Remarks on Writing Separately

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Abstract: Judge Ginsburg compares the styles of appellate opinion writing in United States courts and in those of Great Britain and the civil law countries. She describes as a "middle way" the United States practice of opinions for the court, sometimes accompanied by separate concurrences and dissents. This practice, she observes, contrasts with the British tradition of seriatim opinions by each member of the bench, and with the angle, anonymous judgment characteristic of civil law systems. While noting that the Anglo-United States practice of writing separately has gained adherents in the civil law world, she concludes that judges in the United States might profitably consider the styles of jurists abroad and exercise greater restraint before writing separately.

Last summer I had the good fortune to be part of a small delegation to Paris, led by Supreme Court Justices Sandra Day O'Connor and Antonin Scalia. We assembled to exchange views with representatives of the Conseil d'Etat. The Conseil d'Etat is a marvelous, multi-function institution established in Napoleon's time, one of its main sections serves as the Supreme Court of France for administrative law cases. Early in our second session, Justice O'Connor described the doctrine current in the United States concerning the respect or deference courts owe to decisions or rules made by expert administrative agencies or officials. Courts are bound to accept an administrative agency's construction of the statute the agency is charged to enforce, Justice O'Connor reported, so long as the agency's reading is a plausible one, even if not the only plausible reading or, in the judge's view, the more or most plausible reading.

How can that be, a French colleague asked. How can the law have more than one plausible meaning? Or, more accurately, how can a court judgment openly so acknowledge? The law is the law. There can be but one officially correct reading. Shouldn't judges, at least in their official pronouncements, make it appear so to the public? Isn't it the court's responsibility to identify by judgment the (one and only) correct interpretation?

Both sides of the exchange immediately recognized that we had broached one of the fundamental differences in our systems and the

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2. See id. at 19-21, 34-35.
workways of judges. Under the French practice, still followed in large measure in most civil law systems, judicial decisions typically portray the result demanded by the law as inexorable.\textsuperscript{4} There is a right answer. It is expressed in a unanimous judgment, written up in a formal, impersonal, concise, stylized manner. The author of the judgment is neither named nor otherwise identifiable.\textsuperscript{5}

In the United States, by contrast, court decisions recognize openly that the law is not always clear and certain, that the legislator often allows broad scope for interpretation, sometimes wittingly, other times inadvertently. We permit our appellate judges to disagree or distance themselves from the court’s judgment by dissenting or concurring opinion. At the same time, we have doctrines, like deference to expert administrative determinations, that serve, among other purposes,\textsuperscript{6} to keep the individuality of our judges within tolerable bounds.

In this talk, I will comment on the uses and abuses of separate opinions in United States judicial decisionmaking.\textsuperscript{7} As background, I will first describe three patterns of appellate judgments by collegial courts: seriatim opinions by each member of the bench, which is the British tradition; a single anonymous judgment with no dissent made public, which is the civil law prototype; and the middle way familiar in the United States—generally an opinion for the court, from which individual judges sometimes disassociate themselves in varying degrees. In concluding comment, I will suggest that, just as the separate opinion is making inroads in the civil law world, so United States appellate judges might profitably exercise greater restraint before writing separately.

I.

The British Law Lords serve as their nation’s Supreme Court. They generally sit in panels of five.\textsuperscript{8} When a decision issues, each panel

\textsuperscript{4} See Kelman, The Forked Path of Dissent, 1985 Sup. Ct. Rev. 227, 227 (1986) (“No matter how dissimilar the judges may be in temperament and outlook, they are united on the need to foster the myth of the law’s impersonality and inexorability.”).


\textsuperscript{6} In addition to respect for agency expertise, the deference doctrine reflects the principle that the political branches of government bear responsibility for making policy choices. See Chevron, 467 U.S. at 865–66.

\textsuperscript{7} For particularly excellent commentary, from which this discussion has profited, see Kelman, supra note 4.

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member, in turn, announces his individual judgment; in constitutional theory or form, the Law Lord is simply delivering a “speech” in the upper chamber of Parliament.9 No composite judgment of the court need be rendered and, up to the 1980’s, a “laissez-faire ethos on concurrences and dissents” prevailed.10 “‘Threats’ to write [separately] or to dissent, or ‘offers’ of silence carry little weight” in the British tradition, and the presiding Law Lord customarily has not endeavored to reconcile differences of opinion.11

There are two notable exceptions to this British tradition. The first concerns the Privy Council, which for centuries has heard appeals from the highest courts of the colonies and dominions of the Empire. Until 1966, the Privy Council employed a single-judgment technique; it published only unanimous, anonymous decisions.12 The formal justification for this deviation was that the Council functioned (in theory) as adviser to the Crown and therefore should render its advice with one voice.13 Another explanation may more accurately or practically account for the institution and persistence of the Privy Council’s single-judgment system: There were “policy considerations in the heyday of Imperial power which dictated a single clear pronouncement for subject peoples not attuned to the institutions and conventions of their Imperial masters.”14

A second exception to the separate opinion tradition relates to criminal cases and has its principal application at the intermediate court level. It is an idea worth pondering:15

In English criminal appeals, it has long been regarded as imperative that the discomfiture of the unsuccessful appellant should not be aggravated by an overt division of opinion among the judges. To the criminal, punishment itself is bitter enough, without the salt of a favourable but impotent dissenting judgment being rubbed into the wound.

Under the statute today in force, separate opinions may be presented in criminal appeals only when the presiding judge so authorizes.16

9. Final Appeal, supra note 8, at 81–82.
11. Id. at 106, 109; cf. W. Murphy, Elements of Judicial Strategy 59 (1964), quoting a message Justice Stone wrote to Justice Frankfurter about an opinion Frankfurter was drafting: “If you wish to write, placing the case on the ground which I think tenable and desirable, I shall cheerfully join you. If not, I will add a few observations for myself.”
12. See Final Appeal, supra note 8, at 82.
14. Final Appeal, supra note 8, at 82.
15. Id. at 81.
16. Id.
In contrast to the British tradition of opinions separately rendered by each judge as an individual, the civil law tradition calls for a collective, corporate judgment. Disagreement on the law or its proper application nowadays is almost universally admitted to be inevitable some of the time. But according to civil law custom, disagreement is not disclosed. Cases are decided with a single, per curiam opinion. In the French tradition, the judgment is tightly and precisely composed; commentators familiar with the system report that the ideal judgment is “considered all the more perfect for its concise and concentrated style, so that only experienced jurists are able to understand and admire it.” In some continental countries, West Germany and Italy among them, however, the pattern is different; “the judicial decision is presented in the form of a [relatively long] dissertation,” which may include references to previous court decisions or scholarly commentary.

Supreme Court Justice Antonin Scalia tells of a semester’s visit of one of his children with a family abroad, and the clear approval and respect accorded the child’s statement that her father was a law professor. When the Scalia child reported, on a return visit, that her father had become a federal judge on the D.C. Circuit, the change in occupation bewildered the foreign family. Why would a tenured professor want to join the ranks of the judiciary? One of the reasons for the unanimous, anonymous style of judging in civil law countries is the civil service character and mentality of judiciaries outside the common law realm.

Numbers tell the story, in large part. The highest civil court in France, the Cour de Cassation, has over four score members, and the counterpart highest civil court in West Germany numbers over one hundred judges. In common law countries, most judges are “appointed from among practising advocates at the height of their reputation.” In most civil law systems, judging generally is “a career

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17. See Anand, The Role of Individual and Dissenting Opinions in International Adjudication, 14 INT’L & COMP. L.Q. 788, 790 (1965); see also Hambro, Dissenting and Individual Opinions in the International Court of Justice, 17 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRRECHT 229, 230 (1956-57) (in all supreme courts, “[i]t must be a common experience that the judges do not always agree... probably nobody today indulges in the illusion of unanimous courts”).


19. Id. at 130; see also infra note 24.


22. R. David & J. Brierley, supra note 18, at 127.
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entered at the beginning of one's professional life.” Speaking of the “judicial establishment” in West Germany, for example, one commentator explained:

The psychological link between bench and civil service is deeply rooted. During Imperial Germany and the Weimar period judges were regarded as part of the civil service. Though judges now enjoy independent status, the two professions are still similarly structured with comparable tenure, salaries, ranks, promotion procedures, and retirement conditions. The typical appointee begins his career in the lowest court. His ascent within the judiciary is uncommonly slow. Promotion depends usually on the recommendation of higher-ranking judges.

In sync with the anonymous institutional opinion typical in civil law countries is the “reporter” system at work in many continental or continental-style courts. Customarily, a case on appeal is initially assigned to one judge, as the “reporter” judge, who bears responsibility for its preparation. That judge immerses herself in the case and develops a report plus recommended disposition. In most cases, as one might expect, the reporter’s recommendation carries the day.

Finally, in comprehending the different common and civil law styles, one must understand that civil law judgments formally do not count as precedent—the rule of stare decisis does not officially hold.


24. D. KOMMERS, supra note 21, at 53; see also Clark, supra note 23, at 1820–22. But cf. id. at 1829–32 (lay judges serve on many West German courts of first instance, and some appellate courts).

Respecting promotion opportunities for judges in Italy, a leading authority wrote: Since [the judge's] chances of promotion will depend on the decision of a commission of higher magistrates who will evaluate his qualifications (which will be judged primarily on the opinions he has written), it is only natural that as the time approaches when he is to come up for promotion he will be led to neglect those phases of his profession that offer little opportunity for recognition but are of basic importance to the service of justice (e.g., the work of the examining magistrate in criminal cases), and to give preference to the type of work that enables him to make the most favorable impression on his future examiners. It is for this reason that judges who are nearing promotion tend to display their knowledge of jurisprudence by writing decisions as if they were preparing scholarly dissertations; for they know that to a promotion committee a learned decision is worth more than a just one.

P. CALAMANDREI, PROCEDURE AND DEMOCRACY 43–44 (1956).

25. See D. KOMMERS, supra note 21, at 52.

26. See id. at 180, 192.
sway. The notion that courts do not set precedent no doubt figures in the cast of opinions. Unanimity today does not necessarily imply a judgment’s staying power tomorrow, particularly when commentators in the legal academic community return unfavorable reviews.

In the United States, we credit Chief Justice John Marshall with establishing the practice of announcing the Court’s judgment in a single opinion for the Court. In this matter, as in some others, Marshall’s will prevailed over Jefferson’s. Jefferson, a defender of seriatim opinions, said of the Marshall Court’s one judgment, one opinion for the Court practice: An opinion is huddled up in conclave, perhaps by a majority of one, delivered as if unanimous, and with the silent acquiescence of lazy or timid associates, by a crafty chief judge, who sophisticates the law to his own mind, by the turn of his own reasoning.

Opinions for the court remain standard in our Supreme Court and in the federal courts of appeals as well, although separate opinions are not uncommon. Even Marshall, during his Chief Justiceship, disented on several occasions and once specially concurred. As in civilian systems, we have but one judgment, and we mark it the Court’s. But in tune with the British tradition, we place no formal constraints on the prerogative of each judge to speak out separately.

II.

In the civil law pattern, anonymity (faceless or nameless judgments) and unanimity (one judgment, no divergent individual opinions) go together. Before turning to the separate opinion, I will comment on the value and the price of disclosing a court’s votes and the names of opinion authors.

27. See J. Merryman & D. Clark, Comparative Law: Western Europe and Latin American Legal Systems 551-87 (1978). Stare decisis, however, has a strong unifying force in common law systems. The need to “fit[ ] the current decision into the body of past decisions” operates to “reduce[ ] individuality of judgment.” Kelman, supra note 4, at 229.


31. Id. at 196 & n.57.
Disclosure of votes and opinion writers may nourish a judge's ego, his or her sense of individuality; but if our system affords the judge personal satisfaction, it also serves to hold the individual judge accountable. The process of writing signed opinions is a testing venture. California's once Chief Justice Roger Traynor wrote of the process:

I have not found a better test for the solution of a case than its articulation in writing, which is thinking at its hardest. A judge . . . often discovers that his tentative views will not jell in the writing. He wrestles with the devil more than once to set forth a sound opinion that will be sufficient unto more than the day.

The prospect of a dissent or separate concurring statement pointing out an opinion's inaccuracies and inadequacies strengthens the test; it heightens the opinion writer's incentive to "get it right."  

In the press to keep up with a mounting case load, my circuit and others nowadays dispose of a high percentage of cases by unpublished judgment, sometimes accompanied by concise memorandum. These abbreviated dispositions are, without exception, unsigned and, almost without exception, unanimous. I betray no confidence when I tell you that unsigned work products, more often than signed opinions, are fully composed by hands other than a judge's own — by staff attorneys or law clerks — and let out with scant editing by the supervising panel. Judges generally do not labor over unpublished judgments and memoranda, or even published per curiam opinions, with the same intensity they devote to signed opinions. As a bright commentator observed in a related context: "When anonymity of pronouncement is combined with security in office, it is all too easy for the politically insulated officials to lapse into arrogant ipse dixits."

There are exceptions, however, that we notice specially because they deviate from the norm. A published opinion without authorship attribution may be particularly forceful in certain contexts. Consider, for example, the extra weight carried by the Supreme Court's 1958 per curiam opinion in *Cooper v. Aaron*; in that case all nine Justices signed onto a statement for the court reaffirming—in face of official

34. See id. at 218–23.
35. Kelman, supra note 4, at 242.
resistance in Little Rock, Arkansas—that desegregation in public schools is indeed the law of the land.37

Public accountability through the disclosure of votes and opinion authors puts the judge’s conscience and reputation on the line,38 and the repercussions are sometimes severe. Justice Blackmun, for example, continues to be targeted for attack because, over sixteen years ago, he carried out an assignment given to him by then Chief Justice Burger; he wrote the Court’s opinion on women’s access to abortion, Roe v. Wade,39 a 7-2 judgment. The storm following such a decision may sweep away judges who lack the cushion of life tenure. (The majority of our states, I note, still provide for periodic election or reappointment of judges.) Consider the fate of California’s once Chief Justice Rose Bird and her two colleagues, Cruz Reynoso and Joseph Grodin, in the well-financed, successful 1986 campaign against their retention on the California Supreme Court. One commentator wrote in relation to that campaign and its focus on single issues:40

Good judges reaching well-reasoned and even precedentially-restrained results in one particularly controversial case are seriously at risk if a majority of the electorate feels strongly enough about the one issue. Justices who lack principle so that they bend to the pressure of popular opinion will be retained. This places too much external pressure upon the justices.

There is security in anonymity as these illustrations attest. But the judge who works under an anonymity cloak “has nothing like the prominence of the common law judge.”41 Judges nameless to the public who write stylized judgments do not command the moral force judges in the United States sometimes demonstrate. Consider the

38. See Kelman, supra note 4, at 241.
brave performance of certain Fifth Circuit judges and, even more notably, certain district judges in the south in their valiant endeavor to secure compliance with the Supreme Court’s school desegregation decision, Brown v. Board of Education.\textsuperscript{42} I recall, as an example, words written in 1956 by my former D.C. Circuit colleague, Judge J. Skelly Wright. He was at that time a district judge in New Orleans. The words appear in one of his many orders aimed at desegregating the city’s public schools. Judge Wright put his name on the line, his personal safety at risk, and the style is plainly his own:\textsuperscript{43}

The problem of changing a people’s mores, particularly those with an emotional overlay, is not to be taken lightly. It is a problem which will require the utmost patience, understanding, generosity and forbearance from all of us, of whatever race. But the magnitude of the problem may not nullify the principle. And that principle is that we are, all of us, freeborn Americans, with a right to make our way, unfettered by sanctions imposed by man because of the work of God.

Judges on appellate courts in the United States, even those tenured “during good Behaviour\textsuperscript{44} and thus sheltered from electoral accountability, constantly experience internal pressures—the competing tugs of collegiality and individuality. Justice Brennan, speaking of his repeated dissents in death penalty cases, said:\textsuperscript{45}

[T]his type of dissent constitutes a statement by the judge as an individual: “Here I draw the line.” Of course, as a member of a court, one’s general duty is to acquiesce in the rulings of that court and to take up the battle behind the court’s new barricades. But it would be a great mistake to confuse this unquestioned duty to obey and respect the law with an imagined obligation to subsume entirely one’s own views of constitutional imperatives to the views of the majority.

When to acquiesce and when to go it alone is a question our system allows each judge to resolve for herself.


Some judges are more prone to indulge their individuality than others, but all operate under one intensely practical constraint: time. Professor Paul Freund wrote of Justice Brandeis, for whom he clerked: "Not infrequently the preparation of a dissenting opinion was foregone because the demands of other items of work prevented an adequate treatment . . . ." In collegial courts, one gets no writing credit for dissenting or concurring opinions; however consuming the preparation of a separate opinion may be, the judge must still carry a full load of opinions for the court. Dissents or concurrences are written on one's own time.

The danger of crying wolf too often also inhibits separate opinions. Justice Holmes was called "The Great Dissenter," but he in fact dissented less often than most of his colleagues. Chief Justice Stone, a public defender of the right to dissent, once wrote to Karl Llewellyn, another advocate of separate opinions: "You know, if I should write in every case where I do not agree with some of the views expressed in the opinions, you and all my other friends would stop reading [my separate opinions]."

Concern for the well-being of the court on which one serves, for the authority and respect its pronouncements command, may be the most powerful deterrent to writing separately. Professor Freund recently recalled his memory of Justice Cardozo's first year on the Supreme Court:

When I was a law clerk . . . I had access to the docket book of Justice Brandeis. It was burned with the others at the end of the term, and I hope that still obtains. But I was surprised, looking at the docket book, how often Justice Cardozo was in sole dissent in the vote at conference . . . . I . . . surmise [it was] because he was fresh from the New York Court of Appeals, many of the cases at conference were common law cases and he may have had a different view . . . . from the prevailing federal rule.

. . . . I was also struck by how preponderant his course was of suppressing a dissent so that an opinion would come down unanimous . . . .

Professor Alexander Bickel, in his book The Unpublished Opinions of Mr. Justice Brandeis, reported dissenting opinions Justice

47. See ZoBell, supra note 13, at 202.
48. W. Murphy, supra note 11, at 62.
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Brandeis drafted, and circulated among his colleagues, sometimes winning changes in votes, sometimes achieving alterations in majority opinions. Even when Brandeis failed to win concessions, however, he would refrain from publishing the dissent if the majority opinion, though incorrect in his judgment, was narrow and unlikely to cause real harm in future cases.\(^{51}\) Judge Jerome Frank, in a review of Bickel’s book, said of the Brandeis performance:\(^{52}\)

Brandeis was a great institutional man. He realized that the Court is not the place for solo performances, that random dissents and concurrences weaken the institutional impact of the Court and handicap it in the doing of its fundamental job. Dissents and concurrences need to be saved for major matters if the Court is not to appear indecisive and quarrelsome, [for] the appearance of indecision and quarrelsomeness are drains on the energy of the institution, leaving it in weakened condition at those moments when the call upon it for public leadership is greatest. . . . To have discarded some of [his separate] opinions is a supreme example of sacrifice to strength and consistency of the Court. And he has his reward: his shots are all the harder because he chose his ground.

What do separate opinions contribute to the improvement or progress of the law? Most immediately, when drafted and circulated among the judges,\(^{53}\) they may provoke clarifications, refinements, modifications in the court's opinion. They provide, as Chief Justice Stone said, “some assurance to counsel and to the public that decision has not been perfunctory, which is one of the most important objects of opinion-writing.”\(^{54}\) In the category of “minor practical advantages,” a British jurist noted the consolation a dissent may afford the first instance trier: “A contented trial judge,” that reporter observed, “is a better and more confident judge than one who experiences nothing but discouragement from the appellate courts.”\(^{55}\) (Court of appeals judges, whether writing for the court or separately, should remember the district judge's definition of appellate judges: “They are the ones who lurk in the hills while the battle rages; then, when the battle is over, they descend from the hills and shoot all the wounded.”)

Separate opinions in intermediate appellate courts serve an alert function. If appeal from the court's judgment is a matter of right, the

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51. Id. at 28.
52. Frank, Book Review, 10 J. Legal Ed. 401, 404 (1958) (reviewing A. Bickel, The Unpublished Opinions of Mr. Justice Brandeis (1957)).
54. Stone, Dissenting Opinions Are Not Without Value, 26 Judicature 78 (1942).
55. Final Appeal, supra note 8, at 89.
separate opinion may assist the court of next resort by charting alternate grounds of decision. If further review is discretionary, as in the U.S. Supreme Court, a separate opinion may signal to the Court that the case is troubling and perhaps worthy of a place on its calendar.56

Regarding our Highest Court, in a famous dissent Holmes wrote, tongue only partly in cheek, “it is useless and undesirable, as a rule, to express dissent.”57 I suspect he would agree, however, as to some cases, with Chief Justice Hughes’ celebrated statement: “A dissent in a court of last resort is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed.”58

Classic examples include Justice Curtis’ dissent in the _Dred Scott_ case,59 the first Justice Harlan’s dissent in _Plessy v. Ferguson_, 60 Justice Holmes’ dissent in _Lochner v. New York_,61 the Holmes dissent in _Abrams v. United States_,62 the Brandeis concurrence in the result in _Whitney v. California_.63 These extraordinary opinions forecast the future in the realm of equal protection, substantive due process, and freedom of expression.64

Justice Brennan, in the article I quoted earlier, stressed that the dissenters' right in the Supreme Court is exercised most appropriately when fundamental constitutional questions are at stake.65 In constitutional decisionmaking, the Court applies the doctrine of stare decisis with somewhat muted zeal, because short of amendment, only the Court itself can uproot its past decision.66 When statutory interpretation is at issue, there is less cause to write with a later, wiser bench as one's audience. Justice Brandeis counseled: “[I]n most matters it is

56. See, e.g., M. SCHICK, LEARNED HAND’S COURT 339–40 (1970) (of 311 Second Circuit decisions issued with dissents from 1941 to 1951, the Supreme Court reviewed 47, reversing and so vindicating the dissenter 25 times).
60. 163 U.S. 537, 552 (1896).
61. 198 U.S. 45, 74 (1905).
62. 250 U.S. 616, 624 (1919); see also Gitlow v. New York, 268 U.S. 652, 672 (1925) (Holmes, J., dissenting).
63. 274 U.S. 357, 372 (1927).
64. See, e.g., Dennis v. United States, 341 U.S. 494, 507 (1951) (“Although no case subsequent to Whitney and Gitlow has expressly overruled the majority opinions in those cases, there is little doubt that subsequent opinions have inclined toward the Holmes-Brandeis rationale.”).
65. See supra text accompanying note 45.
more important that the applicable rule of law be settled than that it be settled right. This is commonly true even where the error is a matter of serious concern, provided correction can be had by legislation."67 Consider as an example our complex Internal Revenue Code. Generally, is it not "better that the law should be certain than that every judge should speculate upon improvements in it"?68

I do not mean to suggest that dissent or other separate statement in statutory cases is inevitably undesirable. Rather than simply "let sleeping dogs lie,"69 a separate opinion may serve "as a call for rectification by nonjudicial hands,"70 by Congress or an executive agency.71 "[I]t may be important for future policy-making and projected legislation that [the political branches] should know the strength of a minority view."72

III.

Disclosure of votes and separate opinions, I said at the start of these remarks, have made inroads in diverse civil law settings. As examples, I will mention international tribunals, and courts established post-World War II in Italy and West Germany to hear and decide constitutional questions.73

In international tribunals where civil law and common law jurists come together, the practice of publishing votes and separate opinions generally prevails. Most prominently, the International Court of Justice (World Court), seated in The Hague, operates under a 1945 statute providing: "If the judgment does not represent in whole or in part the unanimous opinion of the judges, any judge shall be entitled to

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70. Kelman, supra note 4, at 241.

71. See, e.g., Brock ex rel. Williams v. Peabody Coal Co., 822 F.2d 1134, 1152–53 & n.5 (D.C. Cir. 1987) (Ginsburg, Ruth Bader, concurring) ("Congressional attention to this matter may well be in order.").

72. FINAL APPEAL, supra note 8, at 89.

73. On the introduction of dissenting opinions in Japan after World War II and in newly independent states in South and Central America, see Nadelmann, supra note 5, at 421–22; see also E. McWHINNEY, SUPREME COURTS AND JUDICIAL LAWSMAKING 25 (1986) (Japan).
deliver a separate opinion." Similarly, the European Court of Human Rights, seated in Strasbourg, from its inception in 1950-51 has functioned with full disclosure of separate opinions.

In contrast, the Court of Justice of the European Communities, as organized in 1957, adheres to a principle of formal unanimity and does not permit publication of dissenting opinions. Two factors indicate why. First, the six original members of the European Communities (Belgium, France, Italy, Luxembourg, the Netherlands, West Germany) are civil law nations with traditions against disclosure of votes and publication of separate opinions; the United Kingdom did not become a member of the Communities until 1973. Second, the judges of the European Communities Court serve relatively short, but renewable, six-year terms and there is concern that "publication of separate dissenting opinions could subject [them] to exacting political scrutiny in times of reappointment, perhaps deterring some judges from fully exercising their complete impartiality."

Both Italy and West Germany, after World War II, established special tribunals empowered to decide constitutional questions. Constitutional review by courts is not traditional in either country. These relatively new institutions, which stand apart from the regular judicial hierarchy, admit dissent. A judge of the Italian Constitutional Court may record a dissenting vote, but only the judgment of the Court is published. A larger adjustment was ordered for West Germany's Constitutional Court; pursuant to a 1970 statute, that Court may publish dissenting and concurring opinions. Responding to the concern that reappointment considerations might influence a judge's votes, the same 1970 statute established a relatively long, and nonrenewable,

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77. Grementieri & Golden, supra note 76, at 670; see also L. Brown & F. Jacobs, supra note 76, at 234–35.
79. See Grementieri & Golden, supra note 76, at 671.
80. See id. at 670–71.
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twelve-year term for all Constitutional Court judges.\textsuperscript{81} In the first few years under the statutory permission, dissenting opinions issued in West Germany's Constitutional Court in ten percent of all cases decided by full opinion.\textsuperscript{82} That is about the same dissent rate as in U.S. Courts of Appeals,\textsuperscript{83} but it is modest indeed when compared with the U.S. Supreme Court where the rate of non-unanimous decisions in the same period ran over seventy percent.\textsuperscript{84}

Turning back to the United States to conclude these comments, unanimity in the federal courts of appeals, as I just stated, hovers around the ninety percent mark; the occurrence of separate opinions at that level has not changed significantly in recent decades. In the Supreme Court, the picture is notably different. The rate of non-unanimous decisions mounted from under twenty percent in the early 1900s\textsuperscript{85} to over seventy percent in the middle 1980s.\textsuperscript{86} The ratio of dissenting opinions to majority opinions was less than ten percent in the early 1900s; in the middle 1980s, in number, majority and dissenting opinions ran just about even.\textsuperscript{87}

Addressing a German audience in the early 1930s, Karl Llewellyn responded to the argument that dissents harmfully disturb the security of the law by fostering "a sense of legal uncertainty."\textsuperscript{88} "[S]eparate opinions," Llewellyn reported, "are found in only a small percentage of cases," and by their very infrequency, "serve to reassure people about legal certainty."\textsuperscript{89} That reassurance is not currently operative at our nation's highest judicial instance.

\textsuperscript{81} D. KOMMERS, supra note 21, at 88–89.
\textsuperscript{82} Id. at 195.
\textsuperscript{83} See Ginsburg, supra note 33, at 212 & n.36.
\textsuperscript{84} See, e.g., The Supreme Court, 1973 Term, 88 HARV. L. REV. 43, 276 (1974).
\textsuperscript{86} In the 1985 term, for example, 71\% of the Court's full opinions included at least one dissent. An additional 10\% contained at least one concurrence. See The Supreme Court, 1985 Term: Leading Cases, 100 HARV. L. REV. 100, 306 (1986). In the 1987 term, however, over 35 percent of the Court's full opinions were unanimous and close to 44 percent issued without dissent. See The Supreme Court, 1987 Term: Leading Cases, 102 HARV. L. REV. 143, 352 (1988); Caplan, Rehnquist New and Improved?, A.B.A. J., Jan. 1989, at 40, 45.
\textsuperscript{87} In the 1986 term, there were 152 full opinions for the Court and 154 dissents. The Supreme Court, 1986 Term: Leading Cases, 101 HARV. L. REV. 119, 362 (1987). In the 1987 term, there were 142 full opinions for the Court, and 97 dissents. The Supreme Court, 1987 Term: Leading Cases, 102 HARV. L. REV. 143, 350 (1988).
\textsuperscript{89} Id.
Federal judges at all levels complain of too many and increasingly complex cases. But even overworked lower federal court judges must concede that the Supreme Court’s business has become harder. The Judges’ Bill of 1925 gave the Highest Court discretion, in most circumstances, to select the decisions it believes warrant review, and that discretion has now become virtually complete. The impact of the Court’s certiorari policy—the near disappearance of easy cases—became evident in the 1940s, as the dissent rate moved to over sixty percent. Hard cases do not inevitably make bad law, but too often they produce multiple opinions.

More unsettling than the high incidence of dissent is the proliferation of separate opinions with no single opinion commanding a clear majority. The opening paragraph of the Court’s 1988 decision in Boos v. Barry is illustrative.

O’CONNOR, J., delivered the opinion of the Court with respect to Parts I, II-B, and V, in which BRENNAN, MARSHALL, STEVENS, and SCALIA, JJ., joined, and with respect to Parts III and IV, in which all participating Members joined, and an opinion with respect to Part II-A, in which STEVENS and SCALIA, JJ., joined. BRENNAN, J., filed an opinion concurring in part and concurring in the judgment, in which MARSHALL, J., joined. REHNQUIST, C.J., filed an opinion concurring in part and dissenting in part, in which WHITE and BLACKMUN, JJ., joined. KENNEDY, J., took no part in the consideration or decision of the case.

Keen observers have suggested that this type of performance, if it does not signal even less collegiality on the Supreme Court than in earlier generations, may be attributed to the multiplication of law clerks. Justice Brandeis, as Professor Freund related, put aside some potential dissents for lack of time to reflect and to write. Brandeis had only one clerk; today most Justices have four, to say nothing of

95. Id. at 1160.
97. See supra text accompanying note 46.
more efficient means to retrieve and process words. Has our Supreme Court drifted from its once customary middle way—an opinion for the court sometimes accompanied by a separate opinion—toward the Law Lords' pattern of seriatim opinions, each carrying equal weight, and under which "the English lawyer has often to pick his way through as many as five judgments to find the highest common factor binding on lower courts"?98

Seventh Circuit Judge Richard Posner has urged that, before writing separately, or publishing a separate writing, a judge pause to ponder the question: Is this dissent or concurrence really necessary?99 Instead of exaggerating what one's colleague has written, and then "blast[ing] away at the alleged excess,"100 might it sometimes be prudent to acquiesce provisionally, even if dubitante,101 to withhold speaking separately and at length "at least long enough to see how [the majority's rule] works"?102

Judge Posner suggests that more sensitivity to one's colleagues, and less amour-propre, on the part of court opinion authors as well as potential separate writers, could reduce the number of separate concurring statements that "register a minor reservation," "suggest additional reasons for the result," or "criticize a dissenting opinion."103 The opinion author should be open to incorporating the ideas of others voting on the same side, and the potential separate writer should appreciate that he holds no copyright or other "proprietary interest" in his ideas.104

Particularly problematic among separate concurring statements is the one setting out the writer's interpretation of what the majority opinion really means (or should mean). Such restatements, resembling certain assenting judgments of Law Lords, may "fudge the areas of real agreement," or contain "in the[ir] interstices . . . all the signs of partial dissent without the benefit of the clear hallmark of a dissenting

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98. See Final Appeal, supra note 8, at 90.
100. Final Appeal, supra note 8, at 87; R. Posner, supra note 96, at 233 (“The abusive dissent characteristically exaggerates and distorts the holding of the majority opinion, to the confusion of the bar and lower court judges.”).
101. See Final Appeal, supra note 8, at 86 & n.l.
102. See United States v. Rabinowitz, 339 U.S. 56, 66–68 (1950) (Black, J., dissenting) (objecting to swift overruling of Trupiano v. United States, 334 U.S. 699 (1948), and advocating a "wait-to-see" approach, though Black had dissented in Trupiano).
104. Id. at 240.
they may thus be "deceptive," even "insidious," serving to confuse or "trip up" the incautious or unsophisticated reader.¹⁰⁶

Judges on appellate tribunals, I noted earlier, live daily with the competing claims or demands of collegiality and individuality. It is up to each judge to keep those claims in fair balance. I hope what I have said suggests that jurists in the United States might serve the public better if they heightened their appreciation of the values so prized in the civil law tradition: clarity and certainty in judicial pronouncements.¹⁰⁷

Our Chief Justice, some observers have suggested,¹⁰⁸ may be setting the example. As an Associate Justice, his dissent rate was high.¹⁰⁹ In his first term as Chief Justice, he wrote the fewest separate opinions—nine dissents compared to Justice Stevens' high of thirty-two, no separate concurring statements, compared to Justice Scalia's seventeen.¹¹⁰ In his second term, Chief Justice Rehnquist's total separate statements also numbered nine: seven were dissents, two were concurrences.¹¹¹ While it is too soon to make reliable appraisals,¹¹² if the Chief Justice is calling for more collegiality and caring for one's court as an institution,¹¹³ I heartily concur, and would add no further words.


¹⁰⁶. **Final Appeal**, supra note 8, at 93; R. Posner, supra note 96, at 240.

¹⁰⁷. See Griswold, supra note 96, at 799–800.


¹¹². See Rohde & Spaeth, *Ideology, Strategy, and Supreme Court Decisions: William Rehnquist as Chief Justice*, 72 Judicature 247, 250 (1989) (based on data drawn from National Science Foundation-funded U.S. Supreme Court judicial data base project, authors state that— contrary to popular opinion and press comment—a systematic study of the Chief Justice's votes "indicates that Rehnquist, as chief justice, has not changed his views or strategic behavior," nor is there "appreciable change in his voting in unanimous decisions . . . or cases in which he is the sole dissenter").

¹¹³. See Caplan, supra note 86.