

April 2012

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John J. Hoeffner

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Recommended Citation

Hoeffner, John J. (1991) "One Hundred Years of Solitude: Dissent in the Second Circuit, 1891-1991," *St. John's Law Review*: Vol. 65 : No. 3 , Article 12.

Available at: <https://scholarship.law.stjohns.edu/lawreview/vol65/iss3/12>

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ONE HUNDRED YEARS OF SOLITUDE: DISSENT IN THE SECOND CIRCUIT, 1891-1991

JOHN J. HOFFNER*

No less an authority than Justice Holmes, the "Great Dissenter" himself, considered dissents generally "useless" and "undesirable." While it is probable that almost every judge agrees with Justice Holmes's characterization, it is illustrative of the causes of dissent that almost every judge—if not too modest—probably also can cite from personal experience cases believed to qualify as exceptions to the general rule.¹ In recent years in the United States Court of Appeals for the Second Circuit, at an average rate of approximately once a week, a judge concludes that he or she has found such an exceptional case, and, accordingly, dissents.

Part I of this Article will examine the benefits of dissent, and the considerations that may lead a disagreeing judge to refrain from writing separately. Focusing primarily upon the period before 1891, Part II will provide an historical survey of the practice of dissent in the federal appellate courts generally. In Part III, the emphasis will narrow to the practice of dissent in the Court of Appeals for the Second Circuit since its establishment in 1891, particularly concerning changes in the frequency of dissent and the possible reasons for those changes. Part IV will examine the extent to which the various justifications of dissent appear to have animated the dissents filed in the Second Circuit during this time. Finally, Part V of this Article will disclose patterns in the dissents of individual judges presently serving on the Second Circuit that may be helpful to advocates who find themselves arguing before the court.

* B.A. 1981, Hofstra University; J.D. 1989, St. John's University School of Law. The author is a trial attorney with the Civil Rights Division of the United States Department of Justice, specializing in employment law. Prior to commencing his current position at the Department of Justice, he clerked for Senior Circuit Judge Lawrence W. Pierce of the United States Court of Appeals for the Second Circuit.

¹ Justice Holmes, for example, might have cited *Northern Sec. Co. v. United States*, in which he, in dissent, opined upon the uselessness and undesirability of dissents generally. 193 U.S. 197, 400 (1904) (Holmes, J., dissenting).

I. THE DECISION TO DISSENT

Why dissent? The answer is more complicated than it at first appears. Every dissent, it may be assumed, has its genesis in the fact that a judge disagrees with a majority of his or her colleagues on the proper resolution of a particular case. But such disagreement, while a necessary prerequisite to dissent, does not—or at least should not—inexorably result in a formal and public expression of dissent. Disagreement with the views of a majority should make dissent a possibility, not a certainty. The decision to dissent ultimately must depend upon a subtle weighing and balancing of a myriad of competing concerns, of which the perceived incorrectness of the majority decision is only one factor.

A. *The Case Against Dissent*

Generally, the reasons a judge might choose not to dissent when he or she disagrees with a majority opinion are grounded in (1) prudential concerns of various types, primarily regarding the prompt and efficient administration of justice, and (2) institutional concerns regarding the authority and prestige of the court system. At some point these concerns merge, but they are distinct enough so that each may productively be considered separately.

Judge Learned Hand's comment that a dissenting opinion "cancels the . . . monolithic solidarity on which the authority of a bench of judges so largely depends"² is an example of judicial sensitivity to institutional concerns. The viewpoint expressed by Judge Hand has found adherents in every era in American judicial history at least since the time of John Marshall, himself perhaps the view's foremost advocate.³ The Warren and Burger Courts' strenuous efforts at maintaining unanimity in school desegregation cases implicitly demonstrates that even the members of a disputatious court recognize the deleterious effect dissent may have upon a court's authority and prestige.⁴ The belief is, in sum, that for

² L. HAND, *THE BILL OF RIGHTS* 72 (1958).

³ See generally *infra* Part II.A. As one commentator has noted,

To Marshall, as to many judges, a unanimous opinion carried more weight than one that trailed with it concurrences or dissents. Separate opinions tend to sap the legitimacy of a court. Such opinions suggest that decisions are the product of each judge's personal predilection, rather than ineluctable deduction from "the law."

Friedman, Kagan, Cartwright & Wheeler, *State Supreme Courts: A Century of Style and Citation*, 33 *STAN. L. REV.* 773, 785 (1981).

⁴ See generally B. WOODWARD & S. ARMSTRONG, *THE BROTHERS* 38-110, 345 (1979) (dis-

institutional reasons, it is at times more important for an issue to be settled unanimously than it is for the "right" result always to appear in the form of a dissenting opinion of perhaps no practical import.⁵

Judicial adherence to such a belief in a particular case depends upon the disagreeing judge's evaluation of, among other things, how wrong the majority decision is, and how important it is that the case be settled correctly. Thus, in a case involving a close statutory question of narrow significance, a judge is much more likely to acquiesce silently in the majority view than in a case involving a significant constitutional issue in which positions are polarized.

In the same way that dissent can impair the authority and prestige of a court, so too can an unfortunate byproduct of dissent: a breakdown in collegiality among the court's members. Such a breakdown makes it more likely that caustic language will find its way into the opinions of the court. The result, as with negative advertising in election campaigns, is a demeaning of both the system and its participants.

It is true, as noted by former Justice Powell, that "judges . . . may disagree strongly without personal rancor or ill will."⁶ One may also suffer a blow to the head without developing permanent brain damage. The risk of damage increases, however, with the frequency of the blows. So too does the risk that rancor or ill-will will surface in judicial opinions increase with a rise in the frequency of dissent.

The reason for this is not difficult to fathom. A dissent always suggests, albeit with varying degrees of explicitness, that a col-

lating efforts by Supreme Court Justices to maintain unanimity in certain high-profile cases).

⁵ See THE DOUGLAS LETTERS 165-67 (M. Urofsky ed. 1987) (memorandum of Justice Douglas, dated May 17, 1954, stating that four Justices voted contrary to their view in voting for unanimous opinion in *Brown v. Board of Educ.*, 347 U.S. 483 (1954)); Brennan, *In Defense of Dissents*, 37 HASTINGS L.J. 427, 429 (1986) ("unanimity does have value") (emphasis in original); Johnson, *Foreword: The Accidental Decision and How It Happens*, 65 CALIF. L. REV. 231, 252 (1977) (citing *Brown* and *United States v. Nixon*, 418 U.S. 683 (1974), as cases in which the Supreme Court put aside "what must have been substantial individual differences of opinion so that the Court could speak with the force of unanimity"). Justice Brandeis, for example, did not publish many completed dissents. ZoBell, *Division of Opinion in the Supreme Court: A History of Judicial Disintegration*, 44 CORNELL L.Q. 186, 213 n.139 (1959).

⁶ Powell, *Myths & Misconceptions About the Supreme Court*, 61 A.B.A. J. 1344, 1347 (1975).

league's work is somehow suspect. Its arrival impacts, not as a blow to the head, but perhaps as a blow to the ego. Judges typically are not so delicate as to be unable to inure themselves to such a blow,⁷ but a series of dissents *is* likely to be received as at least annoying, and perhaps more. The well-known conflict between Judges Jerome Frank and Charles Clark in the Second Circuit during the 1940's and 1950's illustrates the danger. Judge Frank dissented more often from Judge Clark's opinions than from the opinions of any other judge.⁸ Eventually, "[t]he sheer number of disputes, the incessant angry letters and memoranda, the dozens of sharp dissents—all of these joined to forge in [Judge Clark's] mind a clear picture of a colleague who was determinedly hostile."⁹

Perhaps the picture would have been more conducive to collegiality had the dissents been fewer; it is impossible to know for sure. However, what is unknowable in a particular case may be ascertained with some certainty in the general one; and, in general, one can say with confidence that dissents damage collegiality. The comments of a Second Circuit judge of more recent vintage, Jon O. Newman, regarding an analogous matter, are instructive:

Collegiality is promoted or impaired by a variety of factors, but frequent use of the *in banc* practice surely poses a threat to what is one of the essential assets of a judicial institution. I believe one reason that majority and dissenting opinions of the Second Circuit are relatively free of the vitriolic language unfortunately found in the writings of some other appellate courts is the infrequency of the occasions when we confront each other as members of an *in banc* court. Members of a panel may and often do disagree with some vehemence, at least during the initial consideration of an appeal, and sometimes the disagreement carries

⁷ A good thing, generally, though it is fortunate that most judges are not able to inure themselves to criticism to the extent achieved by the "famous Master of the Rolls" in the following tale told by Justice Brennan:

After hearing a half hour argument, [the Master of the Rolls, presiding on a three-judge panel], turned to his colleague on the right and said, "John, haven't we heard enough of this—surely we must allow this appeal." "Oh no, Chief," said John, "I couldn't possibly vote to do that." "Oh well, John," said the Master of the Rolls, "you're entitled to be mistaken." He then turned to his colleague on the left. "Tom," he said, "surely you agree that this appeal must be allowed." "Oh no, Chief," said Tom, "I emphatically agree with John." "Well then," said the Master of the Rolls, "the appeal will be allowed and you two argue between yourselves who will write the dissent."

Brennan, *supra* note 5, at 429.

⁸ M. SCHICK, *LEARNED HAND'S COURT* 322 (1970).

⁹ *Id.* at 243.

through to the opinion-writing stage. But in a court of thirteen members, there is usually a period of three or four months, sometimes considerably longer, between sittings in which a particular pair of judges will find themselves assigned to the same panel. The vigor of a prior disagreement has time to subside. Of course, an occasional rehearing in banc poses no threat to collegiality, but if we were confronting one another frequently each year as members of an in banc court, I believe there would be at least some risk to the extremely high level of civility that now pervades our relationships both in the decision-making and opinion-writing phases of our work.¹⁰

While Judge Newman was not speaking of the practice of dissent, the relevance of his comments seems clear. Indeed, frequent dissent must be regarded as a greater threat to collegiality than the "frequent use of the in banc practice" to which Judge Newman's comments are addressed. Judge Newman's caution, after all, is founded on the fact that such "frequent use" increases the possibility of disagreement, *i.e.*, the possibility of dissent. A direct caveat against frequent dissent, on the other hand, counsels caution in an area where conflict is not merely possible, but certain. And just as infrequent use of the in banc procedure provides maximum time for "[t]he vigor of a prior disagreement . . . to subside," so too does a dissent forgone. To disregard such concerns is to risk first a worsening of a court's "level of civility," and then the manifestation of that decline in the form of the increased use of "vitriolic language" in the opinions of the court. The almost inevitable result is a lessening of institutional (and individual) prestige.¹¹

Besides damaging institutional prestige, the loss of collegiality brought about by dissent also impairs a court's ability to administer justice promptly and efficiently. The impairment, while not possible to quantify, is equally impossible to deny. Good personal relations surely make smooth working relations more likely, and smooth working relations usually translate into increased effi-

¹⁰ Newman, *Foreword: In Banc Practice in the Second Circuit, 1984-1988*, 55 BROOKLYN L. REV. 355, 369 (1989).

¹¹ By bringing about a loss of collegiality, dissent can also damage a court's prestige by harming the quality of the court's work. As former Second Circuit Chief Judge Wilfred Feinberg has noted, "collegiality . . . improves the quality of opinions When members of a panel are willing to listen to the suggestions of their colleagues regarding a proposed disposition and ultimately regarding a proposed opinion, the work product usually benefits. Three heads are almost always better than one." Feinberg, *The Office of Chief Judge of a Federal Court of Appeals*, 53 FORDHAM L. REV. 369, 385 (1984).

ciency.¹² Chief Justice Marshall was extremely sensitive to this correlation: he often expressed "serious concern about seemingly petty trifles, such as the choice of a boardinghouse commonly shared by the Court members . . . because he felt that close social relations were essential to decision-making uniformity."¹³ When it appeared in his thirtieth year on the Court that the Justices would not share a common boardinghouse, the Chief Justice predicted a negative impact on the Court's efficiency in a letter to Justice Joseph Story: "I think . . . if the Judges scatter ad libitum, the docket, I fear, will . . . los[e] very few of its causes . . ."¹⁴

In addition to reducing a court's efficiency through its indirect effect on collegiality, a dissent also works to achieve the same end more directly. It is a simple and incontestable fact that dissents take time—time to write, time to respond to—that might otherwise be dedicated to completing a majority opinion of one's own or studying a draft of a colleague's. A dissent thus delays the prompt resolution of not only the case in which it is made, but other cases as well.

Concededly, this concern appears at first a bit unseemly, more suggestive of an assembly line than of a courtroom. But with the adage about justice delayed being justice denied nicely encapsulating the reason why, promptness in decision-making has been long recognized as an independent value of some weight.¹⁵ The reasons for this recognition are numerous. Delay, for example, "increases the pressure for settlement and improves the bargaining position of undeserving litigants who are sheltered by it. [It also] may result in the deterioration of evidence and thus impair the ultimate quality of decisions in cases in which new trials are re-

¹² See Feinberg, *supra* note 11, at 384. As Judge Feinberg has noted, "[t]he essence of a smoothly functioning court is collegiality. That spirit extends to every aspect of the court's operation: the number of cases it disposes of, the speed of disposition and the quality of the judicial work product." *Id.* See generally Goldman & Lamb, *Prologue*, in JUDICIAL CONFLICT AND CONSENSUS 2 (S. Goldman & C. Lamb eds. 1986) (noting negative impact on efficiency that results "[i]f a reasonable degree of consensus is not reached through amicable give-and-take"); Wald, *Some Thoughts on Judging as Gleaned from One Hundred Years of the Harvard Law Review and Other Great Books*, 100 HARV. L. REV. 887, 905-07 (1987) (collegiality among judges is a factor affecting judicial decision-making).

¹³ J. SCHMIDHAUSER, JUDGES AND JUSTICES: THE FEDERAL APPELLATE JUDICIARY 113 (1979).

¹⁴ *Id.* at 114 (quoting letter from John Marshall to Joseph Story (May 3, 1831)).

¹⁵ See, e.g., FED. R. CIV. P. 1 (the rules "shall be construed to secure the just, speedy, and inexpensive determination of every action") (emphasis added).

quired."¹⁶ It is for these reasons, among others, that Learned Hand, recognizing the importance of prompt decision-making, admonished Judge Clark: "After you and [Judge Frank] get through amending your opinions, and stop shouting, for God's sake file the opinions."¹⁷ And for the same reasons, judges of the Second Circuit have taken justifiable pride in the circuit's status as the court with the lowest median time in the nation for processing appeals during most of the last decade.¹⁸

Prudential considerations of another sort also work to limit dissent. Most published dissents, as far as the particular issue in

¹⁶ Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 HARV. L. REV. 542, 554 (1969). In 1978, then-Chief Judge Irving R. Kaufman expressed similar thoughts while addressing an in banc Special Session of the Second Circuit:

Speed, of course, is not an end in itself. No court can adequately fulfill its role merely by churning out dispositions. Each individual who appears before judges deserves a fair hearing and the benefit of their considered and reasoned judgment. But when courts are insensitive to the need to maintain the machinery of justice in proper working order, they are short-changing litigants and being unfair to the consumers of justice. Poor management increases the expense and time necessary for the resolution of even the simplest dispute. Cost and delay, the twin demons of the judicial process, may deter some from seeking vindication of their rights. Unprincipled reliance on plea-bargaining is a by-product of this. And these demons may lead other litigants to compromise valid claims. Unfortunately, all too often, the cost of a forced settlement is far less than the price of justice. Accordingly, courts are everywhere being exhorted, by poor litigants and large corporations alike, to exorcise these demons. If we ignore these pleas, we risk the loss of public confidence.

Proceedings from the Special Session of the United States Court of Appeals for the Second Circuit 21 (June 26, 1978), in 578 F.2d [hereinafter *Special Session*].

¹⁷ Memorandum from Learned Hand to Charles Clark (Nov. 26, 1943), quoted in M. SCHICK, *supra* note 8, at 241. Apparently, Judge Hand adopted such an exasperated tone only after he failed in an attempt to effect change in his argumentative colleagues by affecting a tone of disapproving resignation:

I like to dance in the moonlight as well as any man, but my wind is not as good as it once was, and I cannot keep time with the antiphonal strophe and antistrophe of my youthful colleagues. "When, as, and if" between you—and supposing that happy time shall ever arrive—you come to the point of exhaustion, I shall play upon the harp and timbrel and lift up my voice in praise to God. BUT, while all this agitating cerebration remains in parturition, I shall merely sit on the side lines, contemplate my navel, and repeat the syllable, OM.

Id. (quoting memorandum from Learned Hand on Petition for Rehearing in *Cover v. Schwartz* (Jan. 6, 1943)).

¹⁸ See *United States v. Delia*, 925 F.2d 574, 575 (2d Cir. 1991); Feinberg, *supra* note 11, at 385; Kaufman, *Must Every Appeal Run the Gamut?—The Civil Appeals Management Plan*, 95 YALE L.J. 755, 761 (1986); Newman, *supra* note 10, at 382; Newman, *Foreword: In Banc Practice in the Second Circuit: The Virtues of Restraint*, 50 BROOKLYN L. REV. 365, 382 (1984).

dispute is concerned, are exercises in futility, "full of sound and fury, signifying nothing,"¹⁹ affecting as they do neither the resolution of a particular case nor the future course of the law. Pennsylvania once thought dissents were of such little utility that by statute it forbade their publication in its state reporter.²⁰ Pennsylvania's cure was surely worse than the disease, but the importance of dissent frequently is exaggerated. It has been noted that no more than one-tenth of the dissents of Justice Holmes were of any future significance;²¹ and indeed, even this estimate may be inflated: "One must not too readily assume [the existence of a causal relationship between a prior dissent and the present law]. Fortuitous predictions should be distinguished from actual influence."²²

Judges are aware of the futility of most dissents. Admittedly, by itself this awareness might do little to discourage the practice in a particular case. There is a huge difference between perceiving an action as certainly futile and perceiving it as *almost* certainly futile—it is on the exploitation of this difference that lotteries are built. A dissent is a judge's lottery ticket, hope springs eternal even behind the chambers' door, and, absent other considerations, given an inch of hope, a disagreeing judge might be inclined to take six columns of the *Federal Reporter*. The institutional and prudential considerations noted earlier *are* always present, however, and the expectation of a dissent's futility probably strengthens the sway of these considerations, and it thereby indirectly reduces the incidence of dissent. The decision to dissent always involves a risk-benefit analysis; awareness of the improbability that any benefit will accrue surely makes it all the more difficult to discount the dangers.

B. *The Case for Dissent*

The benefits of dissent are of two types: the first type reflects

¹⁹ W. SHAKESPEARE, *MACBETH*, at V.v. 219-20. Speaking of prudential concerns, the author hereby emphasizes, stresses, highlights, underscores, and underlines what should hardly be necessary to note: that more extensive quotation of Macbeth's statement would be entirely inappropriate.

²⁰ See Act of April 18, 1845, Pa. Laws 374; see also Simpson, *Dissenting Opinions*, 71 U. PA. L. REV. 205, 206-08 (1922) (historical discussion of Pennsylvania statute prohibiting publication of dissents).

²¹ ZoBell, *supra* note 5, at 211.

²² *Id.*

broad, system-wide concerns; the second, concerns limited to the particular issues on which the dissent is based. The broad, system-wide benefits are unlikely to act as a conscious influence upon the decision to dissent in most cases, but in assessing the value of dissent, such benefits are of more than incidental importance.

The most significant of the broader benefits arises from the fact that the mere possibility of dissent tends to assure diligence on the part of the writer of the majority opinion. The possibility that flaws in reasoning will be exposed by a dissent is a powerful disincentive to any inclination to, in Learned Hand's phrase, "win the game by sweeping all the chessmen off the table."²³ The threat of dissent, as much as dissent itself, "improves the final product by forcing the prevailing side to deal with the hardest questions urged by the losing side."²⁴

The next system-wide benefit attributable to dissent is that "it indicates that the case was considered by the full bench of judges who sat and that the opinion of the court was not perfunctorily adopted as written by one judge."²⁵ It thus helps to satisfy, if not the reality of justice, at least its appearance.²⁶

The last of the broad benefits attributable to dissent is that the possibility of dissent contributes to the job satisfaction of appellate judges, not an insignificant consideration at a time when judges are leaving the federal bench in unprecedented numbers.²⁷ Second Circuit Judge Wilfred Feinberg has noted that "[t]here is a

²³ L. HAND, *Mr. Justice Cardozo*, in *THE SPIRIT OF LIBERTY* 131 (1960). A California Supreme Court Justice has remarked that "[s]o long as there is a dissenter on any court, the other justices will examine carefully their own views on any particular subject." Carter, *Dissenting Opinions*, 4 *HASTINGS L.J.* 118, 118 (1952).

²⁴ Brennan, *supra* note 5, at 430. In the view of one commentator, even this incentive is not sufficient to eradicate "the accidental decision," *i.e.*, the obviously wrong decision "not easy to explain on any theory other than that some members of the court simply did not pay attention." Johnson, *supra* note 5, at 233. Whatever the extent to which this explanation is correct, were it not for the threat of dissent, "accidental decisions" would surely be much more prevalent.

²⁵ Pound, *Cacoethes Dissentiendi, The Heated Judicial Dissent*, 39 *A.B.A. J.* 794, 795 (1953); *see also* Carter, *supra* note 23, at 119 ("[w]hen there is a dissenting opinion, the attorney for the losing side can be assured that the case has received a thorough airing in the conference room and that the majority opinion is not a one-man decision blindly concurred in by the other justices").

²⁶ Of course, dissent can also undercut the appearance of justice by "emphasizing the personal composition of courts." Bowen, *Dissenting Opinions*, 17 *GREEN BAG* 690-97 (1905), *quoted in* J. SCHMIDHAUSER, *supra* note 13, at 172.

²⁷ *Cf.* Oakes, *Grace Notes on "Grace Under Pressure,"* 50 *OHIO ST. L.J.* 701, 715 (1989) ("judges' morale is . . . at an all-time low").

special affection for dissenting opinions, those often-neglected and frail judicial offspring."²⁸ Not every judge, it is true, is so enamored of dissent as was Justice Douglas, who (at least according to Chief Justice Rehnquist) sometimes gave "the impression that he was disappointed to have other people agree with his views in a particular case, because he would therefore be unable to write a stinging dissent."²⁹ The dissent is, however, the forum in which the contribution of the individual judge is most apparent. A reversal by the Supreme Court or an in banc circuit court based upon the arguments offered by one in dissent is surely a most rewarding affirmation of one's judgment and legal ability; the possibility of such vindication goes a considerable way in providing some relief from the accumulated frustrations of repressed disagreements that are an inevitable part of the appellate judge's professional life.³⁰

The narrower benefit of dissent is obvious: dissent can influence the development of a particular branch of the law in the direction the dissenter desires. The probability that it will do so is something the dissenter should assess at every stage until filing. A full assessment requires the dissenter to measure the probable influence of the dissent on the decision-making of three distinct audiences: (1) the majority; (2) "higher authority"; and (3) "lower authority."

The first audience the dissenter seeks to influence is the majority. Since a disagreeing judge may register disagreement with this audience without filing a formal dissent—indeed, the "dissent" may originally be cast in the form of a suggestion in a memorandum—the risks are relatively low. An unpublished dissenting draft opinion does nothing to damage institutional prestige, and—as long as it remains unpublished—little to damage collegiality. Accordingly, in internal memoranda or in an unpublished draft dissent, a judge may be more inclined to advocate views less strongly held and of a less central nature than might be appropriate in a published dissent.³¹ The result may be to persuade the

²⁸ *Cameco, Inc. v. S.S. American Legion*, 514 F.2d 1291, 1300 n.1 (2d Cir. 1974) (Feinberg, J., concurring).

²⁹ W. REHNQUIST, *THE SUPREME COURT: HOW IT WAS, HOW IT IS* 255 (1987).

³⁰ See W. DOUGLAS, *AMERICA CHALLENGED* 4 (1960). Indeed, Justice Douglas wrote that "[t]he right to dissent is the only thing that makes life tolerable for a judge of an appellate court." *Id.*

³¹ It is suggested that the disagreeing judge should at least believe in his proposed opinion to a greater extent than the judge who, when told that his draft dissent had persuaded his colleagues to adopt his view, expressed alarm because he was not sure he wanted that

majority to adopt the minority view.³² Thus, at least initially, the most effective dissent is one that makes its publication as a dissent unnecessary.

When a majority chooses not to adopt a proposed dissenting opinion, however, *i.e.*, when the first audience conclusively rejects the dissenter's point of view, the disagreeing judge must decide whether to appeal to the second and third audiences, *i.e.*, "higher" and "lower" authority, respectively. Higher authority, if the original appeal is to a federal circuit court panel of three judges, means the *in banc* circuit court, the Supreme Court, or the appropriate legislature; lower authority, the district courts and the bar. An appeal to these audiences requires publication,³³ which means that all the aforementioned attendant risks of dissent must be considered and weighed against the possibility that the dissent will find an approving audience.

Realistically, in most instances the possibility that the dissent will find such an audience in the *in banc* circuit court, the Supreme Court,³⁴ or the appropriate legislature is remote. However, dissent does seem to increase the odds that an opinion will be reversed or otherwise overruled. For example, only three of the sixteen cases the Second Circuit has decided *in banc* since 1980 were originally decided by a unanimous three-judge panel.³⁵ The presence of dis-

view to be the law. See Pound, *supra* note 25, at 794. As one judge has noted, the dissent is not the place to publicize every doubt one has about a majority opinion: "if [I] dissented every time [I] entertained a doubt, even a serious doubt, [I] would quite frequently dissent from [my] own opinions." Evans, *The Dissenting Opinion—Its Use and Abuse*, 3 Mo. L. Rev. 120, 120 n.1A (1938).

³² Justice Brennan has noted that "[i]t is a common experience that dissents change votes, even enough votes to become a majority." Brennan, *Address*, Maxwell Air Force Base, Alabama (Sept. 9, 1963), *quoted in* J. SCHMIDHAUSER, *supra* note 13, at 193.

³³ It is possible a circuit judge could refrain from publishing a dissent and yet appeal to the *in banc* court via a request for a vote on a suggestion for a hearing *in banc*, accompanied by an internal memorandum explaining the causes of the judge's discontent. But this is an ineffective strategy when the ground for the *in banc* request is that "the proceeding involves a question of exceptional importance," since one indication that a question is of exceptional importance is the willingness of a judge to dissent from a perceived incorrect answer to the question. The failure to dissent undercuts the urgency of the judge's request. For similar reasons, it is also an ineffective strategy when the ground is that *in banc* consideration is necessary to maintain decisional uniformity. See FED. R. APP. P. 35.

³⁴ See Feinberg, *supra* note 11, at 369 (courts of appeals "operate as [courts] of last resort in approximately ninety-nine percent of the cases they decide").

³⁵ Those three cases are *Beauford v. Helmsley*, 865 F.2d 1386 (2d Cir.) (*in banc*), *vacated*, 492 U.S. 914 (1989); *Black v. Red Star Towing & Transp. Co.*, 860 F.2d 30 (2d Cir. 1988) (*in banc*); *Armstrong v. McAlpin*, 625 F.2d 433 (2d Cir. 1980) (*in banc*), *vacated*, 449 U.S. 1106 (1981). Cf. Sturgess, *Federal Court Watch: Appellate Court Backs Stevens*, Legal

sent also seems to influence positively the Supreme Court's decision to grant certiorari,³⁶ as well as the likelihood that the Supreme Court will reverse upon the merits.³⁷ Additionally, even if the dissent initially fails to persuade the Supreme Court to grant certiorari, it may ultimately achieve indirectly the same end by persuading another circuit that the dissent is correct, since conflict among the circuits may attract the attention of the Court to a particular issue where conflict within a circuit has not.³⁸

Of course, in the latter instance, resolution of the particular case that engendered the dissent remains unchanged; the battle stays lost though the war is won. This also occurs when, as sometimes happens, a dissent influences the legislature to enact "corrective" legislation.³⁹ While the losing party in the original appeal is unlikely to derive much cheer from such a "victory," the more removed perspective of the dissenting judge may allow for the derivation of at least a modest degree of satisfaction.

A final possible benefit of dissent is that it can "emphasize the limits of a majority decision that sweeps, so far as the dissent[] [is] concerned, unnecessarily broadly—a sort of 'damage control' mechanism. Along the same lines, a dissent sometimes is designed to furnish litigants and lower courts with practical guidance—such as ways of distinguishing subsequent cases."⁴⁰ Here, the targeted audience—lower courts and litigants—constitutes a type of authority whose lower status does not preclude it from exercising some influence upon the decision-making of higher powers. Of course, the scope of this influence is limited by the dictates of the majority decision, but such influence may be felt where ambiguity exists. In sum, to return to a previous analogy, even if the war, as well as the battle, is lost, dissent can be viewed as beneficial in that it can lead to the negotiation of a relatively favorable peace.⁴¹

Times, June 24, 1991, at 7 (noting it is unusual for District of Columbia Circuit to hear case in banc in absence of panel dissent).

³⁶ See M. SCHICK, *supra* note 8, at 339-40; Tanenhaus, Schick, Muraskin & Rosen, *The Supreme Court's Certiorari Jurisdiction: Cue Theory*, in JUDICIAL DECISION-MAKING 111, 123-24 (G. Schubert ed. 1963); see also S. Ct. R. 14.1(k)(i) (petitions for certiorari must include copy of all prior opinions of "court whose decision is sought to be reviewed").

³⁷ See M. SCHICK, *supra* note 8, at 340.

³⁸ See S. Ct. R. 10.1(a); see also W. REHNQUIST, *supra* note 29, at 265.

³⁹ See Carter, *supra* note 23, at 119.

⁴⁰ Brennan, *supra* note 5, at 430.

⁴¹ One problem with a dissent of this type is that the more convincingly it demonstrates the limits of the majority decision, the less reason there is for a higher authority to reverse or overrule the same.

II. DISSENT IN THE FEDERAL COURTS BEFORE 1891

A. *The Supreme Court*

Although the reasons for dissenting and for withholding dissent have remained fairly stable since the establishment of the federal court system by the Constitution and the First Congress, American judicial attitudes toward dissent have changed often. In the beginning, dissent was the norm: "In most if not all of the courts of last resort in this country, the judges originally expressed their opinions *seriatim*; the dissents, of course, thereby always appearing."⁴² This mode of decision-making—in which each judge writes an opinion regardless of whether he or she agrees with the court's judgment—was adopted from the English practice. That practice, as favorably noted by Thomas Jefferson, allowed for *seriatim* opinions "in all but self-evident cases".⁴³

The Supreme Court followed the English practice for most of its first decade. During this period, "seriatim opinions were always filed in important cases."⁴⁴ The publication of each judge's individual opinion permitted the expression of variations in reasoning rarely equalled since.⁴⁵ Even today, while the Justices of the Supreme Court hardly can be said to exhibit an undue reluctance to write separately, the institutional preference favors a single opinion joined by all members of the Court, thereby discouraging, however slightly, the highlighting of all but fundamental disagreements. In contrast, the early years of the Supreme Court were marked by an institutional preference that encouraged the discussion of even minute differences in reasoning.⁴⁶ Since each Justice was expected to write separately in each case, there was no inducement to compromise.

The ascension of John Marshall to Chief Justice in 1801 ended the practice of deciding cases by *seriatim* opinion. Instead, Chief Justice Marshall persuaded the Court to allow one member of the Court to speak for all, to deliver not merely the opinion of the in-

⁴² Simpson, *supra* note 20, at 207.

⁴³ Letter of Thomas Jefferson to William Johnson (1822), *quoted in* J. SCHMIDHAUSER, *supra* note 13, at 109.

⁴⁴ ZoBell, *supra* note 5, at 192.

⁴⁵ J. SCHMIDHAUSER, *supra* note 13, at 107.

⁴⁶ *See, e.g., Georgia v. Braislford*, 2 U.S. (2 Dall.) 402 (1792). In *Braislford*, the first case the Court decided by full opinion, all six Justices wrote opinions; the first opinion published was a dissent. *Id.* at 405 (T. Johnson, J., dissenting).

dividual justice but the opinion "of the Court." Not coincidentally, the Justice most often chosen to deliver the opinion of the Court was Chief Justice Marshall himself. During the period from 1801-1804, for example, the Supreme Court decided twenty-six cases by written opinion. Chief Justice Marshall authored the opinion of the Court in twenty-four of these cases; in the other two, he recused himself.⁴⁷ Only one concurring opinion was written during this time;⁴⁸ there were no dissents.

At least during the early years of the Marshall Court, the antipathy of the Justices toward dissenting opinions was intense. Justice William Johnson, appointed by Jefferson in 1804, wrote that after his appointment,

[s]ome case soon occurred in which I differed from my brethren, and I thought it a thing of course to deliver my opinion. But, during the rest of the session I heard nothing but lectures on the indecency of judges cutting at each other, and the loss of reputation which the Virginia appellate court had sustained by pursuing such a course. At length I found that I must either submit to circumstances or become such a cypher in our consultations as to effect no good at all. I therefore bent to the current⁴⁹

Even John Marshall's abundant persuasive powers, however, ultimately were insufficient to maintain the extraordinarily strong compunction against dissent exhibited by the Court during the years 1801-1804. Indeed, yielding to the changing mores of the Court, "Marshall himself eventually filed nine dissents."⁵⁰ But at no time during his entire thirty-five-year tenure on the Court did the decision to write separately assume the degree of ordinariness it has today. Justice Story's view, which may be considered representative of the views of the members of the Court during the latter years of the Marshall era,⁵¹ was disclosed in a letter to Court

⁴⁷ J. SCHMIDHAUSER, *supra* note 13, at 111-12. Marshall's actual dominance was somewhat less complete than the figures given above indicate. The Chief Justice certainly was open to modifying his personal view in order to achieve unanimity, even to the point of writing opinions "contrary to his own judgment and vote." Letter from William Johnson to Thomas Jefferson (Dec. 10, 1822), *quoted in* D.G. MORGAN, *JUSTICE WILLIAM JOHNSON: THE FIRST DISSENTER* 182 (1954).

⁴⁸ The concurrence was by Justice Chase in *Head & Amory v. Providence Ins. Co.*, 6 U.S. (2 Cranch) 127, 169 (1804).

⁴⁹ Letter from William Johnson to Thomas Jefferson (Dec 10, 1822), *quoted in* D.G. MORGAN, *supra* note 47, at 182.

⁵⁰ ZoBell, *supra* note 5, at 196.

⁵¹ The only Justice with a different view appears to have been Justice Johnson. See generally D.G. MORGAN, *supra* note 47; Seddig, *John Marshall and the Origins of Supreme*

Reporter Henry Wheaton:

At the earnest suggestion (I will not call it by a stronger name) of Mr. Justice Washington, I have determined not to deliver a dissenting opinion in *Olivera v. The United Insurance Company*. The truth is, I was never more entirely satisfied that any decision was wrong, than that this is, but Judge Washington thinks (and very correctly) that the habit of delivering dissenting opinions on ordinary occasions weakened the authority of the Court, and is of no public benefit. It is no small proof of my good nature, that I have yielded in this instance, for since my return I have read pretty fully on the subject, and am more and more convinced that my original opinion was right.⁵²

Similarly, in 1827, Chief Justice Marshall, indicating his reluctance to write separately, described it as his "custom," when he disagreed with the Court, to "acquiesce silently in its opinion."⁵³

Dissent on the Supreme Court increased with the appointment of Roger Taney as Chief Justice in 1836. Occasionally, a decision of the Taney Court would illustrate with stark clarity the extent of the movement away from the persuasive unanimity of the early years of the Marshall Court. In the *Passenger Cases*⁵⁴ of 1849, for example, a 5-4 vote yielded eight opinions. On the surface, the existence of such a decision suggests the ephemerality of Chief Justice Marshall's influence over the Court's institutional norms. The surface appearance of mere ephemeral influence is ostensible only, however; the core truth is that Chief Justice Marshall's legacy in this area is one of enduring influence. The bevy of opinions that so distinguished the decision in the *Passenger Cases* as a rarity during Chief Justice Taney's tenure would have marked it as a commonplace in the years before John Marshall became Chief Justice. Cases in which the majority of Justices write separately remain a rarity today. Chief Justice Marshall's legacy is thus not that he eliminated dissent, but rather that by establishing the single majority opinion as the normal mode of decision, he encouraged a practice of bargaining and compromise among the Justices, which

Court Leadership, 36 U. Prrt. L. Rev. 785 (1975).

⁵² 2 THE LIFE AND LETTERS OF JOSEPH STORY 303-04 (W. Story ed. 1851).

⁵³ *Bank of United States v. Dandridge*, 25 U.S. (12 Wheat.) 64, 90 (1827) (Marshall, C.J., dissenting); see also J. MORRIS, FEDERAL JUSTICE IN THE SECOND CIRCUIT 39 (1987) (noting silent acquiescence of Justice Livingston in 1819 decision of Supreme Court directly contrary to decision by Justice Livingston while on circuit two years before).

⁵⁴ 48 U.S. (7 How.) 283 (1849).

thereafter has been characteristic of the Court's deliberations, and which thereafter has worked to minimize dissent's incidence.

Of course, dissent has increased in the Supreme Court since the time of John Marshall. The bulk of the increase, however, is a twentieth century phenomenon. Justice Samuel Blatchford, for example, who served on the Court from April 1882 to July 1893, authored only two dissents during those eleven years.⁵⁵ This rate of dissent of fewer than one every five years (for an average of .18 per year) was low for the time, and is inconceivably low by the standards of today, when the most accommodating Justice still averages more than five dissents each year.⁵⁶ Even the first Justice Harlan, however, who was known for his dissents, averaged only approximately 3.45 per year during the same eleven-year period from 1882 to 1893. Most of the other Justices averaged somewhere in between .18 and 3.45 dissents per year.⁵⁷

Thus, when the modern federal courts of appeals were established in 1891, a Justice's individual expression of opinion had lost some of the stigma that attached to it during the era of the Marshall Court, but had not yet reached the degree of respectability accorded to it by the members of the modern Court.⁵⁸ One might say that the collective attitude of the Justices toward separate opinion writing had evolved incrementally from regarding separate opinions as nearly conclusively illegitimate to regarding them with a kind of permissive presumption of illegitimacy. The evolutionary trend has continued in the century since 1891, to the point where today, in the Supreme Court, it might be said that the only presumption is one favoring legitimacy absent strong evidence to the contrary.⁵⁹

⁵⁵ J. MORRIS, *supra* note 53, at 73.

⁵⁶ See, e.g., *The Supreme Court, 1989 Term*, 104 HARV. L. REV. 129, 359 (1990) (chart indicating dissenting Justices); *The Supreme Court, 1986 Term*, 101 HARV. L. REV. 7, 362 (1987) (same).

⁵⁷ Fifteen Justices served on the Supreme Court from April 1882 to July 1893. During this time, only Justices David J. Brewer and Henry B. Brown—who began service on the Court in 1890 and 1891, respectively—dissented at a rate higher than that of Justice Harlan. No Justice dissented at a rate lower than that of Justice Blatchford.

⁵⁸ See generally Brennan, *supra* note 5 *passim*.

⁵⁹ The history of dissent in the Supreme Court has been explored in detail in Percival E. Jackson's *Dissent in the Supreme Court* (1969). That book notes dissent in the Supreme Court remained low throughout John Marshall's tenure as Chief Justice. *Id.* at 40. After Chief Justice Marshall left the Court, the frequency of dissent fluctuated up and down for approximately the next 100 years, always at a higher rate than that of the Marshall Court, but always too at a rate considerably lower than that of the present Court. See *id.* at 41, 96-

B. *The Lower Federal Courts*

Federal intermediate appellate courts have existed since 1789. However, the peculiar structure of the appellate system prior to 1891 discouraged the independent development of any institutional preferences in the intermediate appellate courts for or against separate opinion writing.

The first implementation of the Congressional authority to "from time to time establish" lower federal courts⁶⁰ became law on September 24, 1789 when President Washington signed the Judiciary Act of 1789.⁶¹ That Act created thirteen district courts, each with a single district judge, and three circuit courts. The circuit courts were granted trial and appellate jurisdiction.⁶² However, no separate circuit judgeships were authorized at this time; the circuit court was to consist of two Supreme Court Justices assigned to the circuit plus the respective district judge.

The Judiciary Act of 1801⁶³ abolished the Justices' circuit-riding responsibilities, concomitantly creating the first separate circuit judgeships. The Act established six circuit courts, with New York, Connecticut, and Vermont grouped together for the first time as the Second Circuit. The incoming Jeffersonians repealed the Federalist-sponsored 1801 Act⁶⁴ and passed their own version of judicial reform in 1802.⁶⁵ The later Act maintained the composition of the Second Circuit—New York, Connecticut, and Vermont—but abolished the separate circuit court judgeships (all of which had been filled by Federalists),⁶⁶ and, with slight changes, reinstated the Justices' circuit-riding duties. Each Justice—there were six at the time—was assigned to one of the six circuits. The circuit court was composed of the circuit justice and the local dis-

97, 169, 175. A substantial increase in the rate of dissent began in the 1940's, and has been maintained to this day. *See id.* at 221, 251; Kurland, *Earl Warren, The "Warren Court," and the Warren Myths*, 67 MICH. L. REV. 353, 355 (1968); *see generally Harvard Law Review's annual Supreme Court review, e.g., The Supreme Court, 1989 Term, supra note 56, at 359; The Supreme Court, 1950 Term*, 65 HARV. L. REV. 107, 181 (1951).

⁶⁰ U.S. CONST. art. III, § 1.

⁶¹ Act of September 24, 1789, 1 Stat. 73.

⁶² The circuit courts were authorized to exercise appellate review over final decrees in civil cases in which the sum in controversy exceeded fifty dollars and in admiralty and maritime cases in which the sum in controversy exceeded three-hundred dollars.

⁶³ Act of Feb. 13, 1801, 2 Stat. 89 (repealed 1802).

⁶⁴ Act of March 5, 1802, 2 Stat. 132.

⁶⁵ Act of April 29, 1802, 2 Stat. 118.

⁶⁶ M. SCHICK, *supra* note 8, at 41.

strict judge. To lessen the hardships on the Justices—"the system is commonly believed to have been fatal to Justices Wilson and Iridell"⁶⁷—Congress permitted the circuit court to be commenced by a single district judge.

With some minor adjustments in response to the nation's geographic growth and an uneven growth in caseload, the system outlined above was maintained until 1869. For a number of reasons, it is difficult to attribute to the circuit courts—then "the weak spot" in the federal judiciary⁶⁸—the development of any independent culture of dissent.

To the extent the Supreme Court Justices participated in the circuit courts' appellate work, it might be conceded that the circuit courts' attitude toward dissent reflected the Supreme Court's attitude. But other factors militate against this conclusion, and suggest instead that rather than a derivative attitude, the circuit courts developed no attitude at all.

As noted, the circuit court could be held by a single judge. From the available evidence, it appears that it usually was.⁶⁹ Obviously, this was not conducive to dissent—it is one of the few remaining unchallenged legal absolutes that every judge on a one-judge tribunal will agree with the decision of the court. Moreover, as the district judges could convene the circuit court on their own, "the privilege of non-attendance came increasingly to be used by the circuit justices."⁷⁰ "Correspondingly, circuit court review of district court decisions became more and more frequently futile."⁷¹ It is little wonder that lawyers preferred to appeal directly to the Supreme Court.⁷² The confluence of these factors explains in large part why only two dissenting opinions are recorded in the reported decisions of the circuit court in the twenty-five years before the Judiciary Act of 1869 became effective.⁷³ And the existence of these factors counsels against viewing the rarity of dissent as conclusive of an institutional bias against dissent on par with that of the Supreme Court during the early years of the Marshall Court.

⁶⁷ C. HOUGH, *THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK* 13 (1939).

⁶⁸ H. HART & H. WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 38 (1953).

⁶⁹ See M. SCHICK, *supra* note 8, at 44-45.

⁷⁰ H. HART & H. WECHSLER, *supra* note 68, at 43.

⁷¹ *Id.*

⁷² C. HOUGH, *supra* note 67, at 31.

⁷³ M. SCHICK, *supra* note 8, at 46.

The Judiciary Act of 1869⁷⁴ established the first nationwide separate circuit judgeships since the short-lived Federalist reform of 1801 was repealed. However, the 1869 Act did little to develop a culture of dissent in the circuit courts. First, the Act created only nine circuit judgeships, one for each circuit.⁷⁵ Second, it continued the practice of allowing the circuit court to be held by a single circuit or district judge. Because the federal courts experienced a vast surge in caseload after the Civil War,⁷⁶ the small number of new judgeships that were created did little to discourage the widespread utilization of the one-judge circuit court. Indeed, it is with good reason that the period from 1869 to 1891 has been called the "nadir of federal judicial administration."⁷⁷ It is, for example, inherently "unfriendly to impartial justice"⁷⁸ to allow trial judges to sit in judgment upon themselves. Yet, by one account, "[b]y the late 1880's, eight-ninths of the litigation in the circuit courts was disposed of by a single judge sitting alone: the district judge."⁷⁹ "[N]ot from Philip drunk to Philip sober," has such a right of appeal been characterized, "but from Philip sober to Philip intoxicated with the vanity of a matured opinion and doubtless also a published decision."⁸⁰ And even when the trial judge did not sit in review of himself, the "circuit court was almost always conducted by a single judge."⁸¹

The Circuit Court of Appeals Act of 1891,⁸² known as the Evarts Act,⁸³ corrected these deficiencies. The Act created a new tier

⁷⁴ Act of April 10, 1869, 16 Stat. 44.

⁷⁵ To deal with the most extensive backlog of cases in the circuit courts, Congress authorized a second judge for the Second Circuit in 1887. M. SCHICK, *supra* note 8, at 50-51.

⁷⁶ There were numerous reasons for the increase. First, several statutes increased the business of the federal courts, *e.g.*, the post-Civil War Civil Rights Acts, the Bankruptcy Act of 1867, and the Removal Act of 1875. "There were economic causes for the caseload explosion as well Litigation was stimulated by industrial development, railroad building, the marketing of goods, the settlement of the public domain, and the economic penetration of the Northwest and Southwest." J. MORRIS, *supra* note 53, at 69.

⁷⁷ H. HART & H. WECHSLER, *supra* note 68, at 45.

⁷⁸ Letter from the Justices of the United States Supreme Court to Congress (Nov. 7, 1792), in 1 AMERICAN STATE PAPERS (CLASS X) MISCELLANEOUS 51-52.

⁷⁹ J. MORRIS, *supra* note 53, at 70; *see* C. WRIGHT, LAW OF FEDERAL COURTS 6 (4th ed. 1983).

⁸⁰ Hill, *The Federal Judicial System*, 12 A.B.A. REP. 289, 304, *quoted in* J. MORRIS, *supra* note 53, at 70.

⁸¹ M. SCHICK, *supra* note 8, at 47; *see* J. MORRIS, *supra* note 53, at 93.

⁸² Act of March 3, 1891, 26 Stat. 826.

⁸³ The Act was named after the Chairman of the Senate Judiciary Committee, William Evarts of New York.

of appellate courts, the Circuit Courts of Appeal,⁸⁴ the structure of which allowed dissent, for the first time, a realistic opportunity to flourish in a federal intermediate appellate court. Under the terms of the Act, two judges were required to establish a quorum, and the practice of allowing trial judges to review their own judgments was eliminated.⁸⁵ The current appellate system dates from the passage of the Evarts Act, and has remained substantially unchanged since its creation in 1891.⁸⁶

III. DISSENT IN THE SECOND CIRCUIT, 1891-1991

A. 1891-1941

The inaugural sitting of the Court of Appeals for the Second Circuit was held on June 16, 1891.⁸⁷ An era of good feelings prevailed until October 4, 1892, when Judge William J. Wallace issued the new court's first dissent in *In re H.B. Clafin Co.*,⁸⁸ a customs case which turned on the meaning of the words "hemmed

⁸⁴ In 1948, the United States Circuit Courts of Appeals were renamed the United States Courts of Appeals. Since the change was one in name only, to facilitate ease of expression and to maintain continuity of expression, with the single exception of the text accompanying this note, the modern nomenclature is used throughout this Article with regard to both the 1891-1948 and post-1948 periods. See Barron, *The Judicial Code: 1948 Revision*, 8 F.R.D. 439, 441 (1949). The same 1948 revision also redesignated the office of "Senior Circuit Judge" "Chief Judge." See *id.*; see also *infra* note 148.

⁸⁵ M. SCHICK, *supra* note 8, at 52 & n.45. The Court of Appeals for the Second Circuit was authorized three judges; the other circuits, two. *Id.* District judges and Supreme Court Justices were also eligible to sit on the new court. J. MORRIS, *supra* note 53, at 93; see also C. WRIGHT, *supra* note 79, at 6.

The Evarts Act also eliminated the appellate jurisdiction of the old circuit courts. M. SCHICK, *supra* note 8, at 52-53. Those courts were finally abolished in 1911. Act of March 3, 1911, ch. 231, § 289, 36 Stat. 1087, 1167. In the interim, they acted as trial courts, "indistinguishable in actual operation from the district courts." J. MORRIS, *supra* note 53, at 93.

⁸⁶ Carrington, *supra* note 16, at 542.

The history of the federal intermediate appellate court in the District of Columbia differs substantially from the history given hereinabove. In the District of Columbia, a three-judge circuit court, established in 1801, was abolished during the Civil War amidst uncertainty as to the strength of its judges' loyalty to the Union. J. SCHMIDHAUSER, *supra* note 13, at 46. At the time of its abolishment, all three circuit judges also served as district judges. *Id.* at 129. The circuit court was replaced by a new court called the Supreme Court for the District of Columbia, which itself was replaced as an appellate court in 1893 by the Court of Appeals for the District of Columbia. *Id.* at 46.

⁸⁷ J. MORRIS, *supra* note 53, at 94.

⁸⁸ 52 F. 121 (2d Cir. 1892). The first concurrence was filed on February 16, 1892. See *Providence Wash. Ins. Co. v. Bowring*, 50 F. 613, 616 (2d Cir. 1892) (Lacombe, J., concurring).

handkerchiefs." Judge Wallace's dissent was short—a single paragraph—and had only one citation. In this regard, it proved to be typical of the dissents in the early years of the court of appeals.

The next year, 1893, was the first full year in which the court possessed its authorized complement of three judges. Three dissents were filed in 1893,⁸⁹ perhaps leading some to conclude that by issuing the court's single dissent of 1892, Judge Wallace had in effect opened the floodgates; after all, the following year dissent tripled! History fails to support such a view, however; ten years later, in 1903, the yearly total still numbered three. As before, the dissents generally were short and relatively free of citation. Indeed, only one of the dissents filed in 1903 contained any citations at all.⁹⁰

The fact that the level of dissent remained low through 1903 suggests that a strong bias against dissent existed during the early years of the court. The inference assumes increased persuasiveness once it is realized that while membership on the court remained the same from 1892 until 1902, in 1902 two new judges were added after one judge retired and one additional judgeship was authorized for the court. That the level of dissent remained stable after the change in the court's composition tends to suggest that the high rate of cohesion during the court's first decade was not so much an anomaly resulting from the chance existence of atypically high degrees of congruent thinking and passivity among the judges as the result of a conscious search for consensus and a conscious suppression of disagreement.

In the next decade in the Court of Appeals for the Second Circuit, by now the busiest court of appeals, the incidence of dissent increased, although by the standards of today it was still low. The "great dissenter" on the court during this period, for example, Judge Walter C. Noyes, dissented only twelve times from 1907 to 1913.⁹¹ Dissents were still short; six of the nine dissents filed in

⁸⁹ See *Sanders v. Palmer*, 55 F. 217, 222 (2d Cir. 1893) (Shipman, J., dissenting); *Hower v. Weiss Malting & Elevator Co.*, 55 F. 356, 359 (2d Cir. 1893) (Wallace, J., dissenting); *Arnold v. Chesebrough*, 58 F. 833, 839 (2d Cir. 1893) (Wheeler, J., dissenting), *cert. denied*, 154 U.S. 493 (1894).

⁹⁰ See *In re The Germanic*, 124 F. 1, 7 (2d Cir. 1903) (Wallace, J., dissenting), *aff'd sub nom.* *Oceanic Steam Navigation Co. v. Aitken*, 196 U.S. 589 (1905). The two dissents without citation were *United States v. Baltic Mills Co.*, 124 F. 38, 42 (2d Cir. 1903) (Coxe, J., dissenting) and *Wyckoff, Seamans & Benedict v. Howe Scale Co.* of 1886, 122 F. 348, 354 (2d Cir. 1903) (Wallace, J., dissenting), *rev'd*, 198 U.S. 118 (1905).

⁹¹ J. MORRIS, *supra* note 53, at 94 n.*.

1913 had no citations whatsoever. Analysis of the courts' 1923 opinions reveals a substantially similar picture.

It is impossible to state with certainty why dissent became and stayed somewhat more common in the two decades after 1903. The increase may be attributable in part to changes in the court's membership. Some of the increase is probably a result of changes in the subject matter of cases that came before the court. From 1891 to the 1920's, that subject matter became increasingly unfamiliar, as the "federal courts were transformed from courts dealing primarily with admiralty, diversity cases, and a few federal specialties, into courts with a heavy public law docket consisting of a much increased criminal business and many cases involving government regulation of the economy."⁹²

Another probable reason for the increase in dissent is that as the courts of appeals grew in stature from experiments needing to prove themselves to courts whose value had been proved through experience, the judges accorded less weight to the danger posed by dissent to the courts' institutional prestige. Such a phenomenon would not have been unprecedented; it is what occurred in the Supreme Court after John Marshall successfully established that Court as a potent and independent national force in the early 1800's. The institution being less vulnerable, the cautions appropriate to a more vulnerable era appear correspondingly less attractive. That the courts of appeals did grow in stature and, accordingly, became less vulnerable during these years is beyond dispute; the passage of the Judiciary Act of 1925⁹³ stands as tangible evidence of this. The 1925 Act, popularly known as the Judges' Bill, through the use of the writ of certiorari allowed the Supreme Court for the first time to exercise significant control over its own docket.⁹⁴ The passage of the Judges' Bill "signified that the Courts of Appeals had come of age and could be trusted as the final forum for all but a very few classes of cases in public law."⁹⁵ The increased confidence in the courts of appeals that such a law reflected could hardly have developed overnight, and could hardly

⁹² *Id.* at 94.

⁹³ 43 Stat. 936.

⁹⁴ The process begun in 1925 has continued throughout the decades since, the most recent evidence being the passage of Pub. L. No. 100-352, 102 Stat. 662, on June 27, 1988. See, e.g., Siegel, Commentary on 1988 Repeal of 28 U.S.C. § 1252, in 28 U.S.C.A. § 1252 (West Supp. 1991).

⁹⁵ J. MORRIS, *supra* note 53, at 120.

have gone unnoticed by the courts' judges.

The core of the court that was later widely recognized as the United States' strongest joined the Second Circuit between 1924 and 1929, with the additions to the court of Learned Hand, Thomas Swan, Augustus Hand, and, in the newly established fifth seat, Harrie B. Chase.⁹⁶ In absolute numbers, dissent increased during the early years of this court, but at least the bulk of the increase was more a function of the court's increased caseload of the 1930's than any increased proclivity toward dissent.⁹⁷

The most notable change during this time was in the frequency with which dissents contained citations. This change may be attributed largely to Congress's 1930 authorization of a law clerk for court of appeals judges.⁹⁸ Then, as now, law clerks were recruited mainly from the ranks of law review alumni, who, as a group, have been trained to greet the unsupported statement with the kind of revulsion most others reserve for the sound of fingernails screeching along a blackboard. Especially in the days before the widespread availability of computerized research services and the proliferation of specialized reporters, a judge burdened with a heavy caseload was unlikely to develop much of a habit for searching out precise authority for statements he knew to be true; this was a consequence of prioritization, however, not distaste for appropriate citation. The proof is in the opinions themselves. Before 1930, the absence of citation in dissents was common, perhaps even the norm. After the judges were given the luxury of an assistant trained in and inclined toward providing citation, however, citation in dissents very quickly became the norm, so much so that by 1940, only one of twenty-eight dissents was completely devoid of cites.⁹⁹

B. 1941-1991

The arrival of Charles Clark and Jerome Frank upon the now six-member Second Circuit in 1939 and 1941, respectively, began an unprecedented era of frequent dissent. During the years 1941-51, the six judges on the court averaged approximately five pub-

⁹⁶ The fifth member of the court was Martin T. Manton, who resigned in disgrace in 1939. See *infra* notes 148-50 and accompanying text.

⁹⁷ See M. Schick, *supra* note 8, at 65.

⁹⁸ Act of June 17, 1930, Pub. L. No. 71-373, 46 Stat. 774.

⁹⁹ That dissent was authored by Judge Chase in *Heenehan v. Prudence Realization Corp.*, 108 F.2d 103, 104 (2d Cir. 1940).

lished dissents per judge per year.¹⁰⁰ This figure was high for the time, and is still high for today. The six judges of the Second Circuit who were active from 1981 through 1990,¹⁰¹ for example, averaged slightly less than three dissents per year during that ten-year period. It should also be noted that the six judges of the Second Circuit who were on active status from 1981 through 1990 dissented at a slightly *greater* rate than their colleagues who were active during only a portion of this period.

What accounts for the markedly favorable attitude toward dissent possessed by the judges of the Second Circuit during the 1940's and early 1950's? One reason is the presence of judges with personalities more inclined toward dispute than accommodation. Judges Clark and Frank surely must be categorized as such, as must, to a slightly lesser degree, Judge Learned Hand. But, as will be discussed below, undoubtedly contributing to the pronounced natural inclination of these judges was the relative weakness of the considerations that ordinarily restrain dissent. This combination of personality and circumstance created an atmosphere unusually tolerant of dissent. This atmosphere permeated the Second Circuit, was breathed in by all the judges, and can be expected to have affected them all, even the judges inclined toward conciliation and accommodation.

The most persuasive evidence such an atmosphere existed is the frequency with which dissents were filed. Confirming evidence can be found in statements by the judges explicitly recognizing that dissent was in the air. For example, in 1946, Judge Swan commented in an internal memorandum that "[i]n the manner of disagreement, this court is getting regrettably like its superior in Washington."¹⁰² Judge Swan had been on the Second Circuit since 1927; his comment additionally implies that the judges of the Second Circuit previously had not been so quick to dissent. Tellingly, Judge Swan's remark was occasioned by his own preparation of a dissenting opinion,¹⁰³ and generated the following response from an unpersuaded Judge Clark: "I do not feel badly about the num-

¹⁰⁰ See M. SCHICK, *supra* note 8, at 315.

¹⁰¹ Namely, Chief Judge Oakes (1971) and Judges Feinberg (1966), Meskill (1975), Newman (1979), Kearsse (1979), and Cardamone (1981) (year of appointment to Second Circuit in parentheses).

¹⁰² Memorandum from Thomas Swan to Charles Clark (Nov. 29, 1946), *quoted in* M. SCHICK, *supra* note 8, at 109-10.

¹⁰³ M. SCHICK, *supra* note 8, at 109.

ber of dissents, but think we are now only hitting our stride. Indeed, when on the first week's cases we all concurred in everything, I was distressed for fear we had gone soft."¹⁰⁴ Later Judge Clark referred to the court's "tradition of slugging it out."¹⁰⁵ That tradition was acknowledged in a 1957 survey of appellate courts in which the Second Circuit was alone in indicating that dissent was "encouraged."¹⁰⁶ One member of that 1957 court later expressed the opinion that dissents were "a sign of health and vigor."¹⁰⁷ To be sure, not all of the judges of the Second Circuit during the 1940's and 1950's would have been inclined to agree with such an opinion, but even the judges less enamored of dissent generally were not openly hostile to the practice, as "long as [it] did not unduly delay the administrative process of the Second Circuit."¹⁰⁸

Once it is accepted as true that the judges of the Second Circuit were unusually open to dissent during the 1940's and 1950's (and the statistics make the proposition difficult to contest), the obvious question to ask becomes "why?" As noted, one reason may be found in the personalities of the judges of the court. Another reason is that the considerations that typically act to restrain the impulse to dissent were, under the circumstances, simply not persuasive.

As discussed in Part I, the considerations that tend to temper the impulse to dissent are founded mainly upon (1) a concern for a court's prestige and (2) a concern for a court's efficiency. As far as prestige is concerned, however, "the general contemporary impression [was] that the [Second Circuit] court of appeals from 1941 to 1951 . . . was the strongest court in the United States."¹⁰⁹ Judge Henry Friendly noted that "five of the six judges [of the 1941-51 court] were men of outstanding ability, in analytical power, legal learning, general culture, and the ability to write graceful and pow-

¹⁰⁴ Memorandum from Charles Clark to Thomas Swan (Nov. 30, 1946), *quoted in* M. SCHICK, *supra* note 8, at 110 n.100.

¹⁰⁵ Memorandum from Charles Clark to John M. Harlan (May 4, 1954), *quoted in* M. SCHICK, *supra* note 8, at 109.

¹⁰⁶ M. SCHICK, *supra* note 8, at 109.

¹⁰⁷ Medina, *Some Reflections on the Judicial Function at the Appellate Level*, 1961 WASH. U.L.Q. 148, 150.

¹⁰⁸ See M. SCHICK, *supra* note 8, at 243.

¹⁰⁹ J. MORRIS, *supra* note 53, at 123; see Wyzanski, *Augustus Noble Hand*, 61 HARV. L. REV. 573, 573 (1948) (Second Circuit called "the ablest court now sitting"); Kurland, *Jerome N. Frank: Some Reflections and Recollections of a Law Clerk*, 24 U. CHI. L. REV. 661, 661 (1957); Frank, *The Top U.S. Commercial Court*, FORTUNE 92 (Jan. 1951).

erful English, superior to all but a few judges in the land, including the nine in Washington who reviewed their decisions."¹¹⁰ Judge Friendly's view is in accord with the prevailing view today; more importantly, for our purposes, it was also the prevailing view at the time the court was sitting. After 1951, with death and retirement taking some of its most luminous figures,¹¹¹ the prestige of the court declined, but the decline was neither sudden nor substantial.¹¹²

A member of such an eminently prestigious court, especially during the period it was widely recognized as the nation's strongest, obviously would feel less compunction about dissent based upon a fear of damaging institutional prestige than would a member of a court of inferior status. Courts, like institutions in general, are capable of unity in the face of a clear and present danger, but the less apparently imminent the crisis, the less likely it is that members of the threatened institution will unite. As far as prestige is concerned, during the 1940's and 1950's, the Second Circuit was a remarkably secure institution, substantially more so even than the passage of the Judges' Bill indicated the courts of appeals in general were secure. Thus, a realistic appraisal of the damage a dissent might do to the court's prestige would provide little incentive not to dissent. The court was not oblivious to the damage promiscuous dissent could cause to its authority and prestige; it's just that with dissent, as with other matters, one's ideas as to what constitutes promiscuity tend to change as the costs associated with such conduct are lessened or removed. In sum, the prestige of the Second Circuit during the 1940's and 1950's to a large extent immunized it against the dangers of dissent; the judges were aware of this, and, as a group, acted accordingly.

A concern for court efficiency is the second important impedi-

¹¹⁰ Friendly, 86 *POL. SCI. Q.* 470, 471 (1971). The Washington nine—Justices, not Senators—were also known around the Second Circuit as, among other things, The Jolly Boys, Cherubim and Seraphim, the Nine Tin Jesuses, and the Nine Blessed Chalices of the Sacred Effluvium. M. SCHICK, *supra* note 8, at 142.

¹¹¹ Judge Learned Hand retired from active service in 1951, but continued to sit as a senior judge until his death ten years later. Judge Swan served in active status until 1953, and in senior status until 1965. Judge Augustus Hand died in 1954, after serving in senior status for one year. Judge Chase retired the same year, and thereafter declined to sit as senior judge, except for a brief period during the late 1950's. Judge Clark remained on active status until his death in 1963. Judge Frank, who died in 1957, was also on active status at the time of his death.

¹¹² J. MORRIS, *supra* note 53, at 123, 165.

ment to frequent dissent. This concern too, however, provided little reason for the members of the court during the 1940's and early 1950's to decrease their high rate of dissent. Although the Second Circuit "was faced with the heaviest caseload of any of the intermediate federal courts, it regularly disposed of its business more quickly than did any of the other courts."¹¹³ The high rate of dissent, of course, slowed down the court to some extent, but since it was extremely efficient notwithstanding that high rate, the frequent use of dissent was unlikely to be viewed as a luxury the court could not afford. Adding to this perception was the fact that because of a unique internal practice of the Second Circuit—the preparation of voting memoranda¹¹⁴—it often took less *additional* effort for the Second Circuit's judges to dissent than would have been required elsewhere. Thus, with neither of the primary disincentives to dissent providing persuasive reasons for reducing the Second Circuit's rate of dissent during the 1940's and early 1950's, it is not surprising that the rate of dissent remained consistently high.

This most ideal environment for dissent did not long survive Learned Hand's retirement from active status in 1951, as soon afterward began a nearly continuous trend of almost two decades' duration toward an increasing backlog of pending cases.¹¹⁵ Notwithstanding this less than ideal environment, dissent continued to flourish. Numerous reasons may be offered in explanation of this phenomenon.

First, a certain inertial force influences the behavior of institu-

¹¹³ M. SCHICK, *supra* note 8, at 351-52. The record is remarkable, but not surprising. First, all the judges of the court were diligent. Second, three members of the court were extremely prolific writers (Judges L. Hand, Clark, and Frank); the others were noted for their straight-to-the-point style of opinion-writing and relatively infrequent resort to dissent (Judges Swan, A. Hand, and Chase). *See id.* at 97, 315. Finally, the court was immensely experienced; by 1951, its judges averaged 20 years of service on the federal appellate bench.

¹¹⁴ *Id.* at 96. In the words of Judge Feinberg:

For those cases that the panel, after argument, agrees should be decided by opinion rather than by summary order, it is customary to exchange voting memoranda. These "voting memos" set out the particular judge's vote as well as the reasons for that vote. Voting memos are extremely useful for the purpose of discussion at the voting conferences held after the cases are heard; the memos also benefit the eventual opinion writer, who weeks later has in written form valuable suggestions about the reasoning of an opinion, as well as cogent statements of a colleague's concerns.

Feinberg, *supra* note 11, at 386 n.104. *See* Medina, *Foreward: The "Old" Second Circuit in 1951*, 53 ST. JOHN'S L. REV. 199, 200-01 (1979).

¹¹⁵ M. SCHICK, *supra* note 8, at 68.

tions, as well as individuals. Thus, the Second Circuit's "tradition of slugging it out" favored continued frequent use of the dissent, as did the fact that the most ardent individual followers of this tradition tended to outstay their less disputatious colleagues in terms of service on the court.¹¹⁶

Second, the legal community's regard for the Second Circuit remained high, a fact which may have tended to moderate any impulse toward reducing the incidence of dissent that the increased backlog of cases otherwise might have caused.

Third, certain new developments on the court, authorized by Congress, may have discouraged restraint. Comparative performance sometimes being the enemy of optimal performance, the increase in 1961 of the court's size from six to nine judges made restraint appear less important because it allowed the court to increase its output without reducing its rate of dissent, and thereby held out the hope that the court could reduce its backlog without changing its pattern of dissent. The addition in 1969 of a second law clerk to the staffs of federal appellate judges may have had a similar effect, by allowing the judges to increase their individual outputs without reducing their individual rates of dissent.

Fourth, in terms of efficiency, the continued use of voting memoranda continued to make the decision to dissent less costly in the Second Circuit than elsewhere. Accordingly, a reduction in dissent as a means of achieving increased efficiency appeared correspondingly less attractive.

Finally, the magnitude of the problem indicated that the solution was not in greater judicial self-control. Between 1950 and 1969, the number of cases docketed in the Second Circuit increased fourfold.¹¹⁷ To suggest that limiting dissent might solve the problems caused by such an increase in caseload is akin to suggesting that in order to decrease the force of impact, the passengers on an airplane plummeting uncontrollably to the ground should discard all unnecessary items. In both cases, even full implementation would only prove the inadequacy of the proposed solution.

The accumulation of these factors limited the potential ability of the developing backlog of pending cases to substantially depress

¹¹⁶ Proving that the meaning of a word is always context-dependent, our "nontraditionalists" in this instance are Augustus Hand and Harrie B. Chase, each of whom left the court in 1954.

¹¹⁷ M. SCHICK, *supra* note 8, at 68.

the Second Circuit's rate of dissent. One survey of the federal circuit courts, for example, indicated that during the 1962-1964 terms, the Second Circuit was more prone to dissent than all but the District of Columbia Circuit.¹¹⁸ Slowly, however, as the burdens of a heavy caseload came to be viewed more as a permanent fixture than a temporary aberration, the tradition of slugging it out came to be viewed somewhat less favorably. Evidence of this changed view can be seen in the reluctance to hear cases in banc that developed in the late 1960's after a brief period of relatively frequent resort to the practice.¹¹⁹ Also evidencing this change is the occasional inclusion of self-conscious justifying language within a dissent, such as then-Judge Thurgood Marshall's assurance that "[w]ith deference to my brothers, I deem the issues raised by the present case to be of such importance that a statement of my dissenting views is necessary."¹²⁰ The obvious implication, of course,

¹¹⁸ Goldman, *Conflict and Consensus in the United States Courts of Appeals*, 1968 Wis. L. Rev. 461, 464.

¹¹⁹ During the Chief Judgeship of Learned Hand, the practice of the Second Circuit was "never to sit *in banc*." *Lopinsky v. Hertz-Ur-Self Sys., Inc.*, 194 F.2d 422, 429 (2d Cir. 1951). Soon after Judge Clark, long a frustrated advocate of the *in banc* hearing, became Chief Judge in 1954, the practice changed, *Walters v. Moore-McCormack Lines*, 312 F.2d 893, 893 (1963), so much so that in 1962 the court decided eleven cases in banc. *See id.* at 896. The result was disenchantment with the *in banc* procedure, even among its former adherents. M. SCHICK, *supra* note 8, at 122. Over time, this disenchantment coalesced into a firm suspicion as to the utility of the process: "My view, and that of my predecessor [as Chief Judge], Irving R. Kaufman, is that for the most part in bancs are not a good idea: They consume an enormous amount of time and often do little to clarify the law." Feinberg, *supra* note 11, at 376-77; *see also* *Green v. Santa Fe Indus.*, 533 F.2d 1309, 1310 (2d Cir. 1976) (*in banc*) (denial of petition for rehearing in banc stating in banc procedure is "often an unwieldy and cumbersome device generating little more than delay, costs, and continued uncertainty that can ill be afforded at a time of burgeoning calendars"), *rev'd on other grounds*, 430 U.S. 462 (1977); Feinberg, *Unique Customs and Practices of the Second Circuit*, 14 HOFSTRA L. REV. 297, 311-12 (1986). The colleagues of Judges Kaufman and Feinberg apparently share—and for some time have shared—the same view. *See* Newman, *supra* note 10, at 369; Newman, *supra* note 18, at 382.

¹²⁰ *Rutland Ry. v. Brotherhood of Locomotive Eng'rs*, 307 F.2d 21, 42 (1962) (Marshall, J., dissenting), *cert. denied*, 372 U.S. 954 (1963). The tenor of such comments is reminiscent of the following remarks by Justice Story, delivered at a time when dissent was decidedly ill-favored:

It is [a] matter of regret that . . . I have the misfortune to differ from a majority of the Court, for whose superior learning and ability I entertain the most entire respect Had this been an ordinary case I should have contented myself with silence; but believing that no more important or interesting question ever came before a prize tribunal, and that the national rights, suspended on it, are of infinite moment to the maritime world, I have thought it not unfit to pronounce my own opinion

The Nereide, 13 U.S. (9 Cranch) 388, 455 (1815) (Story, J., dissenting).

is that in most cases in which one disagrees with the majority a statement of one's dissenting views is not necessary. The atmosphere, it seems, was no longer so "encouraging" of dissent.¹²¹

The changed atmosphere, however—changed at least in part due to the court's crushing caseload—did not immediately bring about an appreciable decline in the number of dissents. Instead, the court attempted to increase its efficiency by a variety of programs and procedures whose adoption was perhaps less painful than reducing dissent's incidence. This variety included such simple timesaving devices as increasing the number of oral decisions and unpublished summary orders. The increased utilization of district court and senior circuit judges also helped to expedite case flow, as did the creation in 1971 of the position of circuit executive, which, among other things, relieved the chief judge of the circuit of some administrative duties.

The most ambitious and innovative program was the Civil Appeals Management Plan ("CAMP"), designed by then-Chief Judge Irving R. Kaufman and instituted under his leadership in 1974.¹²² CAMP aims to expedite case flow first by encouraging settlement and compromise, and, if that fails, by clarifying the issues on appeal. It also allows minor procedural issues to be disposed of by staff counsel without the expenditure of judicial resources.¹²³

The number and range of these remedies,¹²⁴ adopted over the course of more than a decade, indicates the seriousness with which the court viewed its case backlog. The fact that so many remedies were needed also illustrates the near intractability of the problem.

¹²¹ See *supra* note 106 and accompanying text.

¹²² See generally A. PARTRIDGE & A. LINN, A REEVALUATION OF THE CIVIL APPEALS MANAGEMENT PLAN *passim* (1983); Kaufman, *supra* note 18, *passim*. The Plan to Expedite the Processing of Criminal Appeals, instituted under Chief Judge Lumbard's leadership, also deserves mention, both as a forerunner of CAMP, and as an additional means adopted by the court to increase its efficiency. See J. MORRIS, *supra* note 53, at 170-71.

¹²³ See Kaufman, *supra* note 18, at 756.

¹²⁴ The court's "sixty-day list," begun when Judge Lumbard was Chief Judge, also is regarded as an effective device for expediting the resolution of cases. See, e.g., Feinberg, *supra* note 11, at 385; Second Circuit Newsletter 3 (Winter 1990). "This is a list of cases undecided sixty days after argument or submission [which] is examined case by case at each meeting of the court of appeals." Feinberg, *supra* note 11, at 385. The examination consists of the judge assigned to write the opinion explaining what stage the opinion is at, and predicting the date it will be circulated to the other judges on the panel. On a court so keenly aware of the state of its docket, the subtle coercive effect of such an examination is obvious. See Oakes, *supra* note 27, at 710 ("judges can . . . be embarrassed at having too many cases on the 60-Day List"); Feinberg, *supra* note 119, at 313 (noting that, due to "peer-pressure," filings of opinions increase immediately before each meeting).

Finally, in the mid-1970's, the court began to reduce its backlog, still without any substantial decline in dissent. By the early 1980's, however, as the court continued to struggle to keep pace with its ever-expanding docket, a reduction in dissent became evident.¹²⁵

In part, this reduction probably was due to the predilections of the new members of the court. Not all the decrease, however, can be so attributed. For example, Judge Feinberg and Chief Judge James L. Oakes—the only judges who served in active status from 1971 to 1990—each dissented approximately twice as often from 1971 to 1980 as from 1981 to 1990. These statistics are made particularly striking by the fact that, as Chief Judge Oakes and Judge Feinberg are generally viewed as moderate to liberal judges, one might have expected the frequency of their dissent to increase during a time the court became, with seven Reagan appointees, increasingly conservative.¹²⁶ Clearly, something in addition to a change in the court's membership was at work; the old tradition of slugging it out finally gave way to a new tradition of increased compromise and acquiescence.

Such a change is in accord with the belief that concerns for court efficiency tend to weaken the impulse to dissent. Still unexplained, however, is why the effect, which lagged so far behind its cause, finally manifested itself. The earlier discussion of five possible reasons why, during the 1960's, the cause and effect were not more closely linked¹²⁷ provides the basis for a comparison that may prove instructive.

First, the inertial force of tradition that had earlier favored a high rate of dissent simply weakened. "[T]radition[s] may wither," Judge Feinberg has reminded us.¹²⁸ Faced with the continuing friction of a large caseload, the Second Circuit tradition of encouraging dissent did wither, but slowly. Old traditions die hard, after all; it is thus not unexpected that the effect did not clearly manifest itself until the 1980's.

Second, as court administration became increasingly a matter of concern for judges and litigants alike, the prestige of a court increasingly became identified with its reputation for administra-

¹²⁵ Compare M. SCHICK, *supra* note 8, at 313 with Feinberg, *supra* note 119, at 300.

¹²⁶ Judges Kaufman, Timbers, Van Graafeiland, and Meskill—all of whom maintained active status throughout much of the 1970's and 1980's—also dissented considerably less often in the latter decade.

¹²⁷ See *supra* notes 115-17 and accompanying text.

¹²⁸ Feinberg, *supra* note 11, at 386.

tive efficiency.¹²⁹ Thus, the prestige of the Second Circuit earned independently of its reputation for efficiency became less able to provide a persuasive reason not to withhold dissent than it did previously.

Third, hard experience taught the court that it approached the chimerical to imagine that Congress, by increasing the number of judgeships or clerkships, or by any other action, might allow the court to carry on as before. Congress generally—and the generalization held true in this case—is reactive, not proactive; it may throw a life preserver to a court drowning in its backlog, but it is unlikely to act affirmatively to reduce the flood tide of new cases coming the court's way. Certainly by the 1980's it had become much clearer than before that unless the court was content to periodically risk drowning, it had better swim straight for shore instead of spending time treading water, arguing.

Fourth, as decades passed, the use of the voting memorandum became less common. Today, only a minority of Second Circuit judges—when presiding on a panel—regularly request voting memos from their colleagues. As the tradition of exchanging voting memoranda became less a rule than a well-respected exception,¹³⁰ the decision to dissent became more costly in terms of efficiency than it was when voting memoranda were more customarily exchanged.

Finally, by 1980, the Second Circuit had established a record of each year decreasing its backlog of cases.¹³¹ Somewhat paradoxically, this record made a reduction in dissent more attractive as a means of increasing court efficiency than it was during the 1960's, when a reduced backlog was only slightly more likely to occur on the court than a balanced budget was likely to emerge from Congress. The achievement of regularly, albeit sometimes minimally, reducing the court's backlog of pending cases became a point of pride among the judges; consequently, the achievement created enormous internal pressures to repeat the success. A baseball pitcher once commented that he was glad never to have won twenty games during a season, since then "they'd expect it every

¹²⁹ See *Special Session*, *supra* note 16, at 5-6 (remarks of Harold R. Tyler, Jr.); *id.* at 20 (remarks of Chief Judge Kaufman).

¹³⁰ For a listing of some reasons for the decline in the use of voting memoranda, see Oakes, *supra* note 27, at 704. In that article, Chief Judge Oakes terms the decline "an unfortunate loss."

¹³¹ *Special Session*, *supra* note 16, *passim*.

year." In the 1970's, the Second Circuit, in effect, made the mistake of winning twenty games year after year. And, as the pitcher might have predicted, an achievement that was once characterized by Chief Justice Burger as a "near miracle[]"¹³² quickly became the expected. In such an environment, on a court that had always remained generally collegial, the relatively minor increase in efficiency a decrease in dissent could bring assumed a potential importance greater than that it had previously possessed, in the same way an additional victory by a pitcher with nineteen wins is commonly imbued with much more significance than an additional victory by a pitcher with eighteen wins.¹³³ In sum, once the court gained control of its spiraling docket, following a struggle that lasted well over a decade, its awareness of the fragility of this hard-won victory¹³⁴ appears to have convinced it that almost every weapon at its disposal¹³⁵ must be used in order to maintain such control, including refraining from dissent. In such a context, the appropriate analogy regarding the efficacy of reducing dissent becomes not to passengers aboard a plummeting airplane, but to sailors aboard an otherwise seaworthy ship that has begun slowly to take on water. In contrast to before, the crew of the Second Circuit seems to have concluded, reasonably and almost unanimously, that constant discard of unnecessary items, such as the luxury item of frequent dissent, may allow them to keep perma-

¹³² *Id.* at 24.

¹³³ See N.Y. Times, October 4, 1990, at D26, col.2 (St. John's alumnus Frank Viola changes mind and decides to pitch in meaningless last game of season in order to gain twentieth win). The following comments by Chief Judge Oakes are reflective of the court's desire to "win twenty" every year:

We have had a process in the Second Circuit known as "clearing the calendar." It started, I believe, when Irving Kaufman was Chief Judge and was continued throughout Wilfred Feinberg's tenure. It means that we decide more cases each year than were filed. If this sounds like an anomaly, it is not; we have actually reduced our backlog of cases each year in this fashion for some years . . . [T]he process is a worthwhile one which, if it does not become the sole aim of the court, should nevertheless be a regular one.

Oakes, *supra* note 27, at 710.

¹³⁴ The precariousness of the court's control was convincingly demonstrated in the 1988-89 and 1989-90 Terms, during which the court's backlog expanded by nearly 400 cases. After implementing additional remedial measures—primarily extra sitting days for the court's judges and extra cases heard at each sitting—the 1990-91 Term saw a return to the norm, with the court disposing of 119 more appeals than were filed during the judicial year. Wise, *Circuit Courts Backlog Cut by 10 Percent*, N.Y.L.J., July 5, 1991, at 1, col. 3.

¹³⁵ The notable exception is the opportunity for oral argument; the Second Circuit is alone in offering that opportunity to every litigant (except incarcerated pro se litigants). See *United States v. Delia*, 925 F.2d 574, 575 (2d Cir. 1991) (one-judge motion).

nently their heads above water, and not merely delay slightly an inevitable crash.

This more accepting attitude toward restraint in dissent is likely to prevail in the Second Circuit as long as caseload pressures remain high. A recent opinion by Judge Newman indicates the pride the court takes in its status as perhaps the most efficient court:

Like most courts, this Court is experiencing an increase in filings and is struggling to keep pace. We have obliged ourselves to take on extra panel assignments in order to handle our volume. For years, this Court, through the efforts of its judges and the cooperation of the bar, has led the courts of appeals of this country in avoiding or at least holding to a minimum the growth of a backlog and in maintaining the lowest median time from filing of appeals to disposition. We strive to maintain the pace for which this Court is highly regarded, not to value speed for its own sake, but in the firm conviction that once backlogs are permitted to develop, they tend to increase, with consequent impairment of the overall functioning of the court system.¹³⁶

That these words were written in response to a motion seeking a one-month delay in the due date of an appellant's brief indicates the seriousness with which even minor delays are viewed, and suggests that the delays necessarily occasioned by dissent are likely to continue to depress dissent's incidence within the Second Circuit. Eternal vigilance, the court now seems convinced, is the price of efficiency.

IV. THE PROOF OF THE MOTIVE IS IN THE WRITING: TYPES OF DISSSENT AND THE MOTIVES THEY REVEAL

As discussed earlier in Part I.B., dissents perform various positive functions. By far the most important of these is the ability of a dissent to influence the development of the law; this may be called dissent's persuasive function. Dissent also performs a prophylactic function, with the possibility of dissent helping to prevent carelessness on the part of judges when drafting majority opinions; an appearance function, by helping to assure litigants and the public alike that all sides of a case were duly considered by all of the judges on a panel; and, lastly, an "ego" function, by providing a forum that allows an individual judge to distinguish him-

¹³⁶ *Id.*

self or herself from (and perhaps beyond) his or her peers.

The following discussion addresses the reasons why each of several different types of dissent are issued. Proceeding under the assumption that the functions listed above span the gamut of dissent's possible functions, the following discussion also assumes that from the text of a particular dissent may be gleaned the motives for its issuance, which motives are assumed, for the most part, to track dissent's various functions. While recognizing the reality of multiple motivations, the following discussion declines to concede that that reality prevents conclusions about motivation from being properly drawn. Finally, the occurrence of dissent today being an accepted and understood fact of life on every multi-judge appellate court in the United States, the discussion below discounts as negligible the prophylactic function's ability to provide particular incentive to dissent in any particular case.

Persuasion is the most important function of dissent, and the legitimacy of any dissent that does not aim to persuade is doubtful. Unfortunately, a minority of dissents—in the Second Circuit and elsewhere—unquestionably are not calculated to persuade. The object of measurement here is not the ultimate persuasiveness of a subject dissent, but rather, the extent of the *attempt* at persuasiveness. An example may make clear the distinction sought to be drawn.

The type of dissent that most clearly is *not* directed at persuasion is the dissent without opinion.¹³⁷ Such a dissent registers disagreement, but that is both all, and nothing. The reaction of a panel of judges to an advocate who, when called upon to argue his appellant client's position, stated, "May it please the Court, I disagree with the decision below," and then sat down, is not difficult to imagine: at a minimum, one can state with confidence, the Court would not be pleased at all. A substantially similar reaction should greet the dissent without opinion, the judicial equivalent of this abandonment of *reasoned* discourse.

Such a dissent is deserving of opprobrium for two basic reasons: (1) it does not do any good; and (2) it does do harm. The potential for persuasion that traditionally provides the primary justification for dissent is so obviously lacking that even the mere

¹³⁷ The term, "dissent without opinion," as used herein, includes all dissents that state nothing more substantive than "I dissent" or "I respectfully dissent," as well as all dissents that literally are "without opinion."

hope of persuasion cannot fairly be viewed as a consideration animating the dissent. Further, the dissent without opinion offers to the public and to the present losing litigant at best insignificant assurance that opposing arguments were carefully and fully considered. Thus, lacking any substantial relation to any of dissent's other justifications, the dissent without opinion appears motivated almost entirely by the purely personal, psychological benefit of disassociation from a position that the dissenting judge, for whatever reason, opposes. Such a benefit may inure always to a dissenter—and, as an incidental benefit, that may be well and good—but much is left to be desired when the sole benefit and sole motivator is psychological succor. This is because this personal benefit is so easily outweighed by the systematic harms attributable to the dissent without opinion, which harms consist basically of an intensified version of the same harms that are attributable to dissents generally.

For example, the dissent without opinion harms the court as an institution, to a greater extent than the reasoned dissent, since it additionally and necessarily conveys at least one of the following unflattering ideas: either the judge is dissenting without opinion for no reason; or for a reason he or she is unwilling to articulate or is incapable of articulating; or because the judge believes that both the judge's colleagues and superiors on the Bench are closed to, or incapable of following, reasoned argument.¹³⁸ The dissent without opinion also is perhaps more injurious to collegiality than is the reasoned dissent, the frustration of the majority author being more acute, with his or her opinion forever tarnished by an unspecified charge of error to which he or she can never respond.¹³⁹

Hardly more justifiable is the dissent that merely states, without elaboration, a reason for disagreement with the majority's view. Such a dissent is really no more viable as an instrument of persuasion than is a dissent without opinion: "With all due respect, the evidence is insufficient," is not the substance of an argument, but the summary of one. Standing alone, such a dissent bears no more resemblance to an adequate legal argument than

¹³⁸ See Simpson, *supra* note 20, at 211; see generally B. WOLFMAN, J. SILVER & M. SILVER, *DISSENT WITHOUT OPINION: THE BEHAVIOR OF JUSTICE WILLIAM O. DOUGLAS IN FEDERAL TAX CASES passim* (1975) (concluding that Justice Douglas's penchant for dissenting without opinion in tax cases was damaging to respect for Court).

¹³⁹ See M. SCHICK, *supra* note 8, at 109 n.96; Simpson, *supra* note 20, at 210 n.21 (suggesting "resentment" aggravated when judge concurs without opinion).

Huck Finn's summary of *Pilgrim's Progress* ("a man . . . left his family, it didn't say why")¹⁴⁰ bears to sound literary criticism.

Dissents without elaboration often arise in highly fact-intensive cases in which the court, "faced with indeterminate and indeterminable standards: reasonable notice, reasonable cause, gross negligence, the requisite proof in fraud or in a criminal prosecution,"¹⁴¹ must decide whether the particular indeterminate and indeterminable standard at issue has been met.¹⁴² Disagreement in such cases is only natural—"he is a pedant who thinks otherwise,"¹⁴³ said Learned Hand—and it is tempting merely to note without elaboration the disagreement and move on: tempting because, when the case involves the application of well-established, though indeterminate and indeterminable standards, to a particular set of facts, judges are aware that a more developed opinion often amounts to little more than the rationalization of an informed gut reaction; tempting because the task of fully canvassing all the evidence in such cases may demand an inordinate amount of time and effort; and, finally, tempting because no matter how much effort is expended, the fact-intensive nature of such cases makes the expected yield in terms of recognition, prestige, or reversal unusually low.

The temptation should be avoided, however, basically for the same reasons that a dissent without opinion should be avoided. The dissent without elaboration may serve the appearance function slightly better than the dissent without opinion, but, as does the dissent without opinion, it ill serves the persuasive function, though not—also in common with the dissent without opinion—the ego function, the fulfillment of which here again intrudes too much on the decision to dissent.

Of course, there is no denying that both dissents without elaboration and dissents without opinion are less costly in terms of time and effort than are full dissents; accordingly, one might contend—and perhaps correctly—that a concern for efficiency also motivates the issuance of these undeveloped dissents. But this

¹⁴⁰ M. TWAIN, *ADVENTURES OF HUCKLEBERRY FINN* 104 (1885).

¹⁴¹ *Ford Motor Co. v. Ryan*, 182 F.2d 329, 332 (2d Cir.) (L. Hand, C.J., concurring), cert. denied, 340 U.S. 851 (1950).

¹⁴² See, e.g., *Welch Scientific Co. v. NLRB*, 340 F.2d 199, 205 (2d Cir. 1965) (Marshall, J., dissenting) (involving issue of whether "substantial evidence" supported findings of NLRB).

¹⁴³ *Ford Motor Co.*, 182 F.2d at 332 (L. Hand, C.J., concurring).

worthy motive does little to legitimize such dissents, for however counterintuitive it may seem, ultimately such dissents poorly serve the cause of efficiency.

To explain, it might be agreed that, under a particular set of circumstances, a dissent without opinion or without elaboration may be more appropriate than a full dissent. What might these circumstances be? Circumstances in which a full dissent is nearly certain to have no effect on the future development of the law; circumstances in which a full dissent is nearly certain to have no effect on the panel majority or judges of a higher or coordinate court; and circumstances in which, because of the relative unimportance of the cause, the additional effort needed to write a full dissent outweighs the slim chance that such a dissent might affect the development of the law and/or the resolution of the case. But these are precisely the circumstances under which a disagreeing judge should forgo dissent entirely! The case for the undeveloped dissent thus ultimately resolves itself into this: sometimes, it is not the worst course of action. The problem, however, is that it is never the best. When the cause is important, when persuasion is possible, the undeveloped dissent is not enough; in other circumstances, as noted, it is too much.

Fortunately, dissents without opinion have never been common in the Second Circuit,¹⁴⁴ and, probably due to the increased availability of law clerks, dissents without elaboration have become much less common in recent years. Indeed, for at least the last fifty years, the vast majority of Second Circuit dissents have been (or at least have aimed at being) fully developed, *reasoned* dissents.¹⁴⁵

¹⁴⁴ It has been noted that in the early years of the Fifth Circuit, "often a judge dissented without opinion." H. COUCH, A HISTORY OF THE FIFTH CIRCUIT, 1891-1981, at 31 (1984). The same cannot be said of the early years of the Second Circuit, but such dissents were not entirely unknown. See, e.g., *Maatschappij Tot Exploitatie Van Rademaker's Koninklijke Cacao & Chocoladefabrieken v. Kosloff*, 45 F.2d 94, 98 (2d Cir. 1930) (Chase, J., dissenting without opinion); *Michel v. United States*, 37 F.2d 38, 41 (2d Cir. 1930) (Chase, J., dissenting without opinion), *rev'd*, 282 U.S. 656 (1931). On the modern court, however, dissents without opinion are virtually unknown, although, unfortunately, concurrences without opinion are not. See, e.g., *Berkovich v. Hicks*, 922 F.2d 1018, 1026 (2d Cir. 1991) (Oakes, C.J., concurring without opinion); *Barrett v. United States*, 798 F.2d 565, 578 (2d Cir. 1986) (Cardamone, J., concurring without opinion); *United States v. Edgerton*, 734 F.2d 913, 923 (2d Cir. 1984) (Van Graafeiland, J., concurring without opinion).

¹⁴⁵ In the first six months of 1991, for example, approximately 28 dissents were filed. Quite typically, none of the dissents were without opinion, and only one can be considered without elaboration. See *United States v. Perrone*, 936 F.2d 1403, 1420 (2d Cir. 1991) (Lumbard, J., dissenting in part, concurring in part).

Such dissents are obviously designed to persuade, and are obviously motivated by the desire to persuade.¹⁴⁶ Such dissents also operate to satisfy the appearance function of dissent, whether or not satisfaction of that function acts as a motivator. Does satisfaction of the ego function act as a motivator? We can assume that it does, but, in the context of a developed, reasoned dissent, it hardly matters whether the answer is yes or no.

It is not unusual for a motivation deemed baneful in some circumstances to be viewed neutrally in others. Sex, for example, is sanctioned by some religions for procreative purposes only, but, if a particular procreative act also yields some slight modicum of personal pleasure—well, perhaps we sometimes do live in a Panglossian world. In the same way, if a reasoned dissent fulfills its primary task of persuasion, it is of little negative consequence if, at the same time, the ego is stroked and massaged as well (*i.e.*, as long as the loosing of the ego does not result in a dissent that is condescendingly dismissive of the majority opinion, or that expressly denigrates the majority author's character or ability, or that is otherwise unduly damaging to collegiality). Indeed, given the futility of eliminating as strong a motivating force as is the ego, one should be thankful when that force finds its expression in the relatively salutary form of the reasoned dissent. This is especially true since the developed, reasoned dissent—in contrast to other types of dissent—is subject to particularized criticism by the majority, which fact tends to discourage those dissents most vulnerable to majority criticism, and to encourage those least vulnerable. In other words, to the extent ego concerns consciously or unconsciously may motivate a dissent, those same concerns may also discourage a reasoned dissent, as the issuance of such a dissent risks the engenderment of a blow to the ego in the form of express and pointed majority con-

¹⁴⁶ The motive may reveal itself explicitly. *See, e.g.*, *Katharine Gibbs School, (Inc.) v. FTC*, 628 F.2d 755, 758 (2d Cir. 1979) (Oakes, J., dissenting from denial of petition for reh'g in banc) (direct call for Supreme Court review); *United States v. Ceccolini*, 542 F.2d 136, 144 n.3 (2d Cir. 1976) (Van Graafeiland, J., dissenting) (same), *rev'd*, 435 U.S. 268 (1978); *see also Audi Vision Inc. v. RCA Mfg. Co.*, 136 F.2d 621, 625 (2d Cir. 1943) (Frank, J., concurring) (suggesting legislative action). However, recognition that not every case is appropriate for Supreme Court review and fears of being labeled a judge who cries wolf have tended to make direct invitations to higher authority no more than occasional. But the absence of such an invitation hardly means the absence of a motive to persuade. Whether the dissenting judge simply contrasts the majority's opinion with Supreme Court (or circuit) precedent and allows the higher authority to draw its own conclusions as to the necessity for reversal, or utilizes a myriad of other persuasive tools, the same motive to persuade is at least implicit in the making of every developed, reasoned dissent.

tradition. Thus, the ego motivation, in the context of a developed, reasoned dissent, acts as a sort of quality control, sifting out those dissents least likely to persuade, *i.e.*, those dissents that can least be justified.

The contrast with the dissent without opinion and the dissent without elaboration is clear. These dissents permit no particularized criticism, for they do not say anything to which such criticism could attach. This absence of risk to the ego means the absence of any ego-derived impetus for restraint. The result—an increased frequency of undeveloped dissents on occasions in which no type of dissent could be justified—is as harmful as it is obvious.

In sum, if it's worth disagreeing, it's worth saying why, even when to say why requires a substantial investment in time and effort. A judge who concludes that saying why would take "too much" time and "too much" effort, really has determined that the subject case is not important enough even to *try to effectively* disagree. That determination having been made, in light of the evident harms attributable to undeveloped dissents, the proper course is not to dissent without opinion or without elaboration; rather, the proper course is not to dissent at all. The ego function—the only function well-served by such dissents — is simply not significant enough to justify a different conclusion. Fortunately, as noted, on today's Second Circuit, a different conclusion seldom is drawn.¹⁴⁷

V. SOME LESSONS OF DISSENT

To this point, this Article has discussed individual judges almost exclusively in the context of its treatment of larger historical patterns. The emphasis is different in this final section: here, the primary focus will be upon the current judges of the Second Circuit as *individuals*, not as members of a collective embodying to a greater or lesser degree a particular historical trend. The initial aim is to discern individual patterns of dissent, for the ultimate purpose of assisting practitioners in more effectively presenting their arguments to the different judges of the Court.

First, however, a few words of explanation and limitation may be in order. The explanation anticipates an objection to the contention that a study of dissents may be helpful to practitioners, namely, that a dissent, by definition, represents a losing argument, and that an attorney who makes it a practice to rely on losing ar-

¹⁴⁷ See *supra* notes 144-45 and accompanying text.

guments mustn't much rely on his practice. It is true, of course, that in the search for "good" authority, a plodding majority opinion beats a sublime dissent nearly every time. But that is only to say that one should not mistake a dissent for the opinion of the court. My point is that circuit court dissents contain lessons of their own beyond an articulation of the law of a particular circuit. The most important of these lessons illuminate an overall approach to judging that transcends the relatively narrow confines of a particular body of substantive law. While these lessons are unlikely to be of determinative assistance when the law of the circuit is clearly contrary to one's position, there are many cases in which the law is not so well-defined. Experience is likely to teach attorneys who heed dissents' lessons to view these latter cases as fertile fields of opportunity.

Those who ignore dissents' lessons, on the other hand, are likely to find the same fields considerably more barren, yet not (these are the words of limitation) as barren as they might be in the absence of a Second Circuit practice adopted in response to the Judge Manton bribery scandal. Judge Manton—until he resigned in 1939, the Second Circuit's senior, *i.e.*, chief judge¹⁴⁸—was convicted that same year of obstruction of justice and intent to defraud the United States. His curious sense of judicial ethics was captured in a nutshell in his petition to the Supreme Court for a writ of certiorari, in which he argued that "it serves no public policy for a high judicial officer to be convicted of a judicial crime, for [it] tends to destroy the confidence of the people in the court."¹⁴⁹ Judge Manton's remaining legacy is the Second Circuit's practice of not publicly revealing the composition of a panel until noon of the Thursday of the week prior to argument.¹⁵⁰ The laudable intent of the practice obviously is to reduce the risk of improper contacts between judges and advocates, but an incidental effect (at least on a large court that sits in panels of three) is that it effectively eliminates the opportunity to tailor one's brief to a specific

¹⁴⁸ While the term "chief judge" was not adopted until 1948, *see* Act of June 25, 1948, ch. 646, § 45(a), 62 Stat. 869, 871, the "senior circuit judge" in the years prior to 1948 is generally recognized as having served in a comparable position. Readers who wish to quibble over this point are directed to the lobby outside the Second Circuit's Foley Square courtroom, where, speaking louder than a thousand words, one can find Judge Manton's picture in a photographic display of all Second Circuit "chief judges."

¹⁴⁹ J.P. MACKENZIE, *THE APPEARANCE OF JUSTICE* 227 (1974). Understandably unmoved by this appeal, the Supreme Court denied the petition.

¹⁵⁰ M. SCHICK, *supra* note 8, at 88.

judicial audience, since (except in in banc cases) the composition of one's panel is not known at the time briefs must be filed. Such tailoring is limited to the oral argument stage of an appeal. To be sure, this reduces the advocate's opportunity to engage in judge-specific argument, but just as surely it does not eliminate it completely. It is entirely legitimate to emphasize different matters in one's oral and written presentations, and, under the right circumstances, also entirely prudent and wise: consistency's loss could well be one's client's gain.¹⁵¹

What points might one emphasize (or minimize, as the case may be) before particular judges? The question is addressed in the paragraphs that follow. In the main, the raw materials from which this Part's conclusions are drawn are each judge's dissents. Dissents do reveal a judge's particular interests; indeed, as Ninth Circuit Judge Alex Kozinski recently has suggested, they do so more effectively than a judge's majority opinions.¹⁵² In a majority opinion, as another federal appellate judge has noted, "there is compromising in order to reach consensus. A judge often conforms his language in order to avoid antagonisms."¹⁵³ Because of this, one can

¹⁵¹ See Bright, *Getting There*, 77 A.B.A. J. 68, 71 (March 1991). In his A.B.A. *Journal* article, Eighth Circuit Judge Myron H. Bright concluded tailoring can be effective, *id.*, and that oral argument "can play a significant role in many cases," *id.* at 72; see also F. WEINER, *EFFECTIVE APPELLATE ADVOCACY* 11-12 (1950) (contending "cases frequently are won and lost on oral argument"); Feinberg, *supra* note 119, at 306 (noting importance of oral argument).

¹⁵² Kozinski, *Confessions of a Bad Apple*, 100 YALE L.J. 1707, 1711 (1991). Although there are dangers in assuming too direct a connection between the dissents and interests of a judge on an intermediate appellate court, by and large a substantial correlation can be discerned. Second Circuit Judge Thurgood Marshall's dissents, for example, quite accurately portended the ultimate expression of his judicial philosophy as a Supreme Court Justice. For example, a majority of Judge Marshall's dissents evidenced a greater solicitude than the majority to the rights of criminal defendants and habeas petitioners, see *United States v. Aviles*, 337 F.2d 552, 560 (2d Cir. 1964) (Marshall, J., dissenting), *cert. denied*, 380 U.S. 906 (1965); *United States v. Fay*, 333 F.2d 12, 21 (2d Cir. 1964) (in banc) (Marshall, J., dissenting), *aff'd*, 381 U.S. 654 (1965); *United States v. Fay*, 350 F.2d 400, 405 (2d Cir. 1965) (Marshall, J., dissenting), *cert. denied*, 382 U.S. 1019 (1966), civil rights demonstrators, see *People v. Galamison*, 342 F.2d 255, 275 (2d Cir.) (Marshall, J., dissenting), *cert. denied*, 380 U.S. 977 (1965), employees, see *Welch Scientific Co. v. NLRB*, 340 F.2d 199, 205 (2d Cir. 1965) (Marshall, J., dissenting), and victims of racially-motivated discrimination, see *Ephraim v. Safeway Trails, Inc.*, 341 F.2d 815, 820 (2d Cir. 1965) (Marshall, J., dissenting).

¹⁵³ Goldman, *supra* note 118, at 479 (quoting unidentified circuit judge). The extent to which a judge may conform his or her language is indicated by Chief Justice Hughes's reported comment that "he tried to write his opinions clearly and logically, but if he needed the fifth vote of a colleague who insisted on putting in a paragraph that did not belong, in it went, and let the law reviews figure out what it meant." W. REHNQUIST, *supra* note 29, at 302; see also B. CARDOZO, *Law and Literature*, in *LAW AND LITERATURE* 33-36 (1931) (contrasting writing of majority and minority opinions).

rarely be certain at which point the majority author has ended and the compromising has begun.

No such uncertainty is presented by a dissent. Thus, when a judge expresses in dissent a particular type of concern in a particular manner time and time again, the conclusion is inescapable that the judge's pattern of dissent is reflective of a heightened interest in the matters consistently raised in dissent. Whether, in dissenting, the judge is right or wrong is not, for our purposes, of much importance; what is important is the insight provided by such dissents into the judge's *overall* approach to the art of judging. Dissents may also yield insights of a more particularized sort, *e.g.*, the dissenting judge's view of the extent of the rights accorded to individuals under the fourth amendment, and these insights may in some instances be of great assistance to the advocate. However, useful though the narrower inquiry can be, such is not the focus here. Instead, the focus will be upon patterns of dissent which may suggest increased receptivity not so much to a particular substantive argument as to a particular *type* of argument.

A. *Just the Facts*

The job of a federal appellate judge is to establish and clarify the law, not to make factual findings. Yet, appellate assessment of the facts is at the heart of many appeals, either directly (whether the factual findings of the district judge are "clearly erroneous"), or indirectly (quasi-factual determinations such as the sufficiency of the evidence or the existence of a genuine issue of material fact). It is apparent from a review of their dissents that judges' interest in such questions differs remarkably.¹⁵⁴

¹⁵⁴ A judge's interest in factual matters is measured herein primarily by the frequency with which he or she has dissented on such matters. To some extent, the accuracy of the measure is subject to dispute; such frequent dissent may merely signify a generally idiosyncratic view. But the nature of fact-focused dissents, combined with consideration of the factors that influence the decision to dissent, militate against this conclusion. A decision that turns on the appropriateness of a factual assessment is unlikely to attract the attention of either the in banc circuit court or the Supreme Court. This is because few such decisions have any but the most limited precedential significance; most cases of this sort involve a *sui generis* inquiry based upon well-established legal standards. It is thus generally easier to acquiesce in a decision one disagrees with when one's disagreement is rooted in a differing factual assessment, since it is easier to conclude one's dissent will affect neither the ultimate resolution of the case nor the future course of the law. Therefore, regardless of whether their conclusions are right or wrong, those judges who frequently decline to take the easier route of acquiescence, by their actions, can properly be considered as having demonstrated a heightened interest in fact-related issues.

The record of Judge Amalya L. Kearse, for example, indicates great sensitivity to fact-related issues. Since her appointment to the Second Circuit in 1979, Judge Kearse has averaged about three dissents per year, approximately half of which were fact-based. While Judge Kearse's overall rate of dissent places her squarely in the middle of the court, no Second Circuit judge dissents more often over fact-based issues.

One inclination of Judge Kearse is particularly apparent from a reading of her dissents: a relatively pronounced reluctance to decide disputes by summary judgment. Six times Judge Kearse has dissented from her colleagues' affirmance, or remand for entry, of a summary judgment;¹⁵⁵ never has she dissented from a reversal of the same. Because the first rule of oral advocacy is to address matters the judges are interested in,¹⁵⁶ and because Judge Kearse has indicated through her dissents an interest in the operation of the summary judgment rule, appellants would be well-advised to press any legitimate issues of summary judgment before a panel on which Judge Kearse is sitting. This is true even if they otherwise might be inclined to emphasize something different, *e.g.*, a jurisdictional issue. It is also true even if one is convinced by Judge Kearse's prior opinions that one's written brief is sufficient to win her vote; after all, the reason Judge Kearse's presence makes pursuit of a summary judgment issue more appealing is not that she controls *all* the votes necessary to issue a persuasive dissent, but rather, that she controls *half* the votes necessary to the issuance of a favorable binding order. While an advocate could scarcely hope for a more capable ally than Judge Kearse, it is an elementary rule of appellate advocacy that one ally, no matter how capable, is simply not enough.

Judge Kearse's dissents also evidence, to a greater degree than the dissents of most of her colleagues, a tendency to defer on factual matters to the finder of fact, whether that fact-finder is a district judge,¹⁵⁷ a jury,¹⁵⁸ or an administrative agency.¹⁵⁹ The

¹⁵⁵ *United States Fire Ins. Co. v. PKFinans Int'l Corp.*, 904 F.2d 169, 171 (2d Cir. 1990) (Kearse, J., dissenting); *Jamie Sec. Co. v. The Limited, Inc.*, 880 F.2d 1572, 1578 (2d Cir. 1989) (Kearse, J., dissenting); *American Home Assurance Co. v. Baltimore Gas & Elec. Co.*, 845 F.2d 48, 52 (2d Cir. 1988) (Kearse, J., dissenting); *Shockley v. Vermont State Colleges*, 793 F.2d 478, 482 (2d Cir. 1986) (Kearse, J., dissenting); *Anderson v. Coughlin*, 700 F.2d 37, 46 (2d Cir. 1982) (Kearse, J., dissenting); *Keeler v. Joy*, 641 F.2d 1044, 1055 (2d Cir.) (Kearse, J., dissenting), *cert. denied*, 454 U.S. 893 (1981).

¹⁵⁶ See Davis, *The Argument of An Appeal*, 26 A.B.A. J. 895, 896 (1940).

¹⁵⁷ See *Hanson Trust PLC v. ML SCM Acquisition, Inc.*, 781 F.2d 264, 285 (2d Cir.

strength of this conclusion is diluted somewhat by the fact that Judge Kearse has on at least two occasions dissented from her colleagues' acceptance of the fact-finders' determinations;¹⁶⁰ perhaps it would be more indisputably accurate to state that Judge Kearse has devoted an uncommon amount of energy toward ensuring the (in her view) proper application of appellate standards of review of factual findings. In that case, the most indisputably prudent advice one might give to an appellant or appellee scheduled to argue before Judge Kearse is not to concentrate on the "legal" issues of one's case to the exclusion of the "factual" issues, because if the latter issues *may* be determinative, determinative they may well be.

After Judge Kearse, Judge Ellsworth Van Graafeiland is the most fact-sensitive member of the Second Circuit. But differences between the two judges exist beyond the relative frequency with which they evidence such sensitivity through dissent. Judge Van Graafeiland, for example, does not seem to share Judge Kearse's aversion to summary judgments. What Judge Van Graafeiland does do, however, more so than any other judge on the court, is to give effect to what might be called the "let's have a little common sense" rule of judging, which rule is based on the premise that "[j]udges are not 'forbidden to know as judges what [they] see as [women and] men.'"¹⁶¹ Thus, Judge Van Graafeiland has dissented to a reversal of a grant of judgment n.o.v. against an employee who secretly had recorded conversations with his employer because "I would not have [such a person] working for me," and "I am satisfied that [neither would my colleagues]";¹⁶² has dissented

1986) (Kearse, J., dissenting); *Olivieri v. Ward*, 766 F.2d 690, 694, 697 (2d Cir. 1985) (Kearse, J., dissenting).

¹⁶⁰ See *United States v. Capo*, 817 F.2d 947, 955 (2d Cir. 1987) (in banc) (Kearse, J., dissenting); *Garcia v. Chase Manhattan Bank, N.A.*, 735 F.2d 645, 651 (2d Cir. 1984) (Kearse, J., dissenting).

¹⁶⁹ See *Barone v. Bowen*, 869 F.2d 49, 53 (2d Cir. 1989) (Kearse, J., dissenting); *Felshina v. Schweiker*, 707 F.2d 71, 74 (2d Cir. 1983) (Kearse, J., dissenting).

¹⁶⁰ See *Sheehan v. Purolator, Inc.*, 839 F.2d 99, 106 (2d Cir.) (Kearse, J., dissenting), *cert. denied*, 488 U.S. 891 (1988); *United States v. Jones*, 763 F.2d 518, 526 (2d Cir. 1985) (Kearse, J., dissenting), *cert. denied*, 474 U.S. 981 (1985).

¹⁶¹ *People v. Galamison*, 342 F.2d 255, 272 (2d Cir.) (Kaufman, J., concurring) (quoting *Ho Al Kow v. Nunan*, 5 Sawy. 552, 560, (1879) (No. 6,546)), *cert. denied*, 380 U.S. 977 (1965).

¹⁶² *Heller v. Champion Int'l Corp.*, 891 F.2d 432, 438 (2d Cir. 1989) (Van Graafeiland, J., dissenting). Judge Van Graafeiland concluded his opinion in *Heller* by noting his "regret . . . that, as a result of our ruling in this case, every disgruntled employee in the Second Circuit henceforth will feel free to report to work with a tape recorder hidden on his per-

to an affirmation of a judgment against a manufacturer in a products liability case because the product was labeled "caustic" and "[i]f there was ever an English word whose meaning is crystal clear, that word is 'caustic'";¹⁶³ and has dissented to an affirmation of a judgment that found police officers and their employer, the County of Suffolk, liable for malicious prosecution because "the jury's verdict . . . that no damages were caused by the individual defendants but that \$300,000 in damages were caused by the County [is, at] the least, . . . bizarre."¹⁶⁴ The lesson to advocates appearing before Judge Van Graafeiland is to be especially alert to the presence of, and be prepared to highlight or discount, similar "dispositive" facts, which have their root in the judge's perception of "common sense," especially when the consequence of the court's failing to accept such facts may be to cast unjust aspersions on the innocent, or to reward the unsavory and disreputable.¹⁶⁵

That such an approach may be productive is reinforced by a second tendency of Judge Van Graafeiland, which is to use to an uncommon degree dictionary definitions for support.¹⁶⁶ This tendency is related to the first in that a dictionary constitutes a codification of the "common sense" of words. The technique possesses a veneer of neutrality that may not always be justified: for example, a law school professor of mine, who clerked on the New York Court of Appeals in the late 1950's, has related that when he was clerking he once searched for two weeks, through a score of dictionaries, to find the decidedly uncommon definition of "solicitation" needed to resolve a case in accordance with his judge's predilection.¹⁶⁷ To his credit, Judge Van Graafeiland appears never to

son." *Id.* at 439.

¹⁶³ *Billiar v. Minnesota Mining and Mfg. Co.*, 623 F.2d 240, 248 (2d Cir. 1980) (Van Graafeiland, J., dissenting).

¹⁶⁴ *Gentile v. County of Suffolk*, 926 F.2d 142, 155 (2d Cir. 1991) (Van Graafeiland, J., dissenting).

¹⁶⁵ See, e.g., *Heller*, 891 F.2d at 438-39 (Van Graafeiland, J., dissenting) (expressing regrets that majority "pat Heller on the back for his contemptible conduct while they castigate Mark Davenport for doing what his conscience and his advisers told him was the proper thing to do").

¹⁶⁶ See, e.g., *Victoria Sales Corp. v. Emery Air Freight, Inc.*, 917 F.2d 705, 710 (2d Cir. 1990) (Van Graafeiland, J., dissenting) (definition of "the"); *Billiar*, 623 F.2d at 248 (Van Graafeiland, J., dissenting) (definition of "caustic"); *United States v. Steinberg*, 551 F.2d 510, 521 (2d Cir. 1977) (Van Graafeiland, J., dissenting) (definition of "predisposition"); *Bartok v. Boosey & Hawkes, Inc.*, 523 F.2d 941, 950-51 (2d Cir. 1975) (Van Graafeiland, J., dissenting) (definition of "posthumous").

¹⁶⁷ The perfunctory memorandum opinion that followed affirmed without comment the opinion of the intermediate appellate court. The only allusion to the definitional search is

have used a dictionary definition to bolster an uncommon usage; having on many occasions witnessed the judge's piranha-like approach to oral argument, it is suggested that the advocate who takes a different approach does so at his or her peril. But when the common definition may be helpful, the advocate, more so with Judge Van Graafeiland than with any other judge, should not hesitate to review and possibly refer to it, and perhaps even make it a focus of his or her presentation.

Except for Chief Judge Oakes, none of the other judges on the Second Circuit are as distinctly interested in factual matters as are Judges Van Graafeiland and Kearse. Judges Newman, Richard J. Cardamone, Lawrence W. Pierce, Ralph K. Winter, and George C. Pratt are particularly disinclined to dissent on such a basis. Judges Feinberg and William H. Timbers appear interested primarily in discouraging what they regard as instances of appellate fact-finding. Judges Roger J. Miner and Francis X. Altimari have demonstrated greater receptivity to fact-based arguments than the least inclined of their colleagues, but it is still too early in their Second Circuit careers to make an assessment beyond this. None of the judges on the court, of course, are entirely closed to the type of arguments discussed above in this Part; a good fact-based argument is thus worth making no matter what the composition of one's panel.¹⁶⁸ Some judges *are* more receptive than others, however; when an advocate possesses the luxury of multiple arguments, the panel's composition should be one factor in determining which of such arguments to emphasize.

B. *The Principle of the Thing*

All appellate judges articulate principles of law and apply those principles to the facts before them. All appellate judges also

an indirect reference, by the reporter, noting that two judges dissented "upon the ground that there was no evidence to establish solicitation . . ." See *People v. Liebenthal*, 5 N.Y.2d 876, 876, 155 N.E.2d 871, 871, 182 N.Y.S.2d 26, 26 (1959); compare *Pittson Coal Group v. Sebben*, 488 U.S. 105, 113 (1988) (majority opinion by Justice Scalia utilizing *Webster's Ninth New Collegiate Dictionary*) with *id.* at 134 n.7 (Stevens, J., dissenting) (utilizing for same word *Webster's Third New International Dictionary*).

¹⁶⁸ During the 1989-90 Term, for example, Judge Pierce, perhaps the Second Circuit judge least inclined to dissent on the basis of a differing factual assessment, wrote two major opinions that turned, at least in part, on appellate rejection of the fact-finders' determinations. See *County of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295, 1311-20 (2d Cir. 1990); *United States v. Casamento*, 887 F.2d 1141, 1161-62, 1167 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 1138 (1990).

from time to time disagree with their colleagues' articulation or application, and record such disagreements in formal dissents. This section is not concerned with identification of particular principles that may with greater or lesser regularity provide the forum for particular judges' disputes. Instead, it will identify different broad approaches typically taken by judges in the course of articulating their reasons for dissenting on matters involving legal principles. The practical utility of this section concededly depends upon whether the type of argument typically advanced by a judge in dissent corresponds to the type of argument a judge is most receptive to hearing from an advocate. In the opinion of the author, a close correspondence does exist. The purpose of most dissents, after all, is to persuade, and, in attempting to persuade, judges will tend to use the mode of argument they themselves find most persuasive.

The biggest difference in styles of argument between judges is in the extent to which reasoning explicitly derived from broad principles is favored and the ease with which broad conclusions are drawn. Some judges often argue from such principles and often draw such conclusions; others, preferring more narrowly based arguments, hardly ever do so. Chief Judge Oakes is probably the Second Circuit's foremost exponent of the former approach. The concluding paragraph of his dissenting opinion in *United States v. Cattouse*¹⁶⁹ is a paradigmatic example of it:

I could prolong this dissent. I end it with a sense of futility. To my mind the majority's willingness to expand the exigent circumstances exception is but another sad paragraph in a book that could be entitled *The Erosion of the Fourth Amendment*. And I fear the chapters that have yet to be written.¹⁷⁰

One might compare this to Judge Pierce's narrowly tailored conclusion in *United States v. Moreno*¹⁷¹ that the majority had gone too far in extending the plain view exception to the fourth amendment's prohibition against warrantless seizures:

In sum, this case brings us uncomfortably close to holding that the mere viewing of a package of the type present here, by itself, constitutes probable cause. See [*United States v. Barrios-Moriera*, 872 F.2d 12, 17 (2d Cir. 1989)] (rejecting suggestion that "the mere viewing and evaluation of the package alone consti-

¹⁶⁹ 846 F.2d 144 (2d Cir.), *cert. denied*, 488 U.S. 929 (1988).

¹⁷⁰ *Id.* at 150 (Oakes, J., dissenting).

¹⁷¹ 897 F.2d 26 (2d Cir.), *cert. denied*, 110 S. Ct. 3250 (1990).

tuted probable cause.”). I feel constrained to reverse¹⁷²

Initially, it should be noted that the case cited by Judge Pierce, *Barrios-Moriera*, was also a case involving the plain view exception from which Judge Pierce dissented. Judge Pierce might then have concluded that *Moreno* was another paragraph in, if not a book that could be entitled *The Erosion of the Fourth Amendment*, then at least an essay. But, despite the similarities in subject matter and in viewpoint as to the direction of the law, Judge Pierce took an entirely different tack in summarizing his position.

First, Judge Pierce confined himself narrowly to the issue before him. In contrast to Chief Judge Oakes, who more or less suggested in his concluding paragraph that the current state of fourth amendment jurisprudence resembled “so much codswallop,”¹⁷³ Judge Pierce accepted the current law without critical comment. The citation to *Barrios-Moriera* is not, after all, to his own dissent in that case, but to the majority opinion from which he dissented.

Another difference is in the two judges’ descriptions of future consequences. Characteristically, Chief Judge Oakes took a broad position, saying he “fear[ed] the chapters that have yet to be written,” but declining to state with any particularity exactly what he feared those chapters would entail. Also characteristically, Chief Judge Oakes suggested it was not merely any particular case precedents that were in danger, but the fourth amendment itself.

Judge Pierce, on the other hand, stated with exactitude the future consequence he feared, and rather than overtly rooting the fear in fourth amendment concerns, more narrowly rooted it in concern for the viability of circuit precedent.

Each of these approaches has its respective strengths and weaknesses, in majority as well as in separate opinion-writing. Quotability, not at all a matter of insignificance in the appellate judging business, is the most obvious strength of the broader approach. It allows a judge’s words to have impact on matters beyond the particulars of the case for which the words were written. The strength of the narrower approach is that, like a tool designed to perform one task and one task only, it is more likely to help accomplish that task than a tool of more general application. A majority opinion written by a judge writing in the narrower style, for

¹⁷² *Id.* at 34 (Pierce, J., dissenting).

¹⁷³ *United States v. Valencia*, 677 F.2d 191, 193 (2d Cir. 1982) (Oakes, J., dissenting).

example, is more likely to become, and stay, a viable precedent. At the same time, however, it is less likely to be of assistance when another task needs doing, *i.e.*, when one is looking to stretch a precedent, or apply one in an analogous situation. This is the major weakness of the narrow approach, a weakness the broader approach does not share.

The major weakness of the broader approach is that on some occasions, being more provocative of dissent, it may draw a dissent when a more narrowly drawn opinion would not, and thus may deprive "the bar [of] the [superior] guidance of a unanimous opinion."¹⁷⁴ It can hardly be considered coincidental that the two judges on the current court most committed to the broad approach—Chief Judge Oakes and Judge Cardamone—are also the judges whose majority opinions most often find other judges writing separately in dissent or concurrence. Conversely, Judges Feinberg, Kearse, and Pierce, all of whom write in the narrower style, are least likely to find other members of a panel dissenting from or separately concurring with their majority opinions.¹⁷⁵

Neither the broad nor narrow approach is necessarily better than the other; each is in its own right legitimate. When Judges Learned and Augustus Hand were on the Second Circuit, practitioners who advised, "Quote Learned, but follow Gus," were not slighting either, but merely recognizing the most obvious attributes of each approach.¹⁷⁶ Augustus Hand, more so than his cousin, held the center of the court, in large part due to his understated, narrow, one-case-at-a-time approach. In that position, he wielded tremendous influence.¹⁷⁷ But there is also no doubt that outside the circuit, in other courts and in academia, Learned Hand was more influential, as was his colleague Judge Frank, perhaps as adept at the broad approach as any judge in history.

¹⁷⁴ See Feinberg, *supra* note 119, at 301.

¹⁷⁵ Judge Cardamone is the judge least likely, by far, to obtain unanimous support. Chief Judge Oakes is next, followed, in order, by Judges Winter, Meskill, Pratt, Newman, Kearse, Pierce, and Feinberg. Obviously, not all judges of the Second Circuit are included in this listing. The list does include, however, all judges who were on active status in 1982 and who maintained active status at least until 1990. In the interests of accuracy, other judges were excluded so as to ensure that conclusions were derived from a large sample of cases, and not distorted by inequalities in caseloads.

¹⁷⁶ Actually, part of Learned Hand's genius as a judge was that to a large extent he embodied the best of two worlds; although he generally took a narrow approach to opinion-writing (though not as narrow as Augustus Hand), he nonetheless remained among the most quotable of judges.

¹⁷⁷ See M. SCHICK, *supra* note 8, at 321; Wyzanski, *supra* note 109, at 583.

The upshot of all this for the practitioner is that, in readying one's argument, one should prepare to address the particular concerns that the judge's general approach indicates he or she is probably most interested in. It is foolish to assume too great a difference between the two approaches; the exigencies of legal argument usually do keep the expressed range of views within a relatively circumscribed area. But it is equally foolish to assume no difference exists. Thus, before Judges Feinberg, Kearse, and Pierce, it is best to argue narrowly; before Chief Judge Oakes and Judge Cardamone, a broader approach may be more productive. Often, there is more than one way to win a case; an advocate who insists upon arguing a case in the manner he or she feels most comfortable with, in disregard of the approach most likely to appeal to the advocate's judges, disserves his or her client.¹⁷⁸

Before leaving this section, one more matter might be noted, related to the discussion above, having to do with Judge Newman. More often than any other judge on the court, usually in concurrence but sometimes in dissent, Judge Newman writes separately to express his views on the future implications and the limits of the legal principles articulated by the court in its decisions.¹⁷⁹ Nor-

¹⁷⁸ D.C. Circuit Judge Patricia M. Wald has stated that "a judge sometimes decides whether to file a . . . dissent . . . based . . . upon the support she can anticipate from her clerks." Wald, *Selecting Law Clerks*, 89 MICH. L. REV. 152, 153 (1990). In the same way, a judge may decide whether to press an issue with his or her colleagues based upon the support he or she has received from an advocate.

¹⁷⁹ See *New Era Publications Int'l v. Henry Holt Co.*, 884 F.2d 659, 662 (2d Cir. 1989) (Newman, J., dissenting from denial of petition for reh'g in banc) (writing "to allay . . . misunderstanding"), *cert. denied*, 110 S. Ct. 1168 (1990); *United States v. Coonan*, No. 90-1223, slip op. at 6384 (2d Cir. July 16, 1991) (Newman, J., concurring) ("writ[ing] separately to illuminate [a] perplexing issue"); *United States v. Salerno*, 829 F.2d 345, 346 (2d Cir. 1987) (Newman, J., concurring) (noting constitutionality of statute still an open question); *Cine 42nd Street Theater Corp. v. Nederlander Org., Inc.*, 790 F.2d 1032, 1048 (2d Cir. 1986) (Newman, J., concurring) (writing "to identify a difficulty"); *Malchman v. Davis*, 761 F.2d 893, 906 (2d Cir. 1985) (Newman, J., concurring) (writing to "express a caution"), *cert. denied*, 475 U.S. 1143 (1986); *United States v. Young*, 745 F.2d 733, 765 (2d Cir. 1984) (Newman, J., concurring) (writing "separately to express a caution"), *cert. denied*, 470 U.S. 1084 (1985); *United States v. Hannon*, 728 F.2d 142, 146-47 (2d Cir. 1984) (Newman, J., concurring) (noting "matter less clear than the majority opinion suggests" and identifying issue that "remains to be determined"); *Edwards v. Jones*, 720 F.2d 751, 757 (2d Cir. 1983) (Newman, J., concurring) ("identifying . . . risk now [to] serve as a caution to . . . future panel"); *United States v. Lace*, 669 F.2d 46, 53 (2d Cir.) (Newman, J., concurring) (writing separately in "hope that [majority] dictum will not in future cases ripen into a holding"), *cert. denied*, 459 U.S. 854 (1982); *Calavo Growers v. Belgium*, 632 F.2d 963, 969 (2d Cir. 1980) (Newman, J., concurring) ("add[ing] a word of caution to emphasize the [applicable] controlling principles"), *cert. denied*, 449 U.S. 1084 (1981); *Hansen v. Harris*, 619 F.2d 942, 958 (2d Cir. 1980) (Newman, J., concurring) (writing to emphasize "limiting principle for [court's] decision"),

mally, Judge Newman writes to narrow the reach of the majority decision. At least for lawyers who can predict with relative certainty where the future interests of their clientele will lie, the lesson is plain. When before Judge Newman, more so than when before other members of the court, if advantageous to one's position, one should discuss possible future undesirable consequences of a broadly-worded adverse decision, as well as ways to limit such consequences. The result may not turn defeat into victory—indeed, such discussion may require *arguendo* assumption of some type of adverse decision—but it might limit the extent of one's defeat: "he who in argument just a little budes, may live to argue before other judges."

C. *The Respectful Dissent*

The great majority of dissents on the Second Circuit are today—and have always been—cast in the most respectful of terms. *Sturm und Drang* there may be at the District of Columbia Circuit,¹⁸⁰ and at the Supreme Court too¹⁸¹—and this may be reflected in the opinions of these courts—but at the Second Circuit, the opinions reflect, if not always sunny skies and carefree times, at least a more temperate climate relatively free from the stresses of personally directed invective.

The first lesson that may be drawn from this fact—that the advocate should take particular care to address the appellate court in similarly civil and respectful terms—is rather obvious and easy to apply, and, in fact, commonly is applied. The only additional point that might be noted is that the veneer of respectfulness the advocate extends to the appellate judges ought to be extended as well to the district judge whose judgment is being questioned upon appeal. A majority of the members of the Second Circuit were at one time district judges, and such judges tend to remain sensitive to real or perceived slightings of their former colleagues on the

rev'd sub nom. Schweiker v. Hansen, 450 U.S. 785 (1981).

¹⁸⁰ See Mikva, *Sturm und Drang at the D.C. Circuit*, 57 GEO. WASH. L. REV. 1063, 1064 (1989) (current D.C. Circuit Chief Judge Abner J. Mikva characterizes some dissents as "turgid" with "ad hominem-ad feminem overtones"); see also *Air Line Pilots Ass'n Int'l v. Eastern Air Lines*, 863 F.2d 891, 913-32 (D.C. Cir. 1988) (denial of suggestion for rehearing in banc).

¹⁸¹ Quick, *Whatever Happened to Respectful Dissent?*, 77 A.B.A. J. 62, 63 (June 1991) (criticizing trend on Supreme Court toward "opinion-writing that reeks of condescension").

trial bench.¹⁸²

Judge Carroll C. Hincks, for example, who served as Chief Judge of the United States District Court for the District of Connecticut before his appointment to the Second Circuit in 1953, was said by his Second Circuit colleague, Judge Harold R. Medina, to be so solicitous of the feelings of district judges that, when reversing the judgment below, he would not even use the word "reversed" unless he was "outraged."¹⁸³ Similarly, Judge Timbers, who followed in Judge Hincks's footsteps in serving as Chief Judge of the District of Connecticut before being appointed to the Second Circuit, often has demonstrated his own determination to ensure that district judges are accorded the esteem and respect that is properly due them. Judge Timbers has, for instance, taken care to excise from the well-established "abuse of discretion" standard of review any intimations of judicial misconduct:

As must be obvious to all, references in this opinion to abuse of discretion . . . on the part of the district judge are not to be taken as any reflection by the author of this opinion upon the district judge personally. Such [a] term[] simply express[es] the judicial standard[] to be invoked My colleagues and I hold Judge Stewart in the highest esteem. The benchmark of a truly competent district judge—as with Judge Stewart in the instant case—is his capacity to insure that the record demonstrates with crystal clarity the basis of his exercise of discretion . . . , so that a reviewing court can determine abuse of discretion . . . or the absence thereof.¹⁸⁴

Judge Timbers has expressed similarly protective sentiments on a number of other occasions.¹⁸⁵ On account of this protective atti-

¹⁸² This is not to say that the circuit judges without district court experience are insensitive, but, unable as they are to muster up personal memories of a wrongheaded appellate reversal, they do tend to be a bit less passionate in rebutting perceived unwarranted criticisms.

¹⁸³ *Proceedings from the Joint Session of the United States Court of Appeals for the Second Circuit and the United States District Court for the District of Connecticut in Memory of Honorable Carroll C. Hincks* 26 (December 21, 1964), in 342 F.2d (comments of Judge Medina).

¹⁸⁴ *SEC v. Stewart*, 476 F.2d 755, 759 n.1 (2d Cir. 1973) (Timbers, J., dissenting); see also *United States v. Griesa*, 481 F.2d 276, 281 n.4 (2d Cir. 1973) (Timbers, J., dissenting) ("[a]s we repeatedly have stated, the reference to 'abuse of discretion' on the part of the district judge is not to be taken as any reflection upon the district judge personally").

¹⁸⁵ See, e.g., *United States v. Ramos*, 572 F.2d 360, 364 (2d Cir. 1978) (Timbers, J., dissenting from denial of motion for reh'g in banc) (court's decision "demeaning to the trial judge"); *United States v. Robin*, 545 F.2d 775, 782 (2d Cir. 1976) (Timbers, J., dissenting)

tude—which permeates the court¹⁸⁶—it is suggested that counsel for the appellant, in detailing the magnitude of the district judge's errors, avoid cavalier dismissal of the district court's opinion (especially when before Judge Timbers, who does seem the Second Circuit member most sensitive to "attacks" upon the honor of the district court). The district judges are viewed as partners in the administration of justice, not as inferiors, and the advocate who adopts a tone of superiority to the district judge should recognize that by doing so he or she thereby implicitly adopts a tone of superiority to the appellate judges, whose favor is ultimately necessary to the advocate's success.

A substantially more subtle and substantially more conjectural lesson that *may* be drawn from the language of dissent derives from the employment by some judges of standardized language to indicate the depth of the judge's disagreement with the majority. Judge Timbers, for example, typically either "respectfully dissents,"¹⁸⁷ or "respectfully but emphatically (or most emphatically) dissents."¹⁸⁸ The inclusion of the word "emphatically" in some but

("majority decision is the most unwarranted interference with a conscientious district judge[] . . . that I have seen in more than sixteen years on the federal bench"); *Redington v. Touche Ross & Co.*, 592 F.2d 617, 626 (2d Cir. 1978) (Timbers, J., concurring) (noting district judge did not have benefit of SEC amicus brief), *rev'd*, 442 U.S. 560 (1979); *cf.* *United States v. Purnett*, 910 F.2d 51, 57 (2d Cir. 1990) (Timbers, J., dissenting) (quoting his own concurring opinion in *United States v. Busic*, 592 F.2d 13, 38 n.2 (2d Cir. 1978), Judge Timbers describes District Judge Bartels (the trial judge in both *Busic* and *Purnett*) as "one of the most conscientious and experienced federal trial judges in the United States," and states that majority's refusal to affirm Judge Bartel's decision "will force district judges in our Circuit to be baffled").

¹⁸⁶ The generally protective attitude extends beyond sensitivity to criticism, to sensitivity to other, probably more onerous burdens, such as workload. *See, e.g.*, *Nance v. Kelly*, 912 F.2d 605, 608 (2d Cir. 1990) (Pratt, J., dissenting) ("[r]eversal adds extra, useless burdens to the work of the district court"); *Karl v. Board of Educ.*, 736 F.2d 873, 878 (2d Cir. 1984) (Pratt, J., dissenting) (congressional act "created a potential for thrusting many additional difficult cases on already overworked district judges"); *hear, e.g.*, oral argument, *United States v. Rexach*, 896 F.2d 710 (2d Cir.) (recorded November 3, 1989) (cassette recording on file with Second Circuit Court Clerk), *cert. denied*, 111 S. Ct. 433 (1990). The Supreme Court is similarly protective of the courts of appeals; for example, it "once informally rebuked the Solicitor General's Office for stating accurately . . . in a petition for certiorari that only in the named court of appeals were NLRB decisions almost always overturned, thereby impugning anti-Labor bias to the judges." R. STERN, *APPELLATE PRACTICE IN THE UNITED STATES* 315 n.6 (2d ed. 1989).

¹⁸⁷ *See, e.g.*, *Cheng v. GAF Corp.*, 713 F.2d 886, 892, 895 (2d Cir. 1982) (Timbers, J., dissenting); *United States v. Lawson*, 683 F.2d 688, 695, 697 (2d Cir. 1982) (Timbers, J., dissenting); *Durham Indus., Inc. v. North River Ins. Co.*, 673 F.2d 37, 41, 43 (2d Cir.) (Timbers, J., dissenting), *cert. denied*, 459 U.S. 827 (1982).

¹⁸⁸ *See, e.g.*, *Wilson v. Ruffa & Hanover, P.C.*, 844 F.2d 81, 88 (2d Cir. 1988) (Timbers,

not all dissents appears anything but random; even a cursory review will reveal that, without exception, Judge Timbers' "emphatic" dissents possess a harshness of rhetoric alien to his other, "non-emphatic," dissents. Similarly, Judge Feinberg's "emphatic" dissents are considerably sharper than the dissents in which he simply "respectfully dissents."¹⁸⁹

Is this to say anything more than Judges Feinberg and Timbers mean what they say when they say "emphatically"? Perhaps not, but information of this sort indeed may be highly useful, as anyone who's ever played poker or heard words of love surely must concede. It connotes nothing sinister, suggests nothing of the bluff or the lie, to imply judges do not always say exactly what they mean. Especially when discussing a matter of no conceivable precedential import, such as the characterization of one's own dissent, a judge could easily employ reflexively a preferred phrase, with no more meaning intended than a Senator from California might attribute to his Senate floor reference to "the gentleman from North Carolina." Understanding this, unless they have read carefully a sufficient number of a judge's dissents to see a pattern emerge, practitioners reasonably might be inclined to view the characterizing words as so much boilerplate. But, at least in the cases of Judges Feinberg and Timbers, that would be a mistake.

In what manner might an advocate utilize knowledge of a particular pattern? Such knowledge could influence the advocate's assessment of circuit precedent. Precedents are like rubberbands; how much ground they cover at any particular moment depends largely on whether they are then being pulled and stretched, or rolled up and pocketed. A judge who has dissented emphatically regarding a particular issue may be more inclined than other

J., dissenting), *vacated sub nom.* *Wilson v. Saintine Exploration and Drilling Corp.*, 872 F.2d 1124 (2d Cir. 1989); *United States v. Melendez-Carrion*, 790 F.2d 984, 1010, 1015 (2d Cir. 1986) (Timbers, J., dissenting); *Klein v. Harris*, 667 F.2d 274, 293, 297 (2d Cir. 1981) (Timbers, J., dissenting); *Davis v. Smith*, 607 F.2d 535, 543 (2d Cir. 1979) (Timbers, J., dissenting from grant of petition for reh'g).

¹⁸⁹ Compare, e.g., *Christensen v. Kiewit-Murdock Inv. Corp.*, 815 F.2d 206, 216 (2d Cir.) (Feinberg, C.J., dissenting), *cert. denied*, 484 U.S. 908 (1987); *Menechino v. Oswald*, 430 F.2d 403, 412 (2d Cir. 1970) (Feinberg, J., dissenting), *cert. denied*, 400 U.S. 1023 (1971) and *United States v. Follette*, 379 F.2d 846, 848 (2d Cir. 1967) (Feinberg, J., dissenting) with *O'Gee v. Dobbs Houses, Inc.*, 570 F.2d 1084, 1091 (2d Cir. 1978) (Feinberg, J., dissenting); *United States v. Dioguardi*, 492 F.2d 70, 83 (2d Cir.) (Feinberg, J., dissenting), *cert. denied*, 419 U.S. 873 (1974); *United States v. Carpenter*, 457 F.2d 621, 624 (2d Cir. 1972) (Feinberg, J., dissenting) and *Johansen v. Confederation Life Ass'n*, 447 F.2d 175, 182 (2d Cir. 1971) (Feinberg, J., dissenting).

judges to view favorably attempts to reduce the scope of the disfavored precedent, or to stretch the reach of possibly countervailing decisions. With such a judge on one's panel, one may, with greater hope for success, and lesser concern for loss of credibility, press an issue that otherwise might be considered a lost, almost certainly lost, or even damaging, cause. If the panel is not identical, and the two cases not beyond the highly developed and often highly creative powers of distinguishment typically possessed by federal judges, one could pick up a second vote.

One might also use the presence or absence of certain key words to gauge the probable utility of suggesting rehearing in banc. "Usually, full-court review depends on a dissenter who can line up allies":¹⁹⁰ it is usually further dependent upon whether the dissenter even tries to line up allies—often, dissenting judges do not request a poll of the full court. The less the dissenter's discontent, the more likely it is that no poll will be requested. Thus, an understanding of the words the dissenter uses to express relative degrees of discontent provides a shorthand approach to accurately assessing the probable value of suggesting in banc review.

D. Chief Judge Oakes and the Lessons of the Chief Judgeship

Since his elevation to the Second Circuit from the United States District Court for the District of Vermont, Chief Judge Oakes has been by far the court's most frequent dissenter. Over the course of two decades on the appellate bench, he has averaged more than seven dissents per year. Except for Judges J. Edward Lumbard, Jr. and Van Graafeiland, no other current Second Circuit judge has written separately at even half the rate of the current Chief Judge.

Why so many dissents? Perhaps it is the mark of a vastly superior mind; perhaps the mark of a mind exceptionally contrary in instinct; perhaps it evidences a desperate attempt to force interaction with his colleagues and thus overcome the terrible loneliness and isolation of life in Brattleboro, Vermont.¹⁹¹ Perhaps, but prob-

¹⁹⁰ Sturgess, *supra* note 35, at 7.

¹⁹¹ FED. R. EVID. 201. Modern-day Ethan Allens and other sensitive Vermont natives are additionally directed to Chief Judge Oakes' recognition of Vermont's distinctive influence upon him, *see* United States v. Barnes, 604 F.2d 121, 175 (2d Cir. 1979) (Oakes, J., dissenting from denial of petition for reh'g in banc), *cert. denied*, 446 U.S. 907 (1980), to be considered in conjunction with his confession to occasional feelings of aloneness, *see* Oakes, *supra* note 27, at 714.

ably not, unless the presence of any of these possible causes has greatly lessened since 1989, the year in which Chief Judge Oakes's yearly rate of dissent first began an appreciable decline to its current level, which is one that is average for the court. Assuming, for the moment, since it seems an accurate assumption, that the Chief Judge is now just as intelligent, just as contrary in instinct, and just as lonely as he was in 1988, we should initially look for other reasons to explain his record of dissent.

Fortunately, we need not look far. As it turns out, the decline in dissent corresponds exactly with Judge Oakes's assumption of the office of chief judge on December 31, 1988. It further appears that such a reduction upon assumption of the chief judgeship is not an anomaly; since at least 1959, every Second Circuit chief judge has dissented less as chief judge than he did before assuming the office. To be sure, some of the reduction is attributable to the slightly smaller caseload a chief judge may carry, in deference to his or her administrative responsibilities. But the slightly reduced caseload of a chief judge cannot explain reductions in dissent in excess of fifty percent, as occurred with Judges Friendly and Feinberg, and is occurring with Chief Judge Oakes. Nor can it explain why the rates of dissent of former chief judges tend to remain depressed after they leave the office of chief judge.

What can explain such a reduction? Chance cannot, for the reductions are too frequent and too extreme. The best explanation is that the office of Chief Judge increases one's sensitivity to the importance of collegiality on the court¹⁹² and, concomitantly, to the tendency of dissent to damage collegiality. Such increased sensitivity results from the fact that the Chief Judge is responsible for a myriad of administrative duties, many of which cannot be satisfactorily accomplished without the assistance of his or her colleagues. Those colleagues, of course, each enjoy the utmost in job security regardless of the level of cooperation they afford the chief judge; thus lacking the stick, it is no surprise that chief judges turn to the carrot. They more directly than other judges have a stake in collegiality beyond collegiality itself.

If reductions in dissent among judges who attain the position of chief judge may be attributed to a changed appreciation for the benefits that such reductions might bring—and, since ascension to

¹⁹² See Feinberg, *supra* note 11, at 384-86 (noting importance of collegiality); Oakes, *supra* note 27, at 706-08 (same).

the chief judgeship is unlikely to change one's views as to other matters that may affect one's rate of dissent, such as the approach one takes to constitutional and statutory interpretation, this seems a fair conclusion—then we also may fairly conclude that rates of dissent among different judges are also affected by differing appreciations for the benefits of restraint in dissent. Applying these propositions to the particular case of Chief Judge Oakes, if the current chief judge's substantial decrease in dissent since becoming chief can be attributed to an increased appreciation for the benefits of restraint—and, again, there is little else to which a decrease of such magnitude can be attributed—then we also may fairly conclude that a substantial part of the reason *Judge* Oakes developed such an extraordinary record of dissent compared to his colleagues is that he then possessed a comparatively lesser appreciation for restraint's benefits.

To be sure, there are other reasons that Chief Judge Oakes, before he became chief judge, dissented so much more often than his colleagues. For example, Chief Judge Oakes always has taken a decidedly liberal approach to constitutional law, an approach that has not been shared by most of his colleagues over the course of the last two decades. Since attaining the chief judgeship, Chief Judge Oakes has continued to demonstrate, in dissent, this liberal bent. Indeed, the Chief Judge's record of dissent on constitutional issues since becoming chief judge reinforces the contention that the recent decline in the frequency of his dissent is due to an increased appreciation for the benefits to collegiality of increased restraint. One might expect that conflicts in constitutional interpretation would be most resistant to the conforming effect of an increasing collegial urge; as expected, then, while the sample is yet too small to be statistically significant, the percentage of Chief Judge Oakes's dissents implicating constitutional issues has risen as his overall rate of dissent has declined.

For the practitioner, the lesson in all this is small; namely, that the pattern of dissent of a judge before becoming chief judge may not be a reliable indicator of the judge's actions after becoming chief judge. An exception may lie in those cases the judge views as being of exceptional importance.

The larger and more important lesson is one most appropriately directed not at practitioners, but at appellate judges themselves. The demonstrable fact that judges decrease their rates of dissent upon ascension to the chief judgeship should illustrate to

judges, more convincingly than even the most eloquent articulation of dissent's detriments ever could, the vital importance of collegiality and restraint in dissent. Time after time, their most experienced colleagues have suppressed their rates of dissent so that collegiality might prosper and the tasks of the chief judge might successfully be performed. Actions speak louder than words, it is said, and, as a rule, more truly, too. For at least the last three decades, the actions of the Second Circuit's chief judges have shouted as one: we should not dissent as often as we do.

The suggestion that this lesson is properly limited to chief judges is not well taken. The tasks for which the chief judge requires an atmosphere of collegiality to perform are not, after all, tasks whose successful performance resounds only to the greater glory of the chief judge; rather, successful performance reflects well on the court as a whole, as unsuccessful performance reflects poorly on the court as a whole. Quite evidently, this is a lesson the broadening experience of being chief judge teaches masterfully; however, while the experience of being chief judge may be the greatest teacher of this lesson, other judges should keep in mind that the greatest student of it is the judge who is able to learn enough from the experience of others so as to make redundant the lessons of personal experience.

CONCLUSION

A foolish unanimity is the hobgoblin of little minds, but a foolish dissent is too. The object is to avoid foolishness. All things considered, dissents aid in accomplishing this end, in the same way that the functionally analogous first amendment right of free speech aids in the exposure of error and the discovery of truth.¹⁹³

¹⁹³ The invisible hand of the marketplace of ideas extends to all courts as well. Viewed in this light, the preeminence of the Second Circuit during mid-century begins to partake a bit of a dog-bites-man quality, as the wisdom of the folk and the sense of the common long-ago established that three hands are better than one. One case in which the Second Circuit had all three hands working is *United States v. One Book Entitled Ulysses* by James Joyce, 72 F.2d 705 (1934). In that case, the two visible Hands held that Joyce's masterwork was not "obscene" within the meaning of the Tariff Act of 1930, and therefore could be admitted into the United States. Judge Manton emphatically dissented, which illustrates the disquieting fact—disquieting for those who would be dissent's defenders—that the same freedom that allows a judicial *Ulysses* to be published as a dissent, also allows unfettered publication of works of a considerably less distinguished character. But though the judge's freedom to dissent may in practice sometimes merely provide the opportunity for one to, let's charitably say, remove all doubts as to one's wisdom, a similar problem results from the exercise of the analogous right of free speech. In the free speech realm, the United States has wagered

At the same time, however, dissents pose dangers, the worst of which are made all the more dangerous by their insidiousness. Calculation of a court's rate of dissent provides no direct measure of a court's achievement¹⁹⁴—strong courts *do* dissent at rates both high and low—but this does not mean that strong courts with a high rate of dissent are strong *because* of their record of dissent, nor does it mean that such courts would not be stronger still if their rate of dissent were lower. Rather, such courts may be regarded as having triumphed *despite* their record of dissent.

The Second Circuit, during the 1940's and for a considerable time thereafter, was a court of this type. The appropriate lesson to draw from the existence of such courts is that the importance of unanimity pales in comparison to the importance of appointing as federal appellate judges only persons of the highest caliber in ability, diligence, training, and experience; the strengths of such judges may override problems caused by dissent. But this is a lesson best directed at the elected branches of government.

For appellate judges, the lessons of dissent may be recast as reflections upon the virtues of the qualities of restraint, modesty, and prudence. Proper appreciation for these qualities, which are characteristic of the ensemble player and not the soloist, puts an appellate judge in good stead because appellate courts exercise their authority by means of majority opinions, which opinions, as the First Circuit has noted, "are not solos but concertos."¹⁹⁵

When the music of the majority becomes too dull or too discordant, however, soloing may be appropriate. In such circumstances, it is incumbent upon the soloing judge to prepare with care his alternative composition. When restraint does fall to dismay, when modesty does fall to duty, then prudence demands that the resulting dissent be, with allowances for avoidance of duplication, a fully reasoned, alternative opinion.

In recent years, the judges of the Second Circuit have demonstrated admirably the qualities that the lessons of dissent suggest one is well-advised to foster. They have established an enviable record, one as worthy of emulation by judges who know themselves to sit on courts as rich in judicial talent as was the Second Circuit

as a society that the costs do not exceed the benefits. In the appellate courts, for similar reasons, the same result should obtain.

¹⁹⁴ Nor can one so assess a particular judge's achievement.

¹⁹⁵ *Haddad v. Border Express, Inc.*, 303 F.2d 134, 137 (1st Cir. 1962) (Woodbury, C.J., concurring).

during the years of Learned Hand's leadership, as it is worthy of emulation by those judges who suspect that they do not.

