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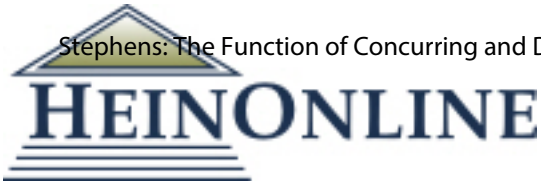

THE FUNCTION OF CONCURRING AND DISSENTING OPINIONS IN COURTS OF LAST RESORT

RICHARD B. STEPHENS

"For out of olde feldes, as men seith,
Cometh al this newe corn fro yeer to yere;
And out of olde bokes, in good feith,
Cometh al this newe science that men lere."*

The appellate judge can rarely prove the correctness of his opinion with the same degree of assurance that Pythagoras enjoyed in demonstrating that the square of the hypotenuse of a right triangle equals the sum of the squares of the other two sides. Controversy is the germ of every lawsuit, and disagreement, not only among lawyers and litigants but also among judges, permeates the entire judicial process. This essay is concerned with discordant expressions of opinion by appellate judges.

It is necessary at the outset further to define the subject. If an appellate judge disagrees with the other members of his court, as regards either the decision in a case or the reasons for such decision, he has three principal choices. First of all, he may capitulate, accept the views of his fellows, and in this fashion foster what Chief Justice Stone referred to as the "much cherished illusion of certainty in the law and of infallibility of judges."[1] Second, he may note his dissent or his concurrence in the result only, without expressing the grounds for such action. Finally, he may dissent or concur and prepare an opinion explaining his reasons for so doing.[2] The comments in this

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*CHAUCER, THE PARLEMENT OF FOULES.

[1]Stone, *Dissenting Opinions Are Not without Value,* 26 J. OF AM. JUD. SOC'Y 78 (1942).

[2]These are the principal choices, but there are examples of mere expression of doubt. See, *e.g.,* Holmes, J., in Richardson v. Shaw, 209 U.S. 365, 385 (1908): "A just deference to the views of my brethren prevents my dissenting from the conclusion reached, although I cannot but feel a lingering doubt." Again, in Bernheimer v. Converse, 206 U.S. 516, 535 (1907), Holmes, J., said: ". . . under the circumstances I shall say no more than that I doubt the result." More difficult to classify is the story, perhaps apocryphal, of the judge who cryptically dissented ". . . for the reasons so ably expressed in the majority opinion."

essay bear on the third choice – the writing of concurring and dissenting opinions.

The scope of this essay is further limited to opinions by judges in the United States. The doctrine, little known in this country, of *jurisprudence constante*[3] and the varying applications in foreign countries of the doctrine of stare decisis[4] form a basis for an interesting comparative consideration of the function of judicial opinions here and abroad. Similarly, geopolitical problems involved in adjudication by international tribunals raise unique questions concerning opinions by their judges.[5] These questions are left to others to pursue.

Expressions of disagreement by judges whose decisions are subject to review by higher authority are not to be considered. In short, the subject here is concurring and dissenting opinions the publication of which is very unlikely to affect the ultimate decision in the case.[6] This essay appraises their function.

I. Concurring and Dissenting Opinions Reflect Judicial Responsibility

Within the past decade two chief justices of the United States have spoken upon the subject of dissents, Stone in 1942,[7] and Vinson in 1949.[8] Each has suggested that the publication of a dissenting opinion is, among other things, some assurance to the litigants in the case, their counsel, and the bar and the public generally that the decision has been reached after careful consideration and that the deciding process has not become perfunctory. Mere revelation of the fact that judges have disagreed carries no such assurance. Stubborn disagreement of

[3]See Herny, *Jurisprudence Constante and Stare Decisis Contrasted,* 15 A.B.A.J. 11 (1929); see also Brash, *Chief Justice O'Neill and the Louisiana Civil Code—The Influence of His Dissents,* 19 Tulane L. Rev. 436, 444 (1945); Sprecher, *The Development of the Doctrine of Stare Decisis and the Extent to Which It Should Be Applied,* 31 A.B.A.J. 501, 505 (1945).

[4]See Paton and Sawyer, *Ratio Decidendi and Obiter Dictum in Appellate Courts,* 63 Law Q. Rev. 461 (1947).

[5]See Dumbauld, *Dissenting Opinions in International Adjudication,* 90 U. of Pa. L. Rev. 929 (1942).

[6]A published concurring or dissenting opinion, even in a court of last resort, may affect the final decision in a case if a rehearing is granted or if the case is remanded for further proceedings in an inferior court.

[7]Stone, *supra* note 1.

[8]Vinson, *Work of the Federal Courts,* 69 Sup. Ct. v (1949).

the my-pop-can-lick-your-pop variety often exists in the complete absence of knowledge and careful consideration. Thus the bare notation of a dissent or special concurrence sheds no light on judicial responsibility. But a dissenting or concurring opinion, disclosing not only disagreement but reasons therefor, is some showing of the extent to which the author has fulfilled his judicial duty to consider and decide, and some indication, too, that other members of the court have considered and rejected, not merely ignored, the views expressed by him.

In considering the question of judicial responsibility, and for most other purposes, it is unnecessary to treat dissenting and concurring opinions separately. They have much in common. A dissenting opinion may reflect concurrence with the basic rule of law expressed by the majority but reveal disagreement with the application of the rule in the case at bar.[9] On the other hand, a concurring opinion is frequently a dissent from the majority's statement of a rule of law but an acceptance on some other grounds of the result reached by the majority.[10] In each instance the separate opinion is a confirmation of individual attention to the issues at stake and is indicative of a proper discharge of judicial responsibility.

It is not alone the publication of concurring or dissenting opinions that affords assurance of judicial responsibility. The custom behind such publication is the thing. If, as is generally true, the practice of appellate judges is to note and explain their major differences, the

[9]See, *e.g.*, Panama Refining Co. v. Ryan, 293 U.S. 388 (1935). On the question of whether a legislative delegation to the President was valid, Hughes, C. J., writing for the majority, inquired whether the legislation established "a standard for the President's action." Dissenting, Cardozo, J., agreed there had to be "a standard reasonably clear whereby discretion must be governed." He found it, but the majority did not; the statute was declared invalid.

[10]See, *e.g.*, Rochin v. California, 342 U.S. 165 (1952). The entire Supreme Court, Minton, J., not participating, agreed that a state conviction for illegal possession of morphine should be reversed under the due process clause of the Fourteenth Amendment. Briefly stated, the reason of the majority, as expressed by Frankfurter, J., was that the conduct of the law-enforcing officials, which included the enforced use of a stomach pump to recover morphine capsules swallowed by the accused, was so shocking to the conscience and so offensive to the decencies of civilized conduct as to constitute a departure from due process. Black, J., and Douglas, J., each wrote concurring opinions. Rejecting the reasoning of the majority, they would have construed the Fourteenth Amendment to include the clause of the Fifth Amendment which forbids compelling a person in a criminal case to be a witness against himself and would have held the enforced use of a stomach pump to be within the prohibited compulsion. *Cf.* Black, J., concurring, in Mercoid Corp. v. Mid-Continent Inv. Co., 320 U.S. 661, 672 (1944).

absence of such notation and explanation may be taken to indicate unanimity. Moreover, it may be taken to indicate a wholesome unanimity more likely based on careful study and reflection than on indifference. The publication of concurring and dissenting opinions summons the appellate judge to stand up and be counted; this disclosure is of importance in view of the otherwise secret aspects of the deciding process.

If assurance of individual responsibility on the part of appellate judges were the only objective to be achieved, there would obviously be a better way to gain such assurance. The end would be reached by requiring each judge to write an opinion in each case, a practice well known in the early years of our jurisprudence[11] and to some extent still adhered to abroad.[12] The work load of judges and lawyers, however, militates strongly against a return to seriatim opinions.

From the standpoint of disclosing judicial responsibility, the opposite of separately stated opinions, disregarding the utilization of the memorandum decision with no opinion whatsoever, is the anonymous and apparently unanimous per curiam opinion.[13] Again, of course, the custom is the thing. Because the present general practice of most appellate courts is to publish concurring or dissenting opinions when there are major differences among the judges, an unchallenged per curiam opinion usually means the entire court was in agreement. If, on the other hand, it were the practice of appellate courts to hand down per curiam opinions in all cases on a majority rule basis and without regard to the views of individual judges, virtually no test for individual judicial responsibility would remain.

Early in the nineteenth century under Mr. Chief Justice John Marshall, the United States Supreme Court swung away from the practice of seriatim opinions to the opposite extreme of the unchal-

[11]See, *e.g.*, the several opinions of Jay, C.J., and Johnson, Iredell, Blair, Wilson and Cushing, JJ., in Georgia v. Brailsford, 2 Dall. 402 (U.S. 1792). It has been suggested that the present Supreme Court practice of writing numerous concurring and dissenting opinions approximates a return to the seriatim opinion. See Manley, *Nonpareil among Judges*, 34 CORNELL L. Q. 50 (1948).

[12]The practice persists in England, although in many instances one judge authorizes another to speak for him. See, *e.g.*, the statement of Lord Simond's adoption of Lord MacDermott's opinion in Winter Garden Theatre, Ltd. v. Millennium Products, Ltd., 177 L.T. 349, 360 (H.L. 1947).

[13]A per curiam may, of course, reflect something far from unanimity. See Manley, *supra* note 11, at 51. And one or more judges may actually express dissent, as, *e.g.*, in Henslee v. Union Planters Nat. Bank & Trust Co., 335 U.S. 595 (1949); State v. Miami, 55 So.2d 715 (Fla. 1951).

lenged majority opinion. This caused President Thomas Jefferson real concern; he saw a need for individual responsibility on the part of judges, which was not assured if caucused opinions "done in the dark" were announced as the opinions of the court.[14] Apparently, the Marshall practice of caucusing opinions could not be maintained in the presence of other strong judicial personalities on the court.[15] Whether this is good or bad is a question implicit in the subject of this essay.

As regards assurance of judicial responsibility, the conclusion to be drawn is that the publication of dissenting and concurring opinions is a minimum but adequate device. A return to seriatim opinions would give greater assurance, but only at the expense of imposing an intolerable burden on bench and bar. To draw an inference of indolence or indifference from the fact that a judge seldom writes a minority opinion would be entirely improper, but the publication of a concurring or dissenting opinion is, at least, an affirmative showing of vitality and interest, and sometimes serves as a yardstick for ability. Routine publication of seemingly unchallenged opinions would destroy these indicia of judicial competence and assiduity.

II. Concurring and Dissenting Opinions Preserve Judicial Self-Respect and Independence without Damage to Judicial Prestige

Assurance of judicial responsibility would be dearly bought if the price were a serious loss to the prestige of the courts. But the price is not so high. Admittedly, as the argument runs, minority opinions tend to dispel the cherished illusion of legal certainty and judicial infallibility.[16] This, however, does not amount to the destruction of judicial prestige. The reputation of the courts must rest upon something more substantial than an illusion.

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[14]See Levin, *Mr. Justice William Johnson, Creative Dissenter,* 43 Mich. L. Rev. 497, 513 (1944); Manley, *Nonpareil among Judges,* 34 Cornell L.Q. 50 (1948).

[15]Even during Marshall's tenure, caucused opinions were not the invariable rule. See, *e.g.,* Johnson, J., dissenting in Finlay v. King's Lessee, 3 Pet. 346, 383 (U.S. 1830); Thompson, J., dissenting, in Brown v. Maryland, 12 Wheat. 419, 449 (U.S. 1827); Johnson, J., concurring in Gibbons v. Ogden, 9 Wheat. 1, 222 (1824); and the seriatim opinions in Lambert's Lessee v. Paine, 3 Cranch 96 (U.S. 1805), in which Marshall, C.J., did not sit.

[16]See Stone, *Dissenting Opinions Are Not without Value,* 26 J. of Am. Jud. Soc'y 78 (1942).

It is desirable to examine this question from two separate points of view, that of the legal profession and that of the public generally. The illusion of certain law and an impeccable judiciary does not exist for lawyers and sophisticated laymen. An illusion, which like the bat seeks the cover of darkness, disappears in the light of knowledge and experience. Lawyers do not expect judges to be able to walk on the water. Therefore it is necessary to consider only whether the much cherished illusion should be preserved for the public generally along with the children's Santa Claus myth and Grimm's Fairy Tales.

So stated, the problem becomes essentially one of thought control. Who is to say that the public must emulate the ostrich? Certainty in the law and flawless adjudication are, of course, extremely desirable objectives; the question here, however, is not whether such ends shall be achieved but only whether we should seek to maintain the appearance of a perfection that does not in fact exist. Harsh as reality may sometimes be, to face it is usually better than to ignore it.[17]

In any event, destruction of the much cherished legal illusion does not drag down judicial prestige. If the average individual learns that great legal minds sometimes disagree, he does not necessarily think less well of the judiciary. Honest disagreement is known in every field of special competence; in making a mint julep should you crush the mint or merely bruise it? As recently suggested by Mr. Justice Douglas, "confidence based on understanding is more enduring than confidence based on awe."[18]

In the United States, and in contrast with some less fortunate portions of the world, we still insist on public administration that will stand the light of day. We do not always get it, but we strive for it. In judicial administration the concurring or dissenting opinion is simply a part of the light of day.[19] One can hardly disagree with the suggestion of Mr. Chief Justice Stone[20] that the intellectual pro-

[17]But see Bowen, *Dissenting Opinions,* 17 GREEN BAG 690, 693 (1905): ". . . it is surely to be expected that the wranglings of our judges be at least decently veiled."

[18]Douglas, *Stare Decisis,* 49 COL. L. REV. 735, 754 (1949). This article, originally a lecture, is condensed at 35 A.B.A.J. 541 (1949).

[19]See Douglas, *The Dissent: A Safeguard of Democracy,* 32 J. OF AM. JUD. SOC'Y 104 (1948).

[20]Stone, *Dissenting Opinions Are Not without Value,* 26 J. OF AM. JUD. SOC'Y 78 (1942).

cess of judging is properly tested by the intellectual appeal of a minority judge to history, scholarship, and logic, and that to endure it must be capable of withstanding these tests.

It is necessary, of course, to distinguish good faith dissension from dissension in the sense of quarrelsomeness. Personal differences among members of a tribunal, if so strong as to affect judicial capacity, are damaging to the administration of justice, and when known are certainly damaging to the prestige of the tribunal. But there is no ground for suspecting much such dissension, and in any event it has little to do with the writing of minority opinions. If it may sometimes show through in a sharply worded dissenting or concurring opinion, the fact is unimportant; if it were not revealed there it would very likely manifest itself in other ways. It seems proper, therefore, to limit this essay to a consideration of honest assertions of judicial differences of opinion.

There have been instances of the suppression of concurring and dissenting opinions. For example, from 1898 until 1921 the Constitution of Louisiana forbade their publication.[21] But the publication of minority opinions should be preserved at least as an escape-hatch permitting a judge to disassociate himself from an opinion with which he sharply disagrees. Judicial self-respect and independence require this. It is a wholesome practice to permit a dissenting judge to sound off with Mr. Bumble that: "If the law assumes that, the law is a ass, a idiot."[22] Freedom of expression for the appellate judge is closely related to the constitutional guarantee of freedom of speech.

Moreover, the suppression of dissenting or concurring opinions would obviously not put an end to the critical analysis of judicial opinions. Such analysis would continue in legal and other texts and periodicals. A frank acknowledgment and full disclosure of disagreement among judges is hardly as damaging to judicial prestige as would be a feigned unanimity seriously and skillfully attacked by persons outside the judiciary. A conversion of the courts into face-

[21]Art. 92 of both the 1898 and 1913 Constitutions of Louisiana provided: "Concurring and dissenting opinions shall not be published." This prohibition was omitted from the Constitution of 1921. See DART, LOUISIANA CONSTITUTIONS 616, 672 (1932).

[22]DICKENS, OLIVER TWIST, c. XIV. *Cf.* Field, J., dissenting in Munn v. Illinois, 94 U.S. 113, 140 (1876): "If this be sound law, if there be no protection, either in the principles upon which our republican government is founded, or in the prohibitions of the Constitution against such invasion of private rights, all property and all business in the State are held at the mercy of a majority of its legislature."

less, inanimate agencies would provoke more severe attacks on the judiciary as an institution because this metamorphosis would preclude criticism of individual judges on the basis of their own stated views.

It is suggested in subsequent portions of this essay that the practice of publishing concurring and dissenting opinions is a strong inducement to more careful decision and better written opinions. In this light the practice may be seen to enhance judicial prestige by reducing the number of instances in which judicial action is properly subject to adverse criticism.

III. Concurring and Dissenting Opinions Are Conducive to Careful Decision

The writing of a minority opinion is one thing; its publication is another. It is possible to argue for the writing of such opinions and against their publication. After a case has been decided at the judicial conference following oral argument, the circulation of an opinion written in dissent from the prevailing view may upset the initial determination, and the opinion written in dissent may become the opinion of the majority. If minority opinions as such were destined never to see the light of day, they would, nevertheless, serve this purpose. One wonders, however, how many such opinions would be written if they were to be published only in the event that the dissenter's views gained acceptance by a majority of the court. If, as seems likely, the promise of publication is a major inducement to the writing of dissenting opinions, it is idle to argue that they should be written but not published.

It is probably very rare that a judge initially dissenting goes on to win the day, but there is no doubt that this sometimes happens. Both Mr. Chief Justice Stone and Mr. Chief Justice Vinson have indicated that an opinion circulated to the Court as a dissent sometimes becomes the opinion of the Court.[23] Even if this occurs only infrequently, it is of real significance. The effect on the parties is most apparent; after extraordinary consideration a litigant has won a case that the court agrees he should win, but which was lost on the first vote.

The significance of a minority opinion may, of course, range far

[23]See Stone, *supra* note 20; Vinson, *Work of the Federal Courts,* 69 Sup. Co. v, x (1949).

beyond the issues immediately at stake in the litigation. The question to be decided in *Pollock v. Farmers' Loan and Trust Co.*[24] was the propriety of enjoining the defendant company and its directors from voluntarily complying with the income tax provisions of the Act of August 15, 1894. A speculative consideration of that case suggests the broader aspects of the litigation. The decision on rehearing was that the injunction should issue. The Court held that a tax on realty, a tax on personalty, or a tax on the income from either, is a direct tax and that the income tax provisions of the statute were unconstitutional in that they purported among other things to impose such a direct federal tax without apportionment among the several states[25] and constituted one entire scheme of taxation. Four justices wrote dissenting opinions.[26]

Had the opinion of Mr. Justice White prevailed,[27] for example, the statute would have been upheld, and the modern income tax would probably date from 1894 instead of 1913, the year in which ratification of the Sixteenth Amendment drew the teeth of the *Pollock* decision. The social and economic aspects of this possibility require no comment. Neither is the soundness of Mr. Justice White's views a proper question here. The fact remains that a dissenting opinion such as his may sometimes commend itself to the other members of the court. As a minimum, its circulation makes for more careful decision, and sometimes this may result in better law.

A decision, even in a case involving virtually nothing in a dollar sense, may have an importance to the public comparable to the enactment or amendment of a statute or, as in the *Pollock* case, comparable to the ratification or rejection of a constitutional amendment. Therefore, any factor which bears upon the care with which a decision is reached is not to be lightly regarded. The dissenting opinion has such a bearing. If its acceptance, even infrequently, sometimes improves the law, it plays a useful part.

IV. Concurring and Dissenting Opinions Tend to Improve Judicial Opinions Generally

At some stage in almost every judicial proceeding the judge sheds his judicial robe and becomes the advocate. We may expect

[24]157 U.S. 429 (1895), *on rehearing*, 158 U.S. 601 (1895).

[25]Then required by U. S. Const. Art. I., §§ 2, 9.

[26]158 U.S. 601, 638, 696, 706 (1895).

[27]In this highly controversial case the opinion of White, J., might well have

him to maintain a fair degree of detachment in reading the briefs and in hearing oral argument. It may even be that he should enter the judicial conference with the same frame of mind, although he probably seldom does. But when he argues for his position in the conference, and even more certainly when he is assigned the task of writing the opinion for the court, his effort is one of advocacy. He seeks the acceptance of his views. Where can there be found an example of advocacy superior to that of Mr. Justice Cardozo in his majority opinion appeal to "history, analogy and administrative practice" in *Norwegian Nitrogen Products Co. v. United States*?[28]

Judicial advocacy is not without value. Opinions would rarely be so well written if the author were indifferent to the popular and professional acceptance of his views. The danger is, however, that the advocate may profess too much. The temptation to exaggerate, distort, and suppress is strong and cannot always be overcome by intellectual and moral integrity alone. There is a wide gulf between good reasons and reasons that merely sound good, but the advocate may be prone to resort to the latter when the former are missing.

The potential dissenter is the "fleet-in-being." His readiness to pounce upon what he believes to be majority suppression or distortion of fact[29] or exaggeration of legal doctrine[30] renders these things

prevailed. The articles listed in Dean Griswold's selective bibliography of commentary on this decision, CASES AND MATERIALS ON FEDERAL TAXATION 42 (3d ed. 1950), indicate the wide divergence of views.

[28]288 U.S. 294 (1933); see GELLHORN, ADMINISTRATIVE LAW 515 (2d ed. 1947), wherein the opinion is termed a "masterpiece of advocacy."

[29]Perhaps illustration here tends as much to refute as to support the thesis. But consider the disparity between the majority opinion of Stone, C.J., and the dissenting opinion of Black, J., in Magnolia Petroleum Co. v. Hunt, 320 U.S. 430 (1943). The Court there held that the full faith and credit clause of the United States Constitution precluded recovery under a Louisiana workmen's compensation act after a claim on the same facts under a similar Texas statute had been adjudicated. At pp. 432, 437, Stone, C.J., indicates that the claimant had "sought and procured" or "sought and recovered" an award in Texas. Black, J., says, at p. 450, that while claimant was in a Texas hospital he signed a form which "in small type" bore the designation: "Industrial Accident Board, Austin, Texas." Although notified of a hearing, "Hunt did not participate in that proceeding . . . . Before the Texas award became final Hunt, who had declined to accept any money under it, filed suit . . . in . . . Louisiana." And see Hooper v. California, 155 U.S. 648 (1895).

[30]See, *e.g.*, Frankfurter, J., dissenting in Spiegel v. Commissioner, 335 U.S. 701 (1949), reported in Commissioner v. Church, 335 U.S. 632, 667 (1949): "Contrary to the suggestion in the [Justice Reed's] concurring opinion in this case—a sug-

less likely to occur. His position vis-a-vis the other members of his court is much like that of the appellate court itself vis-a-vis an inferior court. He cannot, of course, change the result in the case, except in the rare instances in which his views are accepted before the decision is handed down; but his power to assert inadequacy or inaccuracy as to fact or legal theory is a weapon that puts the other judges on their mettle.

Advocacy probably plays at least as large a part in the writing of a minority opinion as in the preparation of the opinion of the court. But the effect is simply to balance the scales. It is unchallenged advocacy that degenerates into propaganda. Advocacy that must compete for acceptance with the forceful expression of opposing views is the stuff of which democratic government is made.

As the foregoing comments suggest, the dissenting or concurring opinion may play an important role without ever being written at all. The thousands of potential but unwritten dissents and concurrences have no doubt raised the caliber of judicial opinions substantially just because they might have been written.

V. Concurring and Dissenting Opinions May Influence the Development of the Law

In his famous suggestion that a dissent is "an appeal to the brooding spirit of the law,"[31] the reference of Mr. Chief Justice Hughes was to "a later decision [that] may possibly correct the error in which the dissenting judge believes the court to have been betrayed."[32] Examples of such later decisions are well known.[33] But the brooding spirit of the law exists outside the courtroom, and the dissenter's appeal is not to judges alone. A minority opinion in a court of last resort may help to shape the course of the law in many ways other

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gestion accepted by the [Justice Black's] majority opinion — the Court of Appeals did not find that Spiegel retained an interest because he had not provided for all contingencies." Frankfurter, J., further asserted that the majority's view that Spiegel had retained the reversionary interest necessary to support the imposition of the estate tax was at best a dubious assumption and one that might be speedily upset by a decision of the Illinois Supreme Court.

[31]Hughes, The Supreme Court of the United States 68 (1928).

[32]*Ibid.*

[33]See Evans, *The Dissenting Opinion — Its Use and Abuse,* 3 Mo. L. Rev. 120, 130 (1938); Brandeis, J., dissenting, in Burnet v. Coronado Oil & Gas Co., 285 U. S. 393, 406 (1932).

than by its influence on later judicial decisions. A few illustrations follow.

1. Concurring and dissenting opinions have played a part in changing constitutional law. In *Chisholm v. Georgia*[34] the Supreme Court was called upon to decide whether a state could be sued in assumpsit in the federal courts by a citizen of another state. A majority held that the general Judicial Act[35] authorized such suit and as so construed was consistent with Article III, Section 2, of the Constitution. Mr. Justice Iredell's opinion was a strong expression of dissent; he differed from the majority on the construction of the statute and intimated further that in any event the Constitution could not be construed to permit an action against a state for recovery of money.[36] The sequel, of course, was the Eleventh Amendment, which was ratified in 1795 and brought into the Constitution the dissenting views of Mr. Justice Iredell concerning suit against a state without its consent.

The report of *Hollingsworth v. Virginia*,[37] referring to the *Chisholm* case, states: "The decision of the court . . . produced a proposition in Congress, for amending the Constitution of the United States . . . ." The proposition had become the Eleventh Amendment. How far the amendment is attributable to the *Chisholm* decision, or to Justice Iredell's strong dissent, or to other factors, is largely conjectural; but to believe that the dissenting opinion played a part is not unreasonable.[38]

2. Minority opinions may have an influence on statutory law. The dissenting opinion of Mr. Justice Story in *Cary v. Curtis*[39] has been said to be "probably the most important" ever written.[40] Although

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[34]2 Dall. 419 (U.S. 1793).

[35]1 STAT. 73, 81 (1789).

[36]Chisholm v. Georgia, *supra* note 34, at 449.

[37]3 Dall. 378 (U.S. 1798).

[38]Consider also the extent to which the opinion of Field, J., in Pollock v. Farmer's Loan & Trust Co., 157 U.S. 429, 586 (1895), may have delayed adoption of the Sixteenth Amendment and the extent to which the dissenting opinions of Harlan, Brown, Jackson and White, JJ., *on rehearing*, 158 U.S. 601, 638, 696, 706 (1895), may have promoted the Amendment. The proposed but rejected Child Labor Amendment may be partly attributable to the dissenting opinion of Holmes, J., in Hammer v. Dagenhart, 247 U.S. 251, 277 (1918).

[39]3 How. 236, 252 (U.S. 1845).

[40]See Brown, *A Dissenting Opinion of Mr. Justice Story Enacted as Law within Thirty-Six Days*, 26 VA. L. REV. 759, 763 (1940).

this claim may not be fully supportable,[41] the fact remains that Mr. Justice Story's dissenting views were speedily incorporated into a federal statute. The majority had held, over two dissents, that a statutory provision requiring customs collectors to pay over collections to the Treasury without awaiting settlement of disputes defeated the common law remedy of an action against the collector. The decision was superseded by the passage of a new statute providing against such construction of the provision.[42]

Very recently a dissenting opinion has seemingly played a comparable role in provoking state legislation. A Florida statute provided in general that no person convicted of "any felony" could serve as a juror.[43] The Florida Constitution defines "felony" for the purpose of the Constitution and the laws of the state as an "offense punishable with death or imprisonment in the State Penitentiary."[44] An accused convicted of murder appealed on the ground that two jurymen had been convicted of violations of the federal liquor laws, which were federal felonies. The Florida Supreme Court sustained the conviction, holding, among other things, that the jurors had not been convicted of "any felony" because their offenses were not punishable by death or incarceration in the Florida penitentiary.[45] In his dissenting opinion Mr. Justice Hobson argued for an interpretation of the statute more in keeping with the spirit and purpose of the law and called attention to the improbability that the Legislature had sought to discriminate between felons convicted in Florida courts and felons convicted elsewhere. At the next session of the Legislature the statute was amended to extend the provisions on disqualification to persons convicted elsewhere of crimes recognized as felonies in Florida.[46]

Sometimes the dissenting judge more directly suggests legislation as an answer to a problem that he sees in the decision. In *Goldman v. United States*[47] the Supreme Court held that the use of a detecta-

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[41]*Cf., e.g.,* the dissent of Iredell, J., in Chisholm v. Georgia, 2 Dall. 419, 429 (U.S. 1793).

[42]5 STAT. 349, 727 (1845).

[43]FLA. STAT. §40.01 (1941).

[44]FLA. CONST. Art. XVI, §25.

[45]Duggar v. State, 43 So.2d 860 (Fla. 1949), Adams, Hobson, and Roberts, JJ., dissenting, 3 U. OF FLA. L. REV. 255 (1950).

[46]FLA. STAT. §§40.01, 40.07 (1951), see Legislative Highlights, 4 U. OF FLA. L. REV. 382, 384 (1951).

[47]316 U.S. 129 (1942).

phone by federal agents did not violate the search and seizure provisions of the Fourth Amendment. Mr. Justice Murphy disagreed. In his dissenting opinion he suggested, among other things, that a statutory scheme could be devised permitting the use of detectaphones, but only pursuant to a warrant.[48] In this manner individual privacy would be protected against indiscriminate governmental intrusion without serious impairment of needed law-enforcement measures.

3. Rules adopted by administrative agencies may reflect views expressed in minority opinions. Very recently the Supreme Court sustained a safety regulation,[49] promulgated by the Interstate Commerce Commission, that required drivers of motor vehicles carrying explosive and other dangerous goods to arrange their routes "so far as practicable, and, where feasible" to avoid congested areas, tunnels, dangerous crossings, and so forth. A truck carrying dangerous liquid exploded in the Holland Tunnel, and the owner was charged with violation of the regulation. The district court dismissed the counts based on the regulation on the ground that its language was so vague as to make the standard of guilt conjectural.[50] The Supreme Court affirmed a court of appeals reversal. Mr. Justice Clark's majority opinion contains no adverse criticism of the regulation; he traces its history, notes that the statutory provision condemns *knowing* violation only, and concludes that the regulation gives adequate notice of the conduct required. Mr. Justice Jackson, dissenting,[51] calls the regulation "unworkable" and "indefinite" and pertinently asks:

> "Would it not be in the public interest as well as in the interest of justice to this petitioner to pronounce this vague regulation invalid, so that those who are responsible for the supervision of this dangerous traffic can go about the business of framing a regulation that will specify intelligible standards of conduct?"

The regulation was upheld, of course, but the Commission should not rest complacently on this six-three decision; it may very well re-

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[48]*Id.* at 140, n.6.

[49]1949 CODE FED. REGS. §197.1 (b), Boyce Motor Lines, Inc. v. United States, 342 U.S. 337 (1952).

[50]United States v. Boyce Motor Lines, Inc., 90 F. Supp. 996, 998 (D.N.J. 1950).

[51]Boyce Motor Lines, Inc. v. United States, 342 U.S. 337, 343 (1952), Black and Frankfurter, JJ., joining in the dissent.

examine its regulation in the light of the adverse comments of the dissenters.[52]

The foregoing illustrative cases suggest that the practice of publishing concurring and dissenting opinions results in the orderly presentation of judicial thought and experience for consideration by the legislative and executive branches of the government as well as by judges called upon later to decide similar cases.

VI. Concurring and Dissenting Opinions Complement the Doctrine of Stare Decisis

Taken out of context, the most vituperative comments on the doctrine of stare decisis are those of Portia:[53]

> "There is no power in Venice
> Can alter a decree established:
> 'Twill be recorded for a precedent,
> And many an error by the same example
> Will rush into the state."

But stare decisis is not applied so rigidly in the United States. Our courts have consistently asserted the right to re-examine their own doctrines;[54] and error is not always perpetuated, nor is change persistently eschewed, in the name of precedent.[55] The demand for certainty and continuity in the law has yielded in a measure to the demand for flexible jurisprudence able to keep pace with society. It is unnecessary to decide here whether too much has been so yielded;[56] the important point is that decisions are sometimes overruled.

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[52]It is likely also that in some instances a concurring or dissenting opinion may invoke executive clemency in the form of a pardon or commutation of a sentence. Executive clemency was exercised as regards Dugger; see note 45 *supra*.

[53]Shakespeare, Merchant of Venice, Act. IV, Scene 1.

[54]See Helvering v. Hallock, 309 U.S. 106, 121 (1940): "This Court, unlike the House of Lords, has from the beginning rejected a doctrine of disability at self-correction."

[55]See Evans, *The Dissenting Opinion—Its Use and Abuse*, 3 Mo. L. Rev. 120, 130 (1938); Brandeis, J., dissenting in Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932).

[56]*Cf.* Frankfurter, J., dissenting, in Henslee v. Union Planters Nat. Bank & Trust Co., 335 U.S. 595, 600 (1949): "Wisdom too often never comes, and so one ought not to reject it merely because it comes late." *See* Mahnich v. Southern Steamship Co., 321 U.S. 96, 113 (1944); see Sprecher, *The Development of the*

Whether the overruling of a decision is with any frequency properly attributable to a dissent in an earlier case, or merely heralded by such dissent, is open to some question. Admittedly dissenting opinions may have some bearing on later decisions. Regardless of this influence, however, the elimination of concurring and dissenting opinions would not put an end to all departures from precedent. Without Mr. Justice Holmes' forceful dissent in *Hammer v. Dagenhart*[57] the Court might well have overruled that decision in *United States v. Darby*[58] anyhow; and, of course, many unanimous decisions have been overruled.[59] This raises the question of the relationship between the publication of minority opinions and the application of the doctrine of stare decisis.

Certainty in the law, and flexibility in the law achieved through departures from precedent, are mutually exclusive objectives. If there must be uncertainty, at least there are advantages in knowing where it lies. Concurring and dissenting opinions do not describe the unsettled regions of the law by metes and bounds, but they do serve as warning flags to mark some recognized areas of doubt. Perhaps if stare decisis were applied in the United States as a strict rule of law there would be less reason for disseminating the views of individual judges; but since the decision is not *the* law, an indication of likelihood and probable direction of change becomes important. Minority opinions are guides, though not very reliable ones, to these probabilities. They are cautionary annotations to the decisions, and help reduce the shock attending judicial departures from precedent.

This essay aims at refutation of the paradoxical remark of the "Great Dissenter" that ". . . it is useless and undesirable, as a rule, to express dissent."[60] If the principal purpose of the concurring or dissenting judge is to induce other judges, or lawmakers outside the judiciary, to embrace his views, his efforts are no doubt usually futile. Illustrations in this essay of instances in which minority opinions should influence, or seem actually to have influenced, the development

Doctrine of Stare Decisis and the Extent to Which It Should Be Applied, 31 A.B.A.J. 501, 505 (1945).

[57]247 U.S. 251, 277 (1918).

[58]312 U.S. 100 (1941).

[59]See Brandeis, J., dissenting, in Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932).

[60]Holmes, J., dissenting, in Northern Securities Co. v. United States, 193 U.S. 197, 400 (1904).

of the law are not intended to suggest that they usually do so. Most such opinions, read eagerly at first, soon become an inert segment of the legal literature — of little more interest than the best-selling novels of the past generation.

The function of concurring and dissenting opinions is not confined, however, to their influence on the development of the law. Such opinions demonstrate the vitality and ability of the members of the judiciary. They help to preserve the necessary independence of judges; and if a badly reasoned minority opinion reflects discredit on its author, it may at the same time enhance the stature of the other members of the court, who analyzed and rejected his views. The publication of divergent opinions injects an element of competition into the business of appellate judges, in the absence of which complacency and self-satisfaction might soon erode judicial perspicacity and zeal. In these ways concurring and dissenting opinions earn their place in the law.

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