INSTITUTIONAL CONSERVATISM AND ITS IMPACT ON APPELLATE DECISION-MAKING: AN EMPIRICAL STUDY OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

*Robert J. Brenner**

When there's a dissent, I do not have to wonder. I may still think the majority is right, but I understand, in a way I often do not when the opinion is unanimous, what the majority really decided, and what it rejected—what it would have decided had it gone the other way.[1]

I. INTRODUCTION

While dissenting opinions are often overlooked, in many instances dissenting opinions represent crucial viewpoints on a wide array of legal issues. Dissenting opinions shed light on competing considerations which a court must consider in reaching a well-reasoned result.[2] Dissents not only raise alternate viewpoints, but allow those reading a court decision to truly understand "what the majority really decided."[3] Further, dissents provide an opportunity for the reader of a decision to appreciate what the majority rejected, and what a court would have decided if the case had an alternate outcome.[4]

The dissenting opinion also serves a safeguard in the judicial decision-making process.[5] Proponents argue that the dissenting opinion "keep[s] the majority accountable for the rationale and consequences of its decision,"[6] and "forc[es] the prevailing party to deal with the most difficult questions offered by its opponent."[7] On

* Executive Editor for Lead Articles; J.D. Candidate, Albany Law School, 2012.

1 Robert S. Smith, *Dissenting: Why Do It?*, 74 ALB. L. REV. 869, 872 (2010/2011).

2 Christopher J. Stevens, *An Empirical Study of Dissent at the Supreme Court, Appellate Division, Third Department*, 74 ALB. L. REV. 913, 913 (2010/2011).

3 Smith, *supra* note 1, at 872.

4 *Id.*

5 William J. Brennan, Jr., *In Defense of Dissents*, 37 HASTINGS L.J. 427, 430 (1986).

6 *Id.*

7 Kristopher Ostrander, *Quality in Numbers? The Dynamics of Decision-Making in the*

the other hand, however, dissenting opinions may undermine the judicial decision-making process—dissenting opinions "can do [real] harm."[8] An author of a dissenting opinion can damage the law, undermining the jurisprudence set forth in the majority opinion.[9] However, despite arguments raised by critics, dissenting opinions will always play a critical role in the judicial system, refining the breadth and scope of majority opinions.[10]

An empirical study of a court, through an analysis of majority and dissenting opinions, and the judges by whom they were rendered, can be especially revealing when attempting to understand the jurisprudence developed by a particular court over time.[11] Judges, like all of us, have within them "a stream of tendency . . . which gives coherence and direction to thought and action. Judges cannot escape that current any more than other mortals."[12]

The following study examines dissenting opinions as they may be affected by notions of institutional conservatism, authored by judges sitting on the United States Court of Appeals for the Second Circuit during a period beginning August 1, 2006 and ending October 1, 2011. This article seeks to impart a practical and useful perspective to practitioners and academicians, which may prove helpful to those seeking to understand the motivations underlying dissenting opinions at the Second Circuit.

Part II of this article will present an overview of institutional conservatism, and its interface with the decision-making practices of judges sitting on the Second Circuit. Parts III and IV will specifically analyze the dissents of Chief Judge Dennis Jacobs and Judge Richard C. Wesley, respectively. Both Parts III and IV will also provide a brief biography of each judge, and the impact which their backgrounds may have on their dissents. Finally, Part V concludes by offering a summary of institutional conservatism at the Second Circuit and makes predictions regarding future decision-

Second Department, 74 ALB. L. REV. 895, 895 (2010/2011) (citing Brennan, Jr., *supra* note 5, at 430).

[8] Smith, *supra* note 1, at 869.

[9] *Id.* ("And dissents can do harm. You may annoy your colleagues. You may—by giving into the temptation of making the majority opinion sound worse than it really is—actually increase the damage that it does to the law.").

[10] *See generally* Robert G. Flanders, Jr., *The Utility of Separate Judicial Opinions in Appellate Courts of Last Resort: Why Dissents Are Valuable*, 4 ROGER WILLIAMS U. L. REV. 401, 402 (1999) (explaining that authors of majority opinions are forced to omit arguments subject to objection while recognizing limitations on the scope of the court's holding).

[11] *See generally* BENJAMIN NATHAN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 12 (1921) (discussing determinatives of judicial tendencies).

[12] *Id.*

making trends at the Second Circuit.

It should be noted that this study does not purport to be one hundred percent accurate in either its data or analysis thereof. This study does, however, purport to provide a useful analysis of institutional conservatism, as it may exist at the Second Circuit. This article will also identify trends, as they may exist, in the decision-making and authoring of dissenting opinions by Chief Judge Jacobs and Judge Wesley.

II. INSTITUTIONAL CONSERVATISM AT THE SECOND CIRCUIT

The examination of Second Circuit decisions illuminates the priorities of judges which underlie their decisions, and allows for readily identifiable voting patterns on the court to be ascertained. This study has made it clear that certain preexisting trends affect the decision-making of the Second Circuit as a whole, as well as the decision-making of individual judges. Chief Judge Jacobs and Judge Wesley often dissent to protect individual rights in egregious circumstances, but seem to dissent most often to protect the rights of large institutions.[13]

A. An Empirical Analysis of Dissent at the Second Circuit

For the time period studied, beginning August 1, 2006 and ending October 1, 2011, the Second Circuit decided nearly twelve thousand cases.[14] Of these cases, there were 117 instances where split decisions occurred.[15] Including these 117 instances of split decisions, there were several decisions where multiple dissenting opinions were authored.[16] The total number of dissents authored during the study period is 122.[17]

During the time period studied, Chief Judge Jacobs heard 2,036 cases, and authored dissenting opinions in eight cases.[18] During the

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[13] *See* discussion *infra* Parts III.B, IV.B. Having examined these patterns of dissent, it is important to note that there is a general trend favoring governmental institutions rather than private institutions.

[14] Jessica N. Clemente, *Dissenting at New York's Federal Appeals Court: An Empirical Study of Second Circuit Dissents and the Frequent Dissenter, Judge Rosemary Pooler*, 75 ALB. L. REV. 1121, 1124 (2011/2012).

[15] *Id.* This figure includes dissents authored by those judges sitting on the Second Circuit temporarily, by designation.

[16] *Id.*

[17] *Id.*

[18] *See id.*; Cash v. Cnty. of Erie, 654 F.3d 324 (2d Cir. 2011); Azize v. Bureau of Citizenship & Immigration Servs., 594 F.3d 86 (2d Cir. 2010); LaForest v. Honeywell Int'l Inc., 569 F.3d 69 (2d Cir. 2009); Loeffler v. Staten Island Univ. Hosp., 582 F.3d 268 (2d Cir. 2009); United

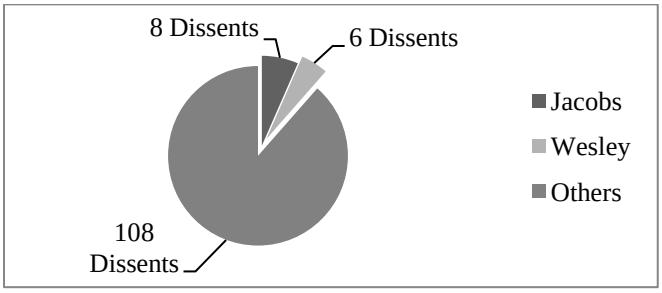
same period, Judge Wesley heard 2,046 cases and authored dissenting opinions in six cases.[19]

TABLE 1: AN OVERVIEW OF THE DISSENTING OPINIONS OF JUDGES JACOBS AND WESLEY

Judge	Number of Cases Heard	Dissents Authored	Percent of Dissenting Opinions Authored
Jacobs	2036	8	0.39%
Wesley	2046	6	0.29%

At first glance, compared to the number of cases heard each year, it does not appear that Judges Jacobs and Wesley dissent often. Despite the seemingly low instances of dissent, as compared to the total cases heard by Judges Jacobs and Wesley, each dissent is of great significance. Each individual dissent can shed light onto the factors and circumstances which have the tendency to cause each of these judges to dissent.

FIGURE 1: A COMPARISON OF THE DISSENTS OF JUDGES JACOBS AND WESLEY TO OTHER MEMBERS OF THE SECOND CIRCUIT DURING THE STUDY PERIOD[20]



States v. Plugh, 576 F.3d 135 (2d Cir. 2009), *abrogated by* United States v. Plugh, 648 F.3d 118 (2d Cir. 2011); United States v. Falso, 544 F.3d 110 (2d Cir. 2008); Husain v. Springer, 494 F.3d 108 (2d Cir. 2007); Zhong v. U.S. Dep't of Justice, 489 F.3d 126 (2d Cir. 2007).

[19] *See* Clemente, *supra* note 14, at 1125; United States v. Broxmeyer, 616 F.3d 120 (2d Cir. 2010); Zalaski v. City of Bridgeport Police Dep't, 613 F.3d 336 (2d Cir. 2010); Abdullahi v. Pfizer, Inc., 562 F.3d 163 (2d Cir. 2009); Bondi v. Capital & Fin. Asset Mgmt. S.A., 535 F.3d 87 (2d Cir. 2008); Villegas Duran v. Arribada Beaumont, 534 F.3d 142 (2d Cir. 2008); United States v. Griffin, 510 F.3d 354 (2d Cir. 2007).

[20] This comparison chart includes all decisions in which there was a split decision. During the time period studied, there were 117 split decisions. Of these split decisions, fourteen of the dissents were authored by Judges Jacobs and Wesley.

TABLE 2: A NUMERICAL COMPARISON OF THE DISSENTING OPINIONS OF JUDGES JACOBS AND WESLEY AS COMPARED TO THE NUMBER OF DISSENTING OPINIONS AUTHORED BY OTHERS

Judge	Dissents Authored	Percentage of Total Dissents Authored
Jacobs	8	6.56%
Wesley	6	4.92%
All Others	108	88.52%
Total	122	100.00%

Figure one provides a visual comparison of the dissenting opinions of Judges Jacobs and Wesley as compared to dissents authored by other members of the court, including those judges sitting on the Second Circuit temporarily by designation. Table two provides a numerical comparison of the same data. As can be seen in both figure one and table two, dissenting opinions authored by Judges Jacobs and Wesley compose a relatively significant portion of the total dissents authored during the study period. As a result, studying the dissents of each of these Judges is a worthwhile exercise in attempting to understand the patterns of dissent, and the jurisprudence advanced by the Second Circuit during the study period.[21]

III. THE DISSENTS OF CHIEF JUDGE JACOBS

Chief Judge Jacobs, as noted above, has authored several dissents during the study period.[22] An analysis of each of these dissents can shed light onto the values and issues which motivate the Chief Judge to dissent. Because Judge Jacobs is the Chief Judge of the Second Circuit, it is particularly important to consider the motivations underlying each of his dissents. "[A] dissenter should feel free to express the precise degree of his or her disagreement—or, if warranted, outrage—that he or she believes is appropriate given the substance and tenor of the majority's opinion in any given

[21] *See generally* Clemente, *supra* note 14, at 1124–26 (discussing the significance of a study of dissent on the United States Court of Appeals for the Second Circuit).

[22] *See infra* Table 1.

case."[23] Thus, not only is it important to consider Chief Judge Jacobs' dissents, but it is also important to note the impact these dissents may have on others members of the court.

A. Chief Judge Dennis Jacobs

As part of analyzing Chief Judge Jacobs' pattern of dissent, it is important to consider his biography, how he rose to the Second Circuit, and events in his life which impact his judicial decision-making.

"Chief Judge Jacobs is a lifelong New Yorker. He was born and raised on [New York's] Upper West Side . . . ."[24] Chief Judge Jacobs earned both his master's and law degrees from New York University.[25] After graduating from New York University Law School, Chief Judge Jacobs joined the New York City firm of Simpson, Thacher & Barlett.[26] Chief Judge Jacobs has stated that he "'was quite happy practicing law,'" and had not extensively contemplated being a Judge until he was appointed to the Second Circuit in 1992.[27] He was named Chief Judge of the Second Circuit in 2006, a term which will expire on September 30, 2013.[28]

Chief Judge Jacobs has noted that "[l]awyers and judges sometimes 'lack humility in approaching great matters,' . . . wrongly considering themselves 'omni-competent' . . . [at the expense of those] whose expertise and insights deserve to be part of the organic growth of the law."[29]

B. Chief Judge Jacobs' Dissenting Opinions

During the period of this study, Chief Judge Jacobs has authored dissents on a variety of matters.[30] Chief Judge Jacobs appears to be the most "vocal" when the rights of a severely aggrieved individual are at issue.[31] However, Chief Judge Jacobs also appears to dissent

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[23] Flanders, Jr., *supra* note 10, at 403–04.

[24] Philip R. Schatz, *Hon. Dennis Jacobs: Chief Judge, U.S. Court of Appeals for the Second Circuit*, THE FED. LAW., Aug. 2011, at 17, *available at* http://www.fedbar.org/Resources_1/Judicial-Profiles/Judicial-PDFs/profile-jacobs.aspx?FT=.pdf.

[25] *Id.* at 16.

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] *Id.* at 17.

[30] *See infra* Part III.B.

[31] *See infra* Part III.B.

to protect large institutions—often casting his "vote" for the institutional adversary.[32] For the purpose of this study, and related analysis, Chief Judge Jacobs' dissents have been organized into five categories: (1) constitutional rights; (2) immigration; (3) civil rights; (4) employment law; and (5) state law claims.

1. Constitutional Rights Cases

a. Husain v. Springer

In *Husain v. Springer*, editors and staff of a school newspaper, as well as students who voted in an election, brought an action against a publically-funded college and its administrators alleging an infringement of their First Amendment rights in connection with a school election.[33] In their amended complaint, plaintiffs sought relief pursuant to 42 U.S.C. § 1983, for violations of their rights under the First and Fourteenth Amendments.[34] The district court held that while the defendant violated plaintiffs' First Amendment rights, there was an insufficient causal link between defendant's conduct and plaintiffs' injuries to impose liability.[35] Plaintiffs appealed to the Second Circuit. In its opinion, the majority discussed that the student newspaper was a limited forum, and that election nullification violated the plaintiffs' First Amendment rights.[36] Further, it was held that only University President Springer could be held liable, and that members of the student senate could not be deemed state actors for the purpose of imposing liability.[37]

In a cogent dissent, Chief Judge Jacobs favors the defendant university and its president, arguing "that the First Amendment protects the freedom of the press and that this protection should be strongest when a newspaper prints election-related content at election time."[38] Chief Judge Jacobs opined: "[A] school administrator should not have to become a constitutional-law [specialist] in order to save herself from personal liability when giving a needed lesson in fair play."[39]

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[32] *See infra* Part III.B.
[33] Husain v. Springer, 494 F.3d 108, 113–18 (2d Cir. 2007).
[34] *Id.* at 119.
[35] *Id.* at 120–21.
[36] *Id.* at 128.
[37] *Id.* at 135.
[38] *Id.* at 137 (Jacobs, C.J., dissenting).
[39] *Id.*

b. United States v. Plugh

In *United States v. Plugh*, the government appealed from an order of the district court, granting defendant's motion to suppress statement made to FBI agents during interrogation.[40] In the majority opinion, authored by Judge Wesley, the court held that: (1) defendant's refusal to sign a waiver of his *Miranda* rights constituted an invocation of defendant's Fifth Amendment rights and (2) the FBI agent's conduct constituted impermissible interrogation.[41]

In his dissenting opinion, Chief Judge Jacobs discusses that the majority's reasoning is flawed and that the statements obtained during the course of the interrogation should be deemed admissible.[42] Jacobs proffers that absent a sufficiently clear statement by the defendant invoking his *Miranda* rights, subsequent statements made by the defendant need not be suppressed.[43]

c. United States v. Falso

Following the denial of a motion to suppress evidence seized from defendant's home and computer, defendant was convicted of crimes related to child pornography and traveling with the intent to engage in illicit sexual conduct with minors.[44] The majority reasoned that while the search warrant was not supported by probable cause, the issuing judge was not knowingly misled, and the affidavit was not so lacking in indicia of probable cause as to render the issuing judge's reliance thereon unreasonable.[45]

In a dissenting opinion, Chief Judge Jacobs agreed with the majority when it held that the FBI agent's "affidavit failed to establish a substantial basis for probable cause."[46] However, Jacobs disagrees with the majority's opinion as to whether "the affidavit was 'recklessly misleading.'"[47] Jacobs points out that the affiant and executing officer were one and the same, and, therefore, the

[40] United States v. Plugh, 576 F.3d 135, 137 (2d Cir. 2009), *abrogated by* United States v. Plugh, 648 F.3d 118 (2d Cir. 2011).

[41] *Plugh*, 576 F.3d at 144–45.

[42] *Id.* at 148–49 (Jacobs, C.J., dissenting).

[43] *Id.*

[44] United States v. Falso, 544 F.3d 110, 112–13 (2d Cir. 2008).

[45] *Id.* at 113.

[46] *Id.* at 132 (Jacobs, C.J., dissenting).

[47] *Id.*

good faith determination of the district court judge as to probable cause is insufficient standing alone.[48]

2. The Immigration Cases

a. Zhong v. United States Department of Justice

In *Zhong v. United States Department of Justice*, a unique question of law arose relating to whether a rehearing en banc should be granted as to an issue of federal immigration law.[49] Rehearing was ultimately denied and Chief Judge Jacobs dissented from the order denying the rehearing en banc.[50]

"In his strong dissent, the Chief Judge touches on two separate issues."[51] First, Jacobs raises a concern as to whether circuit rules regarding binding precedent were ignored.[52] Specifically, Jacobs contends that the original panel hearing the case should have treated prior related decisions as controlling.[53] Second, "[t]he Chief Judge, in his dissent, expresses the fear that . . . all sorts of issues may be considered on appeal which, under the statute and the [Board of Immigration Appeals ("BIA")] regulations, ought not to be reviewed."[54] Jacobs shows a concern regarding the development of efficacious jurisprudence in this case, averring that a rehearing en banc should take place where there is a formidable threat of misapplication in future cases.[55]

b. Azize v. Bureau of Citizenship and Immigration Services

Following an order of removal entered by the BIA, a nonresident alien defendant filed a petition for a writ of habeas corpus seeking cancellation of the order.[56] The majority reasoned that a remand to the district court was appropriate in order to make factual determinations regarding whether the defendant alien's naturalization proceedings were terminated prematurely.[57]

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[48] *Id.* at 132–33.

[49] Zhong v. U.S. Dep't of Justice, 489 F.3d 126, 127 (2d Cir. 2007) (Calabresi, J., concurring).

[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] *Id.*

[54] *Id.* at 133.

[55] *Id.* at 138–39 (Jacobs, C.J., dissenting).

[56] Azize v. Bureau of Citizenship & Immigration Servs., 594 F.3d 86, 87–88 (2d Cir. 2010).

[57] *Id.*

In a vehement dissent, Chief Judge Jacobs argued that defendant's petition should not be remanded, and that defendant's petition for review should be denied.[58] Jacobs averred that the district court is in no position to conduct a finding of fact as to events that occurred in the distant past.[59] Further, Jacobs opined that a grant of relief nunc pro tunc is an equitable remedy to which a convicted criminal is not entitled.[60]

3. The Civil Rights Claim: *Cash v. County of Erie*

In *Cash v. County of Erie*, a pretrial detainee filed a 42 U.S.C. § 1983 claim against the County of Erie, sheriff, and deputy sheriff alleging that the deputy sheriff assaulted her.[61] After entry of a jury verdict in plaintiff's favor, the district court granted defendants' motion for judgment notwithstanding the verdict.[62] The majority found that: (1) defendants were not entitled to judgment as a matter of law because the evidence was sufficient to establish the jury verdict in favor of the plaintiff; (2) defendants were not entitled to a new trial because the errors they assert on the special verdict form were not preserved for appellate review; and (3) the verdict form together with the jury instructions properly instructed the jury as to the elements for properly finding defendants liable under 42 U.S.C. § 1983.[63]

In his dissent, Chief Judge Jacobs argues that to find a basis for a verdict adverse to the defendants, "the majority opinion relies on [both] notice that existing measures [in the prison] were insufficient, and the availability of a measure that would be more effective."[64] Jacobs reasons further that the majority opinion in this case can be read as "to impose strict liability on municipalities . . . for any incidents that arise in a prison."[65]

4. The Employment Claim: *LaForest v. Honeywell International Inc.*

In *LaForest v. Honeywell International Inc.*, employees brought

[58] *Id.* at 93–94 (Jacobs, C.J., dissenting).
[59] *Id.* at 93.
[60] *Id.* at 93–94.
[61] Cash v. Cnty. of Erie, 654 F.3d 324, 327–28 (2d Cir. 2011).
[62] *Id.*
[63] *Id.* at 344.
[64] *Id.* (Jacobs, C.J., dissenting).
[65] *Id.*

an action against an employer's successor in interest, seeking to enforce certain benefits granted to employees, and alleging certain violations of federal law, and the plaintiff's contractual rights.[66] As to the federal claims, the employees ground their claims in the standards set forth under ERISA.[67] In its majority opinion, the Second Circuit held that: (1) the successor in interest had no right to appeal the judgment on the issue of ERISA liability and (2) in determining attorney's fees, the court could only consider conduct specifically relating to the ERISA claim.[68] In a dissenting opinion, Chief Judge Jacobs argues that the successor's liability should be limited.[69] Further, Jacobs argues that the court improperly applied precedent and that the potential for liability against the successor in interest should be foreclosed.[70]

5. The State Law Claim: *Loeffler v. Staten Island University Hospital*

In *Loeffler v. Staten Island University Hospital*, the wife and children of a deceased patient brought suit against defendant hospital under the Rehabilitation Act and New York law for failure to provide a sign language interpreter for a patient and his wife, who were both deaf, forcing the patient's children to be interpreters.[71] The district court held for defendant hospital and the plaintiffs appealed.[72] In the majority opinion, authored by Chief Judge Jacobs, the court held that: (1) a genuine issue of material fact existed as to whether the hospital acted with deliberate indifference and (2) claims under New York law were not co-extensive with the equivalent federal claims.[73] Through a concurring opinion, children were also deemed "aggrieved" persons with standing under the Rehabilitation Act.[74]

Dissenting in part, Chief Judge Jacobs argues that the children are not parties with standing under the Rehabilitation Act, a premise which would limit the defendant hospital's exposure to liability.[75]

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66 LaForest v. Honeywell Int'l Inc., 569 F.3d 69, 71–72 (2d Cir. 2009).
67 *Id.*
68 *Id.* at 76.
69 *Id.* (Jacobs, C.J., dissenting).
70 *Id.*
71 Loeffler v. Staten Island Univ. Hosp., 582 F.3d 268, 270–71 (2d Cir. 2009).
72 *Id.* at 270.
73 *Id.* at 270–71.
74 *Id.* at 279–83 (Wesley, J., concurring).
75 *Id.* at 283–87 (Jacobs, C.J., dissenting in part).

IV. THE DISSENTS OF JUDGE WESLEY

As previously discussed, it is important to observe the biography of a judge before considering his pattern of dissent. Judge Wesley has a wide array of judicial experience, making him a somewhat unique member of the Second Circuit.[76] Judge Wesley gives great deference to the opinions of others and holds the intellect of fellow members of the court in the highest regard.[77] Given this notion, Judge Wesley's dissents are relatively seldom, and a study of the factors and issues which cause him to dissent is vital in understanding the patterns of dissent at the Second Circuit. In order to gain a sound understanding of the factors which motivate Judge Wesley's to dissent, it is important to observe his background and how he rose to the Second Circuit.

A. Judge Richard C. Wesley

Judge Wesley is a lifelong resident of upstate New York.[78] After graduating from Cornell Law School in 1974, Judge Wesley has been, inter alia, a partner in private practice, a New York State Assemblyman, a justice of the New York State Supreme Court, a justice of the New York State Appellate Division, Fourth Department, a member of the New York State Court of Appeals, and, most recently, a member of the United States Court of Appeals for the Second Circuit.[79]

"Although he is a Republican and bona fide conservative, Judge Wesley[]" has garnered the respect of both sides of the aisle, and his dedication to the development of sound jurisprudence is clear.[80] Before deciding a case, "Judge Wesley seeks first to 'know a case as well as the practitioners.'"[81] In doing so, Judge Wesley relies heavily on oral argument, and has stated that "'[o]ral argument can change [his] mind much more often than [one] might expect,

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[76] *See infra* Part IV.A. For a detailed discussion of voting patterns during Judge Wesley's tenure on the New York Court of Appeals, see Vincent Martin Bonventre, Todd A. Ritschdorff & Erika L. Bergen, *Richard C. Wesley: Voting and Opinion Patterns on the New York Court*, 66 ALB. L. REV. 1065 (2003).

[77] *See infra* Part IV.A.

[78] Philip Schatz, *Hon. Richard C. Wesley: U.S. Circuit Judge, U.S. Court of Appeals for the Second Circuit*, THE FED. LAW., Feb. 2006, at 1, *available at* http://www.fedbar.org/Resources_1/Judicial-Profiles/Judicial-PDFs/Wesley-profile.aspx?FT=.pdf.

[79] *Id.*

[80] *Id.*

[81] *Id.* at 2.

[occurring in] something like [fifteen] percent of the cases'" he hears.[82]

Given his breadth of experience in the judiciary, Judge Wesley has noted that "[t]he courts are alike."[83] Judge Wesley shares a strong bond with the members of the court upon which he sits, exhibiting qualities "of collegiality and respect for the intellectual abilities and good will of fellow judges, even in cases of profound disagreement."[84] Admitting that he has "'been involved in many distinct disagreements, [Judge Wesley] ha[s] never had occasion to question the intellectual honesty of another judge.'"[85]

B. Judge Wesley's Dissenting Opinions

Similar to Chief Judge Jacobs, Judge Wesley often dissents to protect the interests of severely aggrieved individuals, or in the alternative, large institutions. Judge Wesley often defers to institutional authority, and is very willing to dissent from a decision of his peers when he believes institutional authority has been undermined.[86] Judge Wesley also appears to be concerned with the rights of criminal defendants, but is seemingly less concerned when the criminal defendant has committed an egregious act.[87]

Judge Wesley's dissents during the study period are organized below into the following categories: (1) plea bargaining; (2) civil rights; (3) parental rights; (4) foreign bankruptcy; (5) the Alien Tort Statute; and (6) criminal law issues.

1. Plea Bargaining: *United States v. Griffin*

In *United States v. Griffin*, the defendant entered a plea of guilty for possession of child pornography.[88] Defendant subsequently appealed.[89] The court held that the prosecution breached its plea agreement with defendant and that the case should be remanded to a different district court judge for sentencing.[90] The court also held

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[82] *Id.*
[83] *Id.*
[84] *Id.*
[85] *Id.*
[86] *See, e.g.*, Zalaski v. City of Bridgeport Police Dep't, 613 F.3d 336 (2d Cir. 2010); Villegas Duran v. Arribada Beaumont, 534 F.3d 142 (2d Cir. 2008), *vacated*, Duran v. Beaumont, 130 S. Ct. 3318 (2010).
[87] *See, e.g.*, United States v. Broxmeyer, 616 F.3d 120 (2d Cir. 2010).
[88] United States v. Griffin, 510 F.3d 354, 357–59 (2d Cir. 2007).
[89] *Id.* at 357.
[90] *Id.* at 367.

that it would exercise discretion in not considering violations of discovery rules or sentencing enhancements.[91]

Judge Wesley, through a dissenting opinion, agrees with the majority "that courts must be vigilant in holding the government to its promises."[92] Wesley submits, however, that the conduct of the defendant must also be considered in these scenarios and weighed against that of the prosecutor.[93]

2. The Civil Rights Claim: *Zalaski v. City of Bridgeport Police Department*

Plaintiff protestor brought an action pursuant to 42 U.S.C. § 1983 against a police department and deputy chief of police, alleging violations of the First Amendment.[94] Plaintiff appealed from the district court order granting defendants' motion for summary judgment.[95] The Second Circuit held that the case should be remanded so that a more comprehensive inquiry as to the facts of the case could be conducted.[96]

In his dissenting opinion, Judge Wesley contends that the record in this case, although sparse, is complete.[97] He discusses that there is no basis for vacating the judgment where a de novo review of the record reveals that summary judgment was proper.[98] Wesley avers that the decision of the district court favoring the defendants should be affirmed.[99]

3. Parental Rights: *Villegas Duran v. Arribada Beaumont*

In this case, the plaintiff father petitioned for an order compelling defendant mother to return the child to Chile pursuant to the Hague Convention on the Civil Aspects of International Child Abduction.[100] The district court dismissed for lack of jurisdiction and the plaintiff appealed.[101] The Second Circuit held that the

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[91] *Id.*

[92] *Id.* at 369 (Wesley, J., dissenting).

[93] *Id.*

[94] Zalaski v. City of Bridgeport Police Dep't, 613 F.3d 336, 337–39 (2d Cir. 2010).

[95] *Id.* at 337–38.

[96] *Id.* at 337.

[97] *Id.* at 343–44 (Wesley, J., dissenting).

[98] *Id.* at 345–46.

[99] *Id.*

[100] Villegas Duran v. Arribada Beaumont, 534 F.3d 142, 144–45 (2d Cir. 2008), *vacated*, Duran v. Beaumont, 130 S. Ct. 3318 (2010).

[101] *Id.* at 145.

appellant's rights do not constitute a custody right under the Hague Convention.[102] The majority explained further that the Hague Convention is only invoked where a "child has been removed in breach of a petitioning parent's custodial rights."[103]

In his dissent, Judge Wesley asserts that the case should be remanded for proceedings consistent with Chilean law.[104] Wesley argues that deference should be given to a foreign sovereign's view of its own law, and therefore, the judicial determination of custody must be made pursuant to Chilean law.[105]

4. Foreign Bankruptcy: *Bondi v. Capital & Finance Asset Management S.A.*

In *Bondi v. Capital & Finance Asset Management S.A.*, a debtor in an Italian bankruptcy proceeding sought to enjoin a securities fraud action against it in the United States.[106] The district court denied the motion, and the debtor appealed.[107] The court held that the district court did not abuse its discretion in denying the motion.[108]

Judge Wesley authored a cogent dissent in this case, arguing that the nature of appeal has changed significantly as a result of an executed settlement agreement.[109] Wesley argues that given these circumstances, the appeal should be stayed, while retaining jurisdiction to revisit it.[110]

5. Alien Tort Statute: *Abdullahi v. Pfizer, Inc.*

In *Abdullahi v. Pfizer, Inc.*, Nigerian children and their guardians sued drug company, Pfizer, Inc., under the Alien Tort Statute ("ATS"), alleging that the drug company improperly tested an experimental antibiotic on children in Nigeria without their consent or knowledge.[111] The district court dismissed the complaint for lack of subject matter jurisdiction and on the ground of forum non

[102] *Id.*
[103] *Id.*
[104] *Id.* at 149–50 (Wesley, J., dissenting).
[105] *Id.*
[106] Bondi v. Capital & Fin. Asset Mgmt. S.A., 535 F.3d 87, 87 (2d Cir. 2008).
[107] *Id.*
[108] *Id.*
[109] *Id.* at 94 (Wesley, J., dissenting).
[110] *Id.*
[111] Abdullahi v. Pfizer, Inc., 562 F.3d 163, 168–69 (2d Cir. 2009).

conveniens, and plaintiffs appealed.[112] The Second Circuit held that: (1) the prohibition of nonconsensual medical experimentation constituted a universally accepted norm of customary international law and therefore fell within the jurisdiction of the ATS and (2) the state action element under the ATS was sufficiently satisfied.[113]

In a lengthy dissent, Judge Wesley asserts that the question on appeal is not whether defendant's actions were wrong, but rather whether they fall into a class of international norms for which ATS jurisdiction exists.[114] Judge Wesley further discusses that "ATS jurisdiction must be reserved only for acts that the nations of the world collectively determine interfere with their formal relations with one another—including those rare acts by private individuals that are so serious as to threaten the very fabric of peaceful international affairs."[115] Wesley argues that the conduct of Pfizer in this instance does not fall within this narrow class and should be protected.[116]

6. The Criminal Law Case: *United States v. Broxmeyer*

In *United States v. Broxmeyer*, defendant appealed his convictions on two counts of production of child pornography and one count of transportation of a minor across state lines with an intent to engage in sexual activity.[117] In reviewing the finding of guilt made by the jury at the district court level, the majority found that the evidence on the record was insufficient to convict defendant of the crimes with which he was charged.[118]

In a dissenting opinion, Wesley argues that the Court of Appeals must defer to the jury's conclusions at trial.[119] However, Wesley argues that the rights of defendants must also be protected, and convictions must be founded on substantiated, actual evidence.[120]

V. CONCLUSION

To properly understand a court, it is crucial to understand the thoughts and factors which motivate its members. Evaluating the

[112] *Id.*
[113] *Id.*
[114] *Id.* at 213 (Wesley, J., dissenting).
[115] *Id.*
[116] *Id.*
[117] United States v. Broxmeyer, 616 F.3d 120, 122 (2d Cir. 2010).
[118] *Id.* at 122–23.
[119] *Id.* at 130 (Wesley, J., dissenting).
[120] *Id.*

biographies of Chief Judge Jacobs and Judge Wesley alone does not allow for an immediate appreciation of the factors which motivate these judge's dissents. However, as the review of these cases has made clear, Judges Jacobs and Wesley, in some instances, will favor institutions and institutional authority. Judges Jacobs and Wesley are seemingly less protective of institutional authority when the rights of an individual citizen are substantially compromised. This focused protection of an individual's rights does not, however, extend to the rights of those citizens who have committed egregious criminal acts.

Given the arguments advanced in the dissents studied, and the reasoning behind them, it is likely that these trends will continue to impact decision-making at the Second Circuit. It is important to note, however, that but for the backgrounds of the judges studied, and physical location of the Second Circuit in the heart of New York City, this might not otherwise be the case.