment recovered against an insured.⁹³ Wesley, however, argued that the endorsement must be read in light of the federal law that created it, not the insurance contract itself.⁹⁴ So read, "the insured" did not include the negligent driver; instead it was restricted to the motor carrier against whom the plaintiff had failed to seek a judgment.⁹⁵

By contrast, Wesley authored the court's opinion that same year in *Alami v. Volkswagon of America*⁹⁶ to permit a cause of action, despite arguably countervailing legal restrictions. According to Wesley, the rule that no one should be permitted to profit from his own wrongdoing did not preclude the estate of an intoxicated driver from seeking damages for enhanced injuries.⁹⁷ The Wesley-led majority reversed the intermediate appeals court and reinstated the

⁹⁰ *Lauer*, 733 N.E.2d at 186.

⁹¹ *Cammon v. City of New York*, 744 N.E.2d 114, 116 (N.Y. 2000).

⁹² 784 N.E.2d 52 (N.Y. 2002).

⁹³ *See id.* at 61–62.

⁹⁴ *See id.* at 62 (Wesley, J., dissenting).

⁹⁵ *See id.* at 64–65 (Wesley, J., dissenting).

⁹⁶ 766 N.E.2d 574 (N.Y. 2002).

⁹⁷ *See id.* at 577 (noting that the plaintiff in the case was not seeking to "profit" from the decedent's wrongdoing; rather, the plaintiff was requesting that the defendant "honor its well-recognized duty to produce a product that does not unreasonably enhance or aggravate a user's injuries").

law suit predicated upon vehicle design defect.⁹⁸ Wesley explained that to do otherwise would relieve an automaker of its duty to manufacture a vehicle not hazardous to its operator.⁹⁹

Judge Wesley's record is similar in tort appeals where he did not write an opinion, but simply cast a vote. For example, in the 2002 case of *Nestorowich v. Ricotta*,¹⁰⁰ Wesley voted with the majority to affirm a judgment against the medical malpractice plaintiff, despite the trial judge's erroneous instruction to the jury.¹⁰¹ The trial judge had suggested that the surgeon might have made the wrong choice between two reasonable options; in fact, the surgical mistake was clear and entailed no exercise of judgment whatsoever.¹⁰² Nevertheless, the Wesley-joined majority ruled that the strong evidence favoring the physician rendered the trial judge's error harmless.¹⁰³

On the other hand, in the 2001 appeal in *Caristo v. Sanzone*,¹⁰⁴ Wesley was part of the majority that sided with the plaintiffs who claimed prejudice from a jury instruction in a vehicle accident case. The Court of Appeals held that because the defendant had been aware of certain hazardous weather conditions when he decided to drive, there was no reasonable application of the "emergency

⁹⁸ See *id.* at 578.

⁹⁹ See *id.* at 577 (maintaining that the duty the plaintiff "seeks to impose on Volkswagen originates not from her husband's act, but from Volkswagen's obligation to design, manufacture and market a safe vehicle").

¹⁰⁰ 767 N.E.2d 125 (N.Y. 2002).

¹⁰¹ See *id.* at 130.

¹⁰² See *id.* (recognizing that there was "no choice between medically acceptable treatments" in the case and noting that neither party contended that the physician's action constituted an "acceptable alternative means of treatment") (emphasis added).

¹⁰³ See *id.* ("[v]iewing the charge as a whole, and in light of the evidence presented, counsel's arguments and the otherwise proper jury instructions, there is no indication that the 'error in judgment' charge clouded the issue or negatively influenced the jury's determination.").

In *Horn v. New York Times*, 2003 WL 443259 (N.Y. Feb. 25, 2003)—an altogether different situation involving a physician—Wesley joined the majority to reject a claim of retaliatory discharge brought by a physician who was fired for complaining that she was directed to violate patient confidentiality and to lie in order to reduce the number of worker compensation claims. See *id.* The Court of Appeals majority declined to recognize a public policy exception to its employment-at-will doctrine for physician ethics; it had previously done so for legal ethics. See *id.* (referencing *Weider v. Skala*, 609 N.E.2d 105, 110 (N.Y. 1992), which held that a law firm that required an associate to "act unethically and in violation of one of the primary professional rules amounted to nothing less than a frustration of the only legitimate purpose of the employment relationship" and, thus, a violation by the employer of an implied-in-law obligation of the employment agreement).

¹⁰⁴ 750 N.E.2d 36 (N.Y. 2001).

doctrine.”¹⁰⁵ That doctrine permits relief from liability *only* for sudden and unexpected circumstances.¹⁰⁶ Wesley voted with the majority that the trial judge’s “emergency” instruction was reversible error and, therefore, that the plaintiffs were entitled to a new trial.¹⁰⁷

IV. CONCLUSION

As noted at the outset, Judge Wesley’s record on the New York Court of Appeals is, in common parlance, conservative. He has been a reliable vote for the prosecution and law enforcement in criminal cases and he generally, though not invariably, has voted against plaintiffs in civil cases—both in those involving civil rights, liberties, and analogous claims and in cases involving tort actions. Wesley’s record is not one to make liberal ideologues rejoice. He rarely sided with the claims of criminal defendants in divided cases—i.e., in appeals where at least one of his colleagues found merit in those claims. Moreover, although his record in civil cases is not nearly as unequivocal, it nevertheless does reflect that Wesley was most often unpersuaded by civil claimants.

On the other hand, Wesley’s record is not an unalloyed joy for ideological conservatives either. Certainly in the civil cases he sometimes showed himself willing to take positions typically associated with liberal jurists. Even his criminal record evinces an occasional, if somewhat infrequent willingness to depart from positions to which a more ideologically dogmatic judge might well have adhered. In some such occasions, Wesley might in fact have been taking the more pro-prosecution side of the two dividing his colleagues on the Court of Appeals. Nevertheless, he at least acquiesced in the pro-defendant aspect of that position instead of insisting on an even more pro-prosecution one.¹⁰⁸

¹⁰⁵ See *id.* at 37 (acknowledging the century-long presence of the “emergency doctrine” in New York and stating that when a situation affords “little or no time for . . . deliberation or consideration, or [the situation] causes the actor to be reasonably so disturbed that the actor must make a speedy decision without weighing alternative courses of conduct, the actor may not be negligent if the actions taken are reasonable and prudent in the emergency context” as long as the emergency has not been created by that actor) (internal citations omitted).

¹⁰⁶ See *id.*

¹⁰⁷ See *id.* at 38.

¹⁰⁸ In *People v. Harris*, 779 N.E.2d 705 (N.Y. 2002), for example, Wesley authored the majority opinion to vacate the death sentence; that opinion was more pro-prosecution than the dissenting opinion to vacate the conviction as well, but less pro-prosecution than an opinion would have been to uphold both the conviction and the death sentence. In *People v. McIntosh*, 755 N.E.2d 329 (N.Y. 2001), Wesley voted with the majority to suppress the

Indeed, Judge Wesley's high level of alignment with majority opinions throughout his tenure on the New York Court of Appeals¹⁰⁹ similarly suggests that ideological autonomy has been less compelling for him than other values, such as collegiality. His 82% agreement with the majority contrasts sharply with the respective 50% and 54% figures for Judges Titone and Smith, Wesley's colleagues with the most liberal records during the period studied.¹¹⁰ Likewise, his alignment with the majority is noticeably higher than the 69% figure for Judge Bellacosa, who for many years was the most conservative—i.e., pro-prosecution and pro-government—member of the New York court.¹¹¹

As Wesley himself revealed last year about his *own* view of individual autonomy on a collegial court—"the necessity of expressing a view contrary to that of the majority of one's colleagues must be kept in check and reserved for limited applications . . . when matters of high principle are at stake."¹¹² Judge Wesley's record on the New York Court of Appeals does not suggest that doctrinaire ideology was frequently elevated to the level of "high principle." Wesley's record does reveal an evident commitment to protect landowner rights in takings cases, and a fairly consistent—but hardly extremist—tilt toward prosecutorial and law enforcement interests in the close criminal cases. There seems, however, little in Wesley's overall record, albeit an undeniably conservative one, that marks him as vehemently or rigidly ideological.

Ultimately, dogmatic conservatives may well find Wesley's record comfortable, but not ideal. Dogmatic liberals may find it less than favorable, but not a cause for alarm.

evidence and reverse the conviction on state common law grounds; that opinion was more pro-prosecution than the separate concurrence, which argued that the investigation in question was also violative of state and federal constitutional prohibitions against unreasonable searches, but it was less pro-prosecution than an opinion would have been to approve the search, admit the evidence, and uphold the conviction.

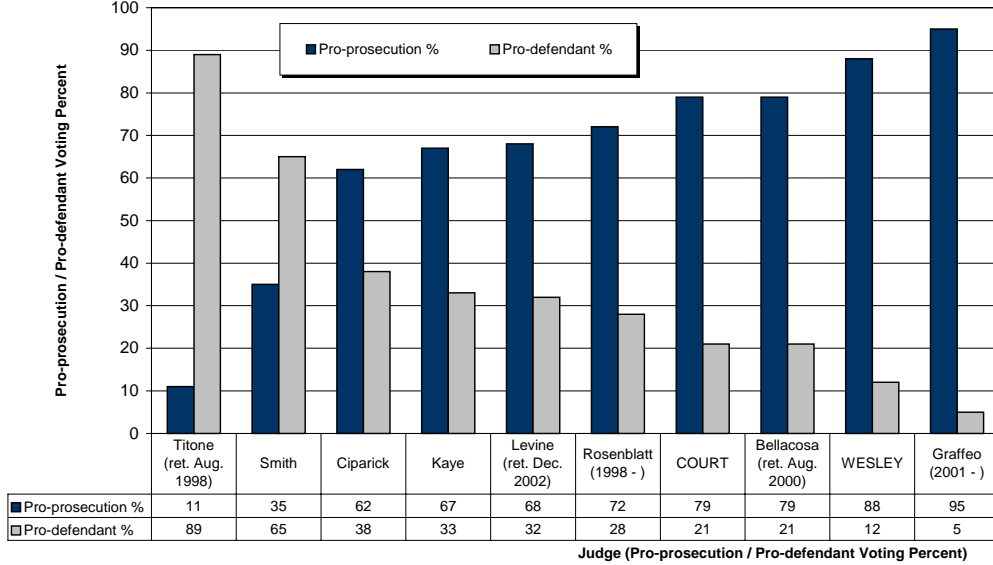
¹⁰⁹ See *infra* Chart 5 (reflecting the percentage of divided appeals in which each member of the court joined in the majority opinion).

¹¹⁰ See *infra* Chart 3 (showing Judges Titone and Smith as having the most pro-individual voting records on the court); see also BONVENTRE, "STREAMS OF TENDENCY", *supra* note 53, chs. II & IV.

¹¹¹ See BONVENTRE, "STREAMS OF TENDENCY", *supra* note 53, at ch. II; see also Bonventre, *Chief Judge Kaye*, *supra* note 3, at 1208 n. 42.

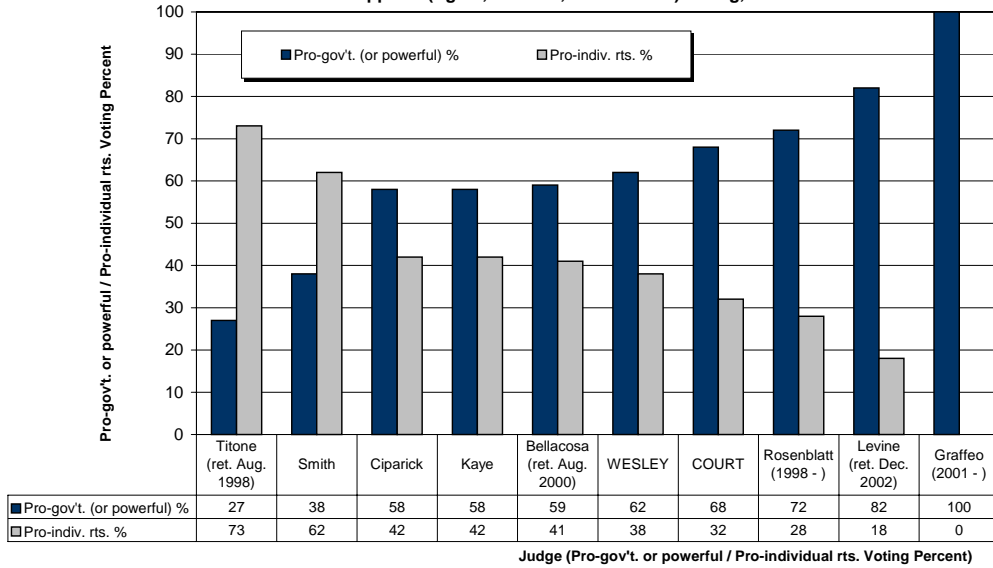
¹¹² See Wesley, *supra* note 3, at 1125–26.

APPENDIX: Chart 1
WESLEY: Criminal Appeals Voting, Jan. 1997 - Feb. 2003



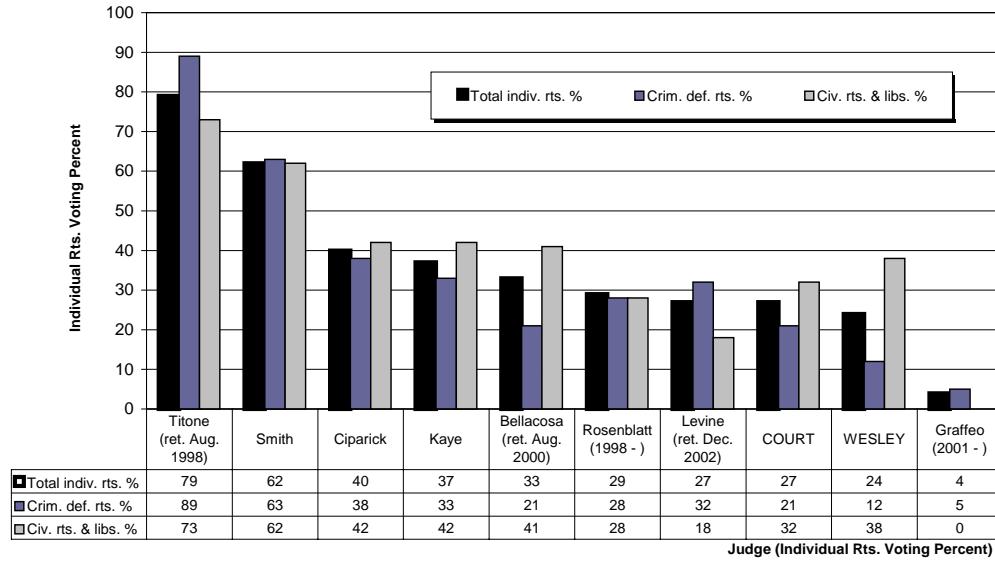
Source: Center for Judicial Process
 Vincent M. Bonventre, Director

APPENDIX: Chart 2
WESLEY: Civil Appeals (rights, liberties, entitlements) Voting, Jan. 1997 - Feb. 2003



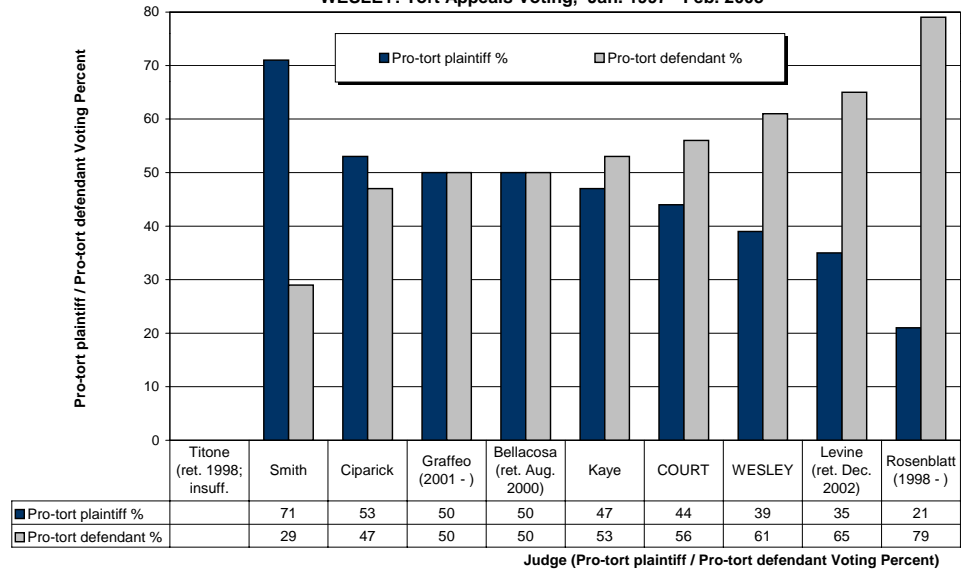
Source: Center for Judicial Process
 Vincent M. Bonventre, Director

APPENDIX: Chart 3
WESLEY: Individual Rights Voting, Jan. 1997 - Feb. 2003



Source: Center for Judicial Process
 Vincent M. Bonventre, Director

APPENDIX: Chart 4
WESLEY: Tort Appeals Voting, Jan. 1997 - Feb. 2003



Source: Center for Judicial Process
 Vincent M. Bonventre, Director

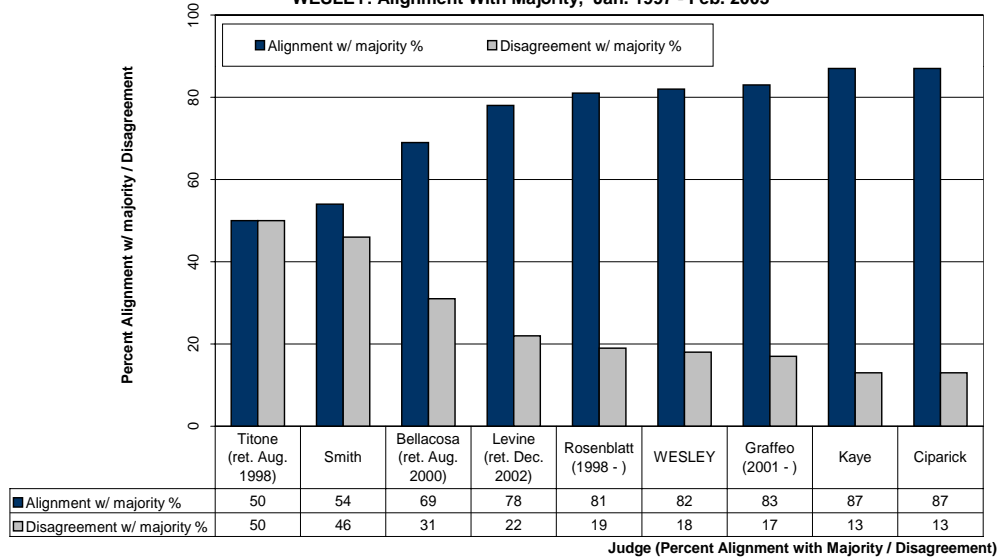
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Wesley: Voting and Opinion Patterns

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APPENDIX: Chart 5

WESLEY: Alignment With Majority, Jan. 1997 - Feb. 2003



Source: Center for Judicial Process
 Vincent M. Bonventre, Director