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THE ROLE OF DISSENTING OPINIONS IN LOUISIANA*

*Joe W. Sanders***

The courts in our nation are now turning out over 20,000 published opinions each year. Some are long. Some are short. Some are of high quality. Some are not. To this cascade of words, Louisiana contributes its full share. Both the reading time and the pocket book of the practicing attorney are sorely taxed. Alert to this problem, the Louisiana State Bar Association has now created a committee to study means of reducing this volume through such devices as memorandum opinions. The Association at its recent meeting even considered tactfully suggesting to us that we write shorter opinions. These circumstances point up the need for an evaluation of dissenting opinions, which admittedly expand this volume of reported legal material. But a stronger reason, perhaps, for an approach to this subject lies in the fact that dissenting opinions in Louisiana operate in a unique civil law setting. Comparative aspects of the subject immediately suggest themselves.

Law is not an exact science. As a practical matter, it can be defined in terms of a rough predictability of results based upon legal situations. This practical aspect of the law has received recognition by those who now develop electronic computers for decision prediction. When they are perfected, I hope that one will be made available to us so that we can predict our own decisions.

The field of the law is vast. The search for it is endless.

John H. Tucker, jr., President of the Louisiana State Law Institute said recently: "The mass of the law has overwhelmed the courts, dismayed the law schools and presented the legal profession with its biggest challenge."¹

I wish it were possible for me to portray for you in the bril-

*An address delivered by Justice Sanders upon his induction as Honorary Member of The Order of the Coif, at the Louisiana State University Law School, May 4, 1963. The initial portion of the address, largely introductory in nature, has been omitted.

**Associate Justice, Supreme Court of Louisiana.

1. *The Shreveport Times*, March 3, 1963.

liant flash of an epigram the difficulty of the task of an appellate judge. This I cannot do. I can picture it only by a resort to poetry, a paraphrase of Markham's great poem, "The Man With The Hoe":

"Bowed by the weight of centuries he leans
Upon his law book and gazes on the desk,
The emptiness of ages in his face,
And on his back the burden of the world."

In common with all members of the human race, the judge achieves only a fragmentary experience in life. His path of activity permits him to contact only a small portion of the vast reality around him. As someone has put it, he has seen life through a micronite filter. He ascends the bench robed in this modicum of experience. His viewpoint is affected by it. Each of the members of a multi-judge court is clothed in a different fragment of it.

Justice Cardozo's statement on this subject is now famous:

"There is in each of us a stream of tendency, whether you choose to call it philosophy or not, which gives coherence and direction to thought and action. Judges cannot escape that current any more than other mortals. All their lives, forces which they do not recognize and cannot name, have been tugging at them — inherited instincts, traditional beliefs, acquired convictions; and the resultant is an outlook on life . . . which, when reasons are nicely balanced, must determine where choice shall fall. In this mental background every problem finds its setting. We may try to see things as objectively as we please. None the less, we can never see them with any eyes except our own."²

The creation of appellate courts, in Louisiana and elsewhere, composed of an odd number of judges suggests that judges are expected to disagree. They sometimes do. When a question is presented that divides society generally, then normally a court will also be divided.

What, then, is the role of dissenting opinions in Louisiana? Do they have value? Do they assist in the administration of justice?

Chief Justice Hughes once wrote:

2. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 12 (1921).

"A dissent in a court of last resort is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed." Chief Justice Stone declared:

"A considered and well-stated dissent sounds a warning note that legal doctrine must not be pressed too far."

In an address before the Conference of Chief Justices, Chief Justice Robert G. Simmons of Nebraska stated:

"It is an appeal to the intellect of tomorrow."³

At first blush, it might appear that dissenting opinions should be of little importance in Louisiana. In its unique civil law system, the doctrine of *stare decisis* does not prevail. Let me hasten to add, however, that this assertion may not be without dissent. Under the civil law doctrine of *jurisprudence constante*, a single case is of less importance. The application of this civil law doctrine requires not one but a series of uniform decisions. Moreover, case law is *de facto* only. The ultimate source of the law is the Code.⁴ Nonetheless, as I view them, dissenting opinions have wielded an important influence on Louisiana law. Lawyers and judges everywhere are essentially retrospective in viewpoint. They search for a comforting precedent, whether it be in a majority or dissenting opinion.

An examination of the annual symposia on the work of the Supreme Court in the Louisiana Law Review discloses that there has been an average of 47 dissents each term during the period from 1937 to 1962. The highest number of dissents has been eighty (80), for the court term 1955-1956.

During the same period, there have also been occasional dissents in the intermediate courts of appeal.

A review of these dissents suggests that a dissent does not often change the result in the case where it is made.

A former Chief Justice who served on the Supreme Court for more than thirty years dissented 745 times, 325 times with written reasons. Of these, comparatively few became the law on rehearing in the same case.⁵

3. See 16 LA. L. REV. 498 (1956).

4. Daggett, Dainow, Hebert & McMahon, *A Reappraisal Appraised: A Brief for the Civil Law of Louisiana*, 12 TUL. L. REV. 12, 17 (1937).

5. See Brash, *Chief Justice O'Niell and the Louisiana Civil Code—The Influ-*

One of my colleagues, who has a distinguished career of twenty-seven years on the court of appeal and Supreme Court, has written 130 dissenting opinions. Of these, twenty-one were adopted as the law in the same case either on rehearing or on writ to the Supreme Court. This record is well above average.

However, I suggest that dissents radiate their greatest influence in later court decisions and legislative action. A dissenting opinion may be adopted as the majority rule in a later case. A recent example is *State v. Gatlin*,⁶ in which the dissenting opinion in several prior cases became the law when the court held that the proper disposition in a felony conviction reversed because of the complete absence of evidence of an essential element of the crime was to grant a new trial, rather than to discharge the accused. More frequently, perhaps, the legal point is the subject of legislation that repudiates the majority rule. For example, this happened to the majority rule of *Schneider v. Schneider*⁷ when the legislature adopted the Code of Civil Procedure, which prohibits suspensive appeals from alimony judgments.

The projection of influence into later cases and legislation confirms, in my mind, that a dissent is an appeal to the intellect of tomorrow.

I cannot fail to make special reference to dissents in the courts of appeal. Under the present appellate structure, most of the direct appeals from the trial courts are to these courts. After the exhaustion of remedies, application for writs may be made to the Supreme Court. It is at this point that the court runs smack into the troublesome law-fact dichotomy. For a writ is granted by the Supreme Court only for an error of law. Sometimes law and fact are so blended that it is most difficult to distinguish them. It is for this reason that a dissenting opinion in the court of appeal is of great aid in action upon writ applications in a close case. It may focus attention on a misstatement of law. It may pinpoint a misapplication of the law. It may disclose a conflict in the jurisprudence. Needless to say, a dissenting opinion in the court of appeal favors writ action.

We see, then, that a dissent has value, both present and future, in the appellate courts of this state.

ence of His Dissents, 19 TUL. L. REV. 436, 448 (1945).

6. 241 La. 321, 129 So. 2d 4 (1961).

7. 240 La. 93, 121 So. 2d 498 (1960).

It has been suggested, however, that the dissenting opinion renders the law uncertain. Writing in 1905, William A. Bowen stated:

"[T]he Dissenting Opinion is of all judicial mistakes the most injurious. . . . It is, happily, a habit of the public mind to regard the judiciary as a worthy and safe repository of all legal wisdom; but this respect must receive a sad shock when every court is divided against itself, and every cause reveals the amateurish uncertainty of the judicial mind."⁸

Sharp disagreement with this view has been voiced by Dean Roscoe Pound:

"Dissenting opinions are not in themselves objectionable. There are very good reasons why the judges of our highest courts should not always agree. Nor does their occasional disagreement show a bad state of uncertainty in the law."⁹

In his dissent in the landmark case of *Miami Corp. v. State*,¹⁰ the late Chief Justice Charles A. O'Niell stated:

"That a decision is rendered by a divided court does not impair its authority, but, on the contrary, shows that the case was well considered."

The Supreme Court of South Carolina¹¹ and Justice Roger J. Traynor of the Supreme Court of California¹² have given expression to similar views.

I am of the opinion that the charge of uncertainty must be rejected. Law itself is uncertain. The dissenting opinion does not make it more so.

The official attitude toward dissenting opinions has varied somewhat over the years. In 1821,¹³ the legislature by special act required each of the members of the Supreme Court to deliver a separate opinion in each case, seriatim commencing with the junior member. This was fulfilled by the court in a most unexpected way. Each judge wrote: "I concur in the opinion

8. 17 GREEN BAG 690, 693 (1905).

9. Pound, *The Heated Judicial Dissent*, 39 A.B.A.J. 794 (1953).

10. 186 La. 784, 839, 173 So. 315, 333 (1936).

11. *Matthews v. Clark*, 105 S.C. 13, 89 S.E. 471 (1916).

12. Traynor, *Some Open Questions on the Work of State Appellate Courts*, 24 U. CHI. L. REV. 211, 218 (1957).

13. La. Act of February 17, 1821, p. 98.

for the reasons adduced."¹⁴ Otherwise, he dissented. The law was short-lived, being repealed the following year.¹⁵

The Constitution of 1898 prohibited the publication of dissenting opinions. This prohibition was contained in Article 92, which provided for the publication of official case reports at public expense. Doubtless it was an economy measure. The court so interpreted it, for dissenting opinions continued to be published in the *Southern Reporter*, a private publication. The prohibition against the publication of dissents was finally eliminated in the Constitution of 1921.

The Louisiana Canons of Judicial Ethics, adopted by the Supreme Court in 1960, are silent on the subject of dissents. Doubtless, the court was of the view that no specific treatment was required because of the broad coverage of the general articles on the conduct of a judge. However, Article 19 of the Canons of Judicial Ethics developed by the American Bar Association provides:

"It is of higher importance that judges constituting a court of last resort should use effort and self-restraint to promote solidarity of conclusion and the consequent influence of judicial decision. A judge should not yield to pride of opinion or value more highly his individual reputation than that of the court to which he should be loyal. Except in case of conscientious difference of opinion on fundamental principle, dissenting opinions should be discouraged in courts of last resort."

This pronouncement provides a ready, though general, guide to the use of dissenting opinions. It enjoins judicial restraint in the use of a dissent. It leaves no room for the so-called heated dissent, for loyalty to the court is emphasized. Neither denunciation, invective, or personal criticism is sanctioned. An examination of the decisions of another state, now famous for its dissents, reveals such choice language as:

"I would say that the doctrine laid down in the majority opinion in the case at bar is based upon the philosophy of bureaucratic communism."¹⁶

14. See, e.g., *Breedlove v. Turner*, 9 Mart.(O.S.) 353, 380-81 (La. 1821).

15. La. Act of February 27, 1822, p. 24.

16. *City of Pasadena v. City of Alhambra*, 33 Cal. 2d 908, 940, 207 P.2d 17, 37 (1949).

"To say that I cannot agree with such sophistry is a gross understatement."¹⁷

"The trend of decisions in this court clearly shows that some of my colleagues on this bench do not feel the weight of the centuries of history which have produced this rule. Do they seek a return to the feudal system or some other pre-twelfth century form of judicial administration?"¹⁸

Fortunately, we have not been troubled with the personal denunciation characteristic of the heated dissent. As I have sometimes said, we have been able to disagree without being disagreeable. The rule that a dissent should express reason, not emotion, is, in my opinion, a sound one. A dissent should afford a critique of the majority opinion.¹⁹

When used with judicial restraint, the dissent becomes a duty, for which the judge need offer no apology. It can assist the court in "giving to every man his due." If truth is with the dissent, the intellect of the future will judge it rightly.

"Truth, crushed to earth, shall rise again."

17. *Werner v. Southern California Associated Newspapers*, 35 Cal. 2d 121, 137, 216 P.2d 825, 835, 13 A.L.R.2d 252, 266 (1950).

18. *Doran v. City and County of San Francisco*, 44 Cal. 2d 477, 506, 283 P.2d 1, 18 (1955).

19. See Pound, *The Heated Judicial Dissent*, 39 A.B.A.J. 794, 795 (1953).