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Dissents in Louisiana: Civility Among Civilians?

C. A. Marvin*

From this nation's creation, legal scholars have discussed pro and con the value or worth of dissenting opinions. Critics of dissenting opinions, emphasizing that "the law . . . is made by those who command the majority," consider dissents to have "no consequences within the [legal] system"¹ and to be "an exercise in futility,"² only "as valuable as is the audit of an honest banker's books."³ In this perspective, the dissenter is simply considered a sore loser, who comes across "like the small boy making faces at the big boy across the street, whom he cannot whip."⁴

Those on the other side of the argument naturally include Supreme Court justices, past and present, who, while recognizing that the dissenter's view rarely prevails as later law, nonetheless regard a dissenting opinion as a valuable tool in the decision-making process, especially in the courts of last resort.⁵ Justice Douglas once said that the right to dissent was the only thing that made life tolerable for him.⁶ Others have said, more pedantically, that the articulation of the dissenting view "safeguards the integrity of the judicial decision-making process by keeping the majority accountable for the rationale and consequences of its decision"⁷ and "improves the final product [the majority opinion] by forcing the prevailing side to deal with the hardest questions urged by the losing side."⁸

Scholarly opinions about the effect of a divided panel or court are also polarized. At one end, the lack of unanimity is traditionally seen as a negative reflection on the court or the panel,⁹ while at the other end, the division is viewed as being positive evidence that the court's decisions "are the product of independent and thoughtful minds, who try to persuade one another but do not simply 'go along' for some supposed 'good of the institution.'"¹⁰ One judge suggested to me that his oath of office supports what he perceives to be his *obligation* to reason independently of his colleagues. He offered his rationale:

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* Chief Judge, Second Circuit Court of Appeal, State of Louisiana. The author gratefully acknowledges the able editorial assistance of his senior research attorney, Clare D. Fiasconaro, B.A., Indiana University, 1976; J.D., Loyola University School of Law, 1983.

1. William J. Brennan, Jr., *In Defense of Dissents*, 37 *Hastings L.J.* 427, 429 (1986).

2. *Id.*

3. Karl N. Llewellyn, *The Common Law Tradition: Deciding Appeals* 27 n.19 (1960).

4. Robert A. Leflar, *Appellate Judicial Opinions* 212 (1974) (quoting V. H. Roberts, *Dissenting Opinions*, 39 *Am. L. Rev.* 23, 24 (1905)).

5. Antonin Scalia, *The Dissenting Opinion*, 1994 *J. Sup. Ct. Hist.* 33, 36-37, 41-42; Brennan, *supra* note 1, at 434-36.

6. Scalia, *supra* note 5, at 42.

7. Brennan, *supra* note 1, at 430.

8. *Id.*

9. Scalia, *supra* note 5, at 35.

10. *Id.*

"I have taken an oath to uphold the constitutions of the state and nation and impartially perform my duties to the best of *my* ability and understanding, and that's all I have. My understanding and my ability are just not the same as yours!"¹¹

The negative view of dissents prevailed among traditional common law scholars well into the earlier part of this century.¹² Because of their tradition, they regarded a dissenting opinion which did not convey "full respect for the doctrine of *stare decisis*" as "an iconoclastic endeavor to upset all that has gone before[,] . . . [a mere vehicle] for the conveyance of pet ideologies . . . [or an attempt] to substitute the impulses of the present for the wisdom of the past . . ."¹³

Justice Brennan, however, in his 1986 lecture defending both the use and the scholarly worth of dissenting opinions, regarded a well-reasoned dissent as a benefit, rather than a threat, to the integrity of the judicial system:

This is not to say that *stare decisis* is of little consequence. . . . As Chief Justice Taney observed, the authority of the [Supreme] Court's construction of the Constitution ultimately "depend[s] altogether on the force of the reasoning by which it is supported." A dissent challenges the reasoning of the majority, tests its authority and establishes a benchmark against which the majority's reasoning can continue to be evaluated, and perhaps, in time, superseded. . . . [S]imply by infusing different ideas and methods of analysis into judicial decision-making, dissents prevent that process from becoming rigid or stale. And, each time the Court revisits an issue, the justices are forced by a dissent to reconsider the fundamental questions and to rethink the result.¹⁴

I. THE ROLE OF PRECEDENT IN LOUISIANA

Our late civilian scholar, then Louisiana Justice Albert Tate, Jr., in a 1974 article, when comparing his role with that of his common law colleagues, concluded that civilian judges in a "mixed jurisdiction" reasoned similarly to common law judges:

11. See generally La. Const. art. X, § 30.

12. See generally Leflar, *supra* note 4, at 203-12.

13. Leflar, *supra* note 4, at 205 (quoting R. Dean Moorhead, *Concurring and Dissenting Opinions*, 38 A.B.A. J. 821, 884 (1952)).

14. Brennan, *supra* note 1, at 435-36. The author quotes approvingly from Charles Evans Hughes, *The Supreme Court of the United States* (1928): "[W]hat must ultimately sustain the court in public confidence is the character and independence of the judges. They are not there simply to decide cases but to decide them as they think they should be decided, and while it may be regrettable that they cannot always agree, it is better that their independence should be maintained and recognized than that unanimity should be secured through its sacrifice." Brennan, *supra* note 1, at 434.

Our basically civilian tradition has been partly overlaid and replaced by Anglo-American common law. . . .

Today, despite the renewed importance of the civilian sources of our substantive law, there is little support in the Louisiana bench and bar for the civilian theory that the role of the judges is to decide cases only, leaving doctrinal development to the scholarly writers. . . .

The Louisiana judge, like his common-law brother, is a law-announcer as well as a case-decider. . . .

As with the common-law judge, he views himself not merely as a technician but also as a scholar, law-maker and exponent of doctrine. However, as with a modern day civilian judge, he is essentially more free than his common law counterpart from the mechanical effects of "binding" precedent; he has the freedom to return, independent of intervening judicial precedents, to the initial legislative concepts and use creative analogies and constructs based upon them; or, in the absence of legislation expressly intended to apply, he is free to devise socially just and sound rules to regulate the unprovided-for case.¹⁵

Justice Tate noted that even in other states, a judge is less bound by precedent when deciding an issue of constitutional, rather than jurisprudential or statutory, law.¹⁶ This difference in "judicial latitude," if you will, may perhaps explain why dissenting opinions are generally valued more by those who routinely decide constitutional issues than by those who equate the role or function of the common-law judge with the rather mechanical application of "settled law," as determined by majority vote in either or both the courts and the legislature, to a particular set of facts.

Justice Tate explained that a Louisiana judge "applies to the Civil Code and other legislation the type of reasoning that a common law judge applies to a constitutional provision."¹⁷ The role of the judge in our "mixed" jurisdiction thus appears to favor, or at least to tolerate, the use of dissenting opinions to express a particular judge's independent understanding of the meaning of the Civil Code and other legislation when that understanding differs from the majority view.

II. THE IMPORTANCE OF JUDICIAL CIVILITY

A dissenting vote cast without written reasons, or a dissenting opinion which expresses only trivial and insubstantial grounds for the author's disagreement with the majority opinion, has no value and may harm the collegiality of the bench.¹⁸

15. Albert Tate, Jr., *The Role of the Judge in Mixed Jurisdictions*, 20 *Loy. L. Rev.* 231, 231, 236-37, 243 (1974).

16. *Id.* at 240.

17. *Id.*

18. Brennan, *supra* note 1, at 435.

A dissenting opinion may also cause harm when it denounces or insults the majority's opinion or its members. The dissenting opinion "should express [the author's] reason, not his feelings."¹⁹

The temptation to express negative feelings or disparaging comments about the majority opinion is sometimes difficult for the dissenting judge to resist, however. Justice Blackmun once remarked that it is "much easier to write a biting dissent than a constructive majority opinion."²⁰ Justice Cardozo said the dissenter enjoys "a freedom of expression, tinged at rare moments with a touch of bitterness, which magnanimity as well as caution would reject for one triumphant."²¹

Even those who regard dissenting opinions as vital to the institutional well-being of appellate courts agree that judges "must be able to express strong disagreement with one another [without doing] so disagreeably."²² The importance of judicial civility has long been recognized. Charles Evans Hughes, who served on both the federal appellate bench and on the United States Supreme Court, wrote in 1928: "Independence does not mean cantankerousness and a judge may be a strong judge without being an impossible person. Nothing is more distressing on any bench than the exhibition of a captious, impatient, querulous spirit."²³ The dissenting judge is expected to disagree without being disagreeable, much like the opposing lawyers in the case are expected to do when representing their respective clients.

In Louisiana, the rules of the supreme court and the five appellate circuits impose professional standards on lawyers. The supreme court requires that the language used in any brief filed in the court be "courteous, and free from insulting criticism of any person, individually or officially, or of any class or association of persons, or of any court of justice, or other institution."²⁴ The Uniform Rules of the Courts of Appeal contain a similar requirement that language used in briefs "shall be courteous, free from vile, obscene, obnoxious, or offensive expressions, and free from insulting, abusive, discourteous, or irrelevant matter or criticism of any person, class of persons or association of persons, or any court, or judge or other officer thereof, or of any institution."²⁵

The "gentleman lawyer" standard of professionalism which many thought to have existed in years past is now considered subsumed or eclipsed by the more aggressive and rancorous style of advocacy that prevails today.²⁶ The Louisiana

19. Leflar, *supra* note 4, at 206 (quoting Roscoe Pound, *Cacoethes Dissentiendi: The Heated Judicial Dissent*, 39 A.B.A. J. 794 (1953)).

20. Leflar, *supra* note 4, at 203.

21. Scalia, *supra* note 5, at 42.

22. Edward McGlynn Gaffney, Jr., *The Importance of Dissent and the Imperative of Judicial Civility*, 28 Val. U. L. Rev. 583, 623 (1994).

23. Charles Evans Hughes, *The Supreme Court of the United States* 68 (1928).

24. La. S. Ct. Rules, Rule VII, § 7 (1997).

25. Unif. Rules of La. Courts of Appeal, Rule 2-12.4 (1997).

26. See generally Gaffney, *supra* note 22, and particularly the text and accompanying footnotes at 584-85 and 623-24.

Supreme Court recently amended the Rules for Continuing Legal Education to include the topic of "professionalism" as a mandatory continuing education subject each year, in addition to the existing "ethics" requirement. The amended rule explains that legal ethics "concerns the standard of professional conduct and responsibility *required* of a lawyer," while professionalism "entails what is more broadly *expected* of attorneys . . . in the service of [the] client and [the] public good[.]"²⁷

The aggressive and rancorous style that characterizes the legal profession has also affected the bench. Within the past decade, beginning in 1989, a committee of federal court judges and lawyers in the Seventh Federal Circuit surveyed members of the bench and bar in Illinois, Indiana and Wisconsin to investigate concerns over the "growing incivility in the practice of law, both on and off the bench."²⁸ In 1992, the Seventh Circuit adopted the committee's recommended Standards for Professional Conduct within the circuit. While not ethical "rules" *per se*, the standards clarify duties which "bind lawyers to better conduct with respect to their fellow lawyers and to the courts in which they practice, and *they bind judges to better conduct towards lawyers and other judges.*"²⁹ Of particular interest here are these three obligations which judges in the Seventh Circuit have undertaken with respect to one another:

We will be *courteous, respectful, and civil* in opinions, ever mindful that a position articulated by another judge is the result of that judge's earnest effort to interpret the law and the facts correctly.

In all written and oral communications, we will *abstain from disparaging personal remarks or criticisms, or sarcastic or demeaning comments about another judge.*

We will endeavor to *work with other judges* in an effort to *foster a spirit of cooperation* in our mutual goal of enhancing the administration of justice.³⁰

The American Inns of Court, created in 1980, also recommends that professional standards for lawyers *and judges* be adopted by its member inns.

The Louisiana Supreme Court also recently adopted, as a General Administrative Rule, the Code of Professionalism in the Courts. This rule states aspirational standards of civility and professionalism as duties owed by judges and lawyers to one another, to litigants, and to the court system.³¹ Specifically

27. Amendments to Rules of the Supreme Court—Rule XXX, adopted May 23, 1997, effective January 1, 1998, reported in West's Louisiana Cases, 693-694 So. 2d at LXII-LXIV (emphasis supplied).

28. Gaffney, *supra* note 22, at 584.

29. *Id.* at 586 (emphasis added).

30. *Id.* at 589 (quoting Final Report of the Committee on Civility of the Seventh Federal Judicial Circuit, 143 F.R.D. 441 (1992)) (emphasis added).

31. Amendment to Rules of the Supreme Court, Part G, New Section 11, adopted August 5, 1997,

included are the three duties of judges toward their colleagues contained in the Seventh Federal Circuit's Standards for Professional Conduct quoted above.³² In the resolution and preamble to the Louisiana Code of Professionalism, the supreme court encourages voluntary use of the new standards by lawyers while stating that the standards "should be . . . followed by all judges of the State of Louisiana."³³

III. LOUISIANA DISSENTS

My curiosity in recent years about the overall degree of civility and professionalism in Louisiana's appellate judiciary led me to search for reported Louisiana civil cases from 1982 through late 1997 with written dissents which cite or discuss the Civil Code.³⁴ A review of these 375 cases allows the conclusion that Louisiana justices and judges have generally maintained a high degree of professionalism, even without formal standards of judicial civility such as those adopted by the Seventh Federal Circuit in 1992 and by the Louisiana Supreme Court in 1997.

In about ninety percent of the cases reviewed, the dissenter simply expressed his or her disagreement with the majority on either, or both, the facts and the law without being disagreeable or expressing any negative "feelings" about the dissenter's colleagues. The dissenter wrote the classical and acceptable dissent in such cases.³⁵

A much smaller percent of the Louisiana dissents may be said to be disagreeable and unacceptable to some degree, some only mildly or obliquely so, others more pointedly. A few Louisiana dissents may be said to express not only extreme or scathing criticism of the majority's decision and reasoning, but also acerbic remarks that are discourteous, disparaging, offensive, or personally insulting to the motive and intellect of the majority judges.

IV. MILDLY TO MODERATELY CRITICAL DISSENTS

The milder dissents remain, for the most part, appropriately focused on the legal or factual differences with the majority, taking only an occasional "dig" at the other side. See, for example, these remarks:

reported in West's Louisiana Cases, 697-698 So.2d at XXXIX-XLI.

32. *Id.* at XLI. See *supra* text accompanying note 30.

33. *Id.* at XXXIX, XL.

34. The search was conducted on WESTLAW using the query: dis("Civil Code" "Civ. Code" C.C.) & da(after 1/1/1982).

35. One appropriate technique when the majority is *affirming* a lower court is for the dissenter to criticize not the majority opinion, but the opinion of the lower court. See, e.g., *State in Int. of R.W. v. J.L.W.*, 491 So. 2d 652, 656-65 (La. App. 2d Cir.) (on original hearing) (Marvin, J., dissenting), *writ denied*, 493 So. 2d 649 (1986).

Hard facts make bad law.³⁶

The facts are acceptably well stated in the majority opinion.³⁷

[T]he recitation of facts in the majority opinion leaves much to be desired³⁸

The majority has made two errors. It has substituted its own fact finding for that of the trial court, and it has ignored the law.³⁹

[T]he majority treats us to wishful conclusions, grandly cast but sparsely supported.⁴⁰

Some dissenters describe the majority decision as "unjust,"⁴¹ "an injustice,"⁴² or "unconscionable."⁴³ A few go beyond merely suggesting why or how the majority should have reached a different result by including in the dissent a lengthy proposed "alternative" to the majority opinion.⁴⁴

Other dissents that contain language critical of the majority opinion are more pointed than the mild dissents described above, but not as acerbic as those mentioned below. For example, the majority decision in *Succession of Lauga*,⁴⁵ finding unconstitutional the legislation which excluded competent persons over the age of twenty-three from being considered forced heirs, prompted these remarks from two of the three dissenting justices:

The majority opinion desperately clings to an ancient tradition that had its roots in entirely different times and circumstances.⁴⁶

36. *Jackson v. Continental Cas. Co.*, 412 So. 2d 1364, 1367 (La. 1982) (Blanche, J., dissenting).

37. *Taylor v. U. S. Fidelity & Guar. Ins. Co.*, 630 So. 2d 237, 243 (La. 1993) (Ortique, J., dissenting in part).

38. *St. Hill v. Tabor*, 532 So. 2d 776, 781 (La. App. 5th Cir. 1988) (Bowes, J., dissenting), *reversed*, 542 So. 2d 499 (1989).

39. *Roberson v. Huggins*, 498 So. 2d 32, 37 (La. App. 1st Cir. 1986) (Edwards, J., dissenting), *writ denied*, 501 So. 2d 216 (1987).

40. *Kozlowski v. Dept. of Health & Human Resources*, 534 So. 2d 1260, 1271 (La. App. 5th Cir. 1988) (Grisbaum, J., dissenting), *writ denied*, 538 So. 2d 592 (1989).

41. *Sharp v. Daigne*, 545 So. 2d 1063, 1085 (La. App. 1st Cir. 1989) (Lanier, LeBlanc, and Savoie, JJ., dissenting), *affirmed*, 555 So. 2d 1361 (1990).

42. *Picone v. Lyons*, 601 So. 2d 1375, 1378 (La. 1992) (Cole, J., dissenting); *In re Levy*, 427 So. 2d 844, 848 (La. 1983) (Watson, J., dissenting); *Mitchell v. Clark*, 431 So. 2d 817, 823 (La. App. 2d Cir. 1983) (Jasper Jones, J., dissenting), *affirmed as amended*, 448 So. 2d 681 (1984).

43. *Harvey v. Dixie Graphics, Inc.*, 593 So. 2d 351, 356 (La. 1992) (Watson, J., dissenting); *Whitney Nat'l Bank v. Derbes*, 436 So. 2d 1185, 1197 (La. App. 4th Cir.) (Barry, J. dissenting), *writ denied*, 441 So. 2d 1220 (1983), *cert. denied*, 466 U.S. 938, 104 S. Ct. 1912 (1984).

44. *Tesvich v. 3-A's Towing Co.*, 547 So. 2d 1106, 1114-36 (La. App. 4th Cir.) (Williams, J., dissenting in part), *writ denied*, 552 So. 2d 383, 384 (1989); *Staté through Dept. of Highways v. Luling Indus. Park, Inc.*, 443 So. 2d 672, 682-90 (La. App. 5th Cir. 1983) (Samuel, J., dissenting), *writ denied*, 444 So. 2d 1247 (1984), *cert. dismissed*, 468 U.S. 1220, 104 S. Ct. 3593 (1984).

45. 624 So. 2d 1156 (La. 1993).

46. *Id.* at 1184 (Hall, J., dissenting).

I disagree with the majority's conclusion and with the analytical machinations engaged in to reach that conclusion⁴⁷

Another succession case involving the issue of dual paternity provoked a dissenter to remark:

[B]efore adopting a loose cannon approach to this area of law, this court ought to at least explain why it is not restrained by the legislative will⁴⁸

More pointedly, the Louisiana dissenters occasionally describe the majority's interpretation of a statute as "eccentric"⁴⁹ or "pedantic,"⁵⁰ and characterize the majority's resolution of the case as "incongruous,"⁵¹ "bizarre,"⁵² or even "capricious."⁵³

In an action by a divorcee against her ex-spouse and his new wife for intentional infliction of emotional distress and intentional interference with a contract, Judge Thibodeaux dissented in part in 1994. His view, perhaps unknowingly, employed similar criticism that was more poetically used in 1916 by a Colorado dissenting jurist. Judge Thibodeaux's criticism is emphasized:

I dissent, however, [to the majority's] refusal to recognize a cause of action for tortious interference with a contract outside the scope of corporate activity.

Louisiana has unfortunately maintained an *anachronistic stranglehold* against recognition of this [cause of action]. . . .

[The] fluidity [of La. Civ. Code art. 2315] relieves our courts *from the tethered and myopic constraints of nineteenth century thinking* which undermine the formulation of a cause of action based on tortiously inducing a contractual breach.⁵⁴

The more poetic Colorado dissenter crafted his disagreement in the style of Aesop to create one of my favorite dissents in a fable critical of blind adherence to precedent:

47. *Id.* at 1184-85 (Kimball, J., dissenting).

48. *Griffin v. Succession of Branch*, 480 So. 2d 313, 316 (La. 1986) (dissenting opinion of Dennis, J.). The majority opinion is reported at 479 So. 2d 324 (La. 1985).

49. *Loop, Inc. v. Collector of Revenue*, 523 So. 2d 201, 208 (La. 1988) (on rehearing) (Dennis, J., dissenting).

50. *Holcomb v. Bossier City Police Dept.*, 660 So. 2d 199, 204 (La. App. 2d Cir. 1995) (Brown, J., dissenting in part).

51. *Id.*

52. *Loop*, 523 So. 2d at 209.

53. *Plumbing Supply House, Inc. v. Century Nat. Bank*, 440 So. 2d 173, 179 (La. App. 4th Cir. 1983) (Garrison, J., dissenting), *writ denied*, 444 So. 2d 1226 (1984).

54. *White v. White*, 641 So. 2d 538, 543-44 (La. App. 3d Cir.) (Thibodeaux, J., dissenting in part), *writ denied*, 648 So. 2d 402 (1994) (emphasis added).

One day through the primeval wood
 A calf walked home, as good calves should;
 But left a trail all bent askew,
 A crooked trail, as all calves do.
 Since then, three hundred years have fled,
 And, I infer, the calf is dead.
 But still he left behind this trail,
 And thereby hangs my moral tale.

* * *

For men are prone to go it blind
 Along the calf-paths of the mind,
 And toil away from sun to sun
 To do what other men have done.
 They follow in the beaten track,
 And out and in, and forth and back,
 And still their devious course pursue
 To keep the path that others do.⁵⁵

I wish I had said that!

Dissenters sometimes, either consciously or unconsciously, subtly or not so subtly, analogize the facts of the case or the majority's treatment of the issues to historical or literary figures. For instance, one dissenting judge said, "The plaintiff's petition for damages [against the foreclosing creditor] . . . describes a raid on plaintiff's business of which Attila the Hun justly could be proud."⁵⁶ Another dissenter stated:

The crux of the issue, and the one on which this case turns, in my opinion, is the failure of the plaintiff, the trial court, and now this appellate court, to give specific and exact substance to the *duties* they contend were owed by [defendant], personally or otherwise, to *this particular contractor* Rather, like Banquo's ghost in Shakespeare's hallowed "Macbeth," the accusation floats in thin air without material form or final destination.⁵⁷

In the case of the *Interdiction of F.T.E.*,⁵⁸ the court addressed the reasonableness of the trial court's award of \$58,000 in attorney fees and travel expenses to the interdict's brother, who had attempted to involuntarily commit and fully interdict F.T.E, but who succeeded only in obtaining a limited interdiction over

55. Van Kleeck v. Ramer, 156 P. 1108, 1121 (1916) (Scott, J., dissenting), *quoted in* Adalberto Jordan, *Imagery, Humor, and the Judicial Opinion*, 41 U. Miami L. Rev. 693, 726 (1987).

56. *Id.* at 178.

57. 9 to 5 Fashions, Inc. v. Spurney, 520 So. 2d 1276, 1287 (La. App. 5th Cir. 1988) (Bowes, J., dissenting), *reversed*, 538 So. 2d 228 (1989).

58. 622 So. 2d 667 (La. App. 2d Cir. 1993).

F.T.E.'s person. The majority of a three-judge appellate panel initially reduced the award to \$36,000, with Judge Brown dissenting on the grounds that even the reduced award was "extravagant."⁵⁹ On rehearing before five judges, the award was further reduced to \$12,500, with Judge Brown writing for the majority. In his dissent to the decision of the three-judge panel, Judge Brown wrote:

[T]he brother's effort to take over F.T.E.'s estate failed. . . .

From April 1990 until May 1992, F.T.E. wrongly suffered a "civil death." The expenses of his involuntary confinement were paid by F.T.E., including his brother's travel expenses from Texas to Shreveport. It is not right for F.T.E. to now pay his unsuccessful brother's legal fees.

I am reminded of Hemmingway's [sic] *The Old Man and the Sea*, where Santiago lost his catch to sharks who tore off large chunks of meat, "like a pig to a trough."⁶⁰

V. HIGHLY CRITICAL DISSENTS

Some dissents impugn not only the reasoning and conclusions of the judges in the majority, but also their motives, their intellect and competence, and their integrity. These dissents often attempt, implicitly or expressly, to justify the dissenter's "feelings" of disbelief and righteous indignation evoked by the majority result.

In a case allowing an automobile insurer to recover from a claimant \$3,400 mistakenly paid to "settle" or "compromise" claims that were not covered under the insurer's policy, the dissenting judge described the majority opinion as "absolutely legally, ethically and morally *wrong*[.] . . . [a] horrendous injustice . . . [supported] by no stretch of logic, the law, or the imagination . . ."⁶¹

A justice who disagreed with the majority's conclusion that rural electric cooperatives are subject to the jurisdiction of the Public Service Commission wrote:

The linchpin of the majority opinion is, unfortunately, a logical paradox. . . . The rest of the majority opinion constitutes an attempt to justify this initial fallacy. . . .

The majority's holding . . . represents a frightening and unprecedented aberration in constitutional interpretation. . . .

59. *Id.* at 674 (Brown, J., dissenting).

60. *Id.* at 673-74.

61. *Carter v. Jefferson*, 597 So. 2d 128, 133-34 (La. App. 5th Cir.) (Bowes, J., dissenting), *writ denied*, 600 So. 2d 609 (1992) (emphasis added).

In seizing upon the . . . statute granting the commission regulatory power over cooperatives to justify its result in this case, the majority ignores prior decisions of this Court. . . . The majority does not rebut or even confront this formidable obstacle; it simply ignores it. . . .

In light of the logical fallacies generated by the majority in its attempt to justify its result by constitutional analysis, it is small wonder that it descends into the murky realms of public policy and regulatory economics in an attempt to justify its conclusion. . . . The majority . . . decides, on a theoretical level, that pervasive government regulation of electric cooperatives is necessary to attain some abstract "good."⁶²

When the Louisiana Supreme Court upheld the constitutionality of the \$500,000 cap on general damages in a medical malpractice action against multiple defendants, the dissenting justice characterized the majority's analysis, in maritime metaphors, as "specious," "flawed," "confused," and "disappointing".⁶³

Like a ship in the night, with only a look and a nod in passing, the majority barely acknowledges Article I, Section 3 of our state constitution and this court's [prior] interpretation. . . while pursuing a hitherto-fore uncharted course. Indeed, if my colleagues meant to follow our previous interpretation of state constitutional law, as their citations indicate, they certainly fouled up their navigation. . . .

My colleagues . . . may have acted irresolutely because of a lack of full understanding of the significant differences between the various equal protection [levels] . . . of scrutiny. . . .

[A] majority of this court has been blinded by a dazzling array of legal talent assembled by special interest groups opposing the single catastrophically injured and disabled tort victim. . . . [T]he interest groups may have caused the court to do far-reaching harm to our state constitutional law as well as to many areas of our tort law in addition to medical malpractice.⁶⁴

Similar accusations that the majority misconstrued the law to favor one side of the case have been made by dissenting appellate court judges. For example, in an action by Plaquemines Parish oyster fishermen against the out-of-state insurers of two tugboats that damaged their oyster beds, the dissenting judge

62. *Cajun Elec. Power Coop., Inc. v. La. Public Serv. Comm'n*, 544 So. 2d 362, 373-76 (La. 1989) (on rehearing) (Cole, J., dissenting in part).

63. *Butler v. Flint Goodrich Hosp. of Dillard Univ.*, 607 So. 2d 517, 523, 529 (La. 1992) (Dennis, J., dissenting), cert. denied, 508 U.S. 909, 113 S. Ct. 2338 (1993).

64. *Id.* at 525-26, 528, 531-32.

accused the majority of "twisting and warping" the applicable case law "to augment the local plaintiffs' recovery"⁶⁵

To the majority's opinion upholding the authenticity of an olographic will against the decedent's intestate heirs, some of whom admitted they had cut the decedent's signature off the will after his death, the dissenter's acrimonious accusations of his colleagues unduly taint his stated reasons for dissenting:

Have we come to the point where the writing of laws is completely in vain?

Shrouding itself under the banner of circumstantial evidence, the majority simply ignores the express requirement of LSA-C.C.P. Art. 2883 that an olographic will "*must* be proved by the *testimony* of two *credible witnesses* that the testament was . . . *signed* in the testator's handwriting" Such wording is plain as day and can be understood by the average high-schooler!

Insofar as our record, seven individuals (at most) saw the subject document intact The first four are deceased, and apparently unnoticed by the majority, cannot present their "testimony" as "witnesses."

[The next paragraph notes that a fifth person did not testify and that the testimony of the remaining two witnesses conflicted.]

In short, we are left with only *one* witness identifying the signature. Furthermore, even that individual's familiarity with [the decedent's] handwriting and signature is questionable. This, quite obviously, does not conform to the requirements of Article 2883.

It never ceases to amaze, in the vernacular, "when push comes to shove," how otherwise assumed logicians can be convinced, and will indeed announce, that Night is Day, Empty is Full, and, in the present case, One is Two. Such legerdemains at the hands of the law somehow always trouble those outside our professional ranks. If we are simply intent upon producing a certain outcome irrespective of existing statutes, can that fact not at least be forthrightly so stated?

The whole framework of the law, its certainty and reliability, suffer when judicially fashioned results disregard the written word, and spring merely from a desire of judges to "do good."⁶⁶

65. *Tesvich v. 3-A's Towing Co.*, 547 So. 2d 1106, 1114 (La. App. 4th Cir.) (Williams, J., dissenting in part), *writ denied*, 552 So. 2d 383, 384 (1989).

66. *Hamilton v. Kelley*, 641 So. 2d 981, 987-88 (La. App. 2d Cir.) (Hightower, J., dissenting), *writ denied*, 646 So. 2d 388 (1994).

VI. REJOINDERS

In only a few rare instances the disagreement between the majority and a dissenting judge extends to rejoinders and a contest of who has the last word, as in *Clomon v. Monroe City School Board*.⁶⁷ The majority opinion provoked two justices to separately dissent, one briefly and the other at length. The longer dissent described the majority decision as "dubious," "disturbing," and "at odds with [a recent decision of the same court] I sincerely believe [it] opens the floodgates of litigation."⁶⁸

The author of the majority opinion then rejoined with "additional reasons in support of the majority opinion," characterizing that dissenter's analysis of the law as "exceedingly narrow," "anomalous," "topsy-turvy," and contrary to the views of "torts scholars."⁶⁹ Responding to the dissenter's fear of opening "floodgates," the majority author wrote, "In the daylight of objective analysis, the dissent's parade of hypothetically horrible cases turns out to be just a bogeyman of its writer's imagination."⁷⁰

The dissenter then assigned "additional reasons in dissent . . . [to] supplement the dissent . . . previously filed"⁷¹ and to respond to the majority author's rejoinder:

[T]here is support from some legal theorists for the position taken by the majority. There is also support against that position.

Aside from the legal theorists, a member of this court, other than this writer, dissents from the majority view A member of the appellate panel that decided the case also dissented from the majority result I believe these views have merit although they do not comport with the theory of the majority in this case, or with various other commentators and courts.⁷²

The dissenter thereafter simply concluded by criticizing the opinion as "bad judicial policy."⁷³

Although such rejoinders are rare, the above example is not unique. One appellate court also produced a similar "continuing dialogue" between the dissenter and the majority author.⁷⁴

67. 572 So. 2d 571 (La. 1990).

68. *Id.* at 580-82 (Cole, J., dissenting).

69. *Id.* at 583, 585-86 (Dennis, J., assigning additional reasons).

70. *Id.* at 586.

71. *Id.* at 587 (Cole, J., assigning additional reasons).

72. *Id.*

73. *Id.* at 588.

74. See *Myers v. State Farm Mutual Auto Ins. Co.*, 483 So. 2d 1063 (La. App. 1st Cir. 1985) (Edwards, J., writing for the majority; Lanier, J., dissenting), *rev'd*, 493 So. 2d 1170 (1986).

VII. HUMOROUS DISSENTS

Humor is sometimes effectively used by a dissenter to demonstrate what is perceived as an absurd majority result. One appellate judge criticized the majority's reliance on Professor Yiannopoulos' work to conclude that the surviving spouse's usufruct, though created by will, was a legal rather than a testamentary usufruct. The dissenter was not as impressed by the Professor. He wrote:

A usufruct is either legal or testamentary. It is a legal usufruct when it comes into being by *operation of law*, . . . *period*. If a usufruct does not come into effect by operation of law, then it is a conventional or testamentary usufruct. There is no other way. You can call it a flop-eared dog if you wish, but you are still dealing with a testamentary usufruct. . . .

As for the majority's relying on Professor Yiannopoulos' observation that it is "preferable" that the usufruct terminate at remarriage, I would simply note here that some folks like their eggs scrambled; others hate broccoli.⁷⁵

In the early 1980s, to facilitate appellate judges' resolution of criminal appeals in the approaching constitutional change of appellate jurisdiction, the supreme court appointed three judges from each appellate circuit to serve as associate justices ad hoc, to sit together with four justices in criminal appeals then pending in the supreme court. Obviously aware that the makeup of such a "supreme court" was met with criticism, the court, on its own motion, addressed the legality of the court's composition in *State v. Petterway*.⁷⁶ To the majority's perhaps predictable opinion, one of the appellate judges, as an ad hoc justice, wrote a lengthy and reasoned dissent, melodically emphasizing his point: "[T]he justices of the Louisiana Supreme Court do not have the power to assign a judge to that Court to clerk their cases, cook their collards, cut their crabgrass, or clean their commodes."⁷⁷

VIII. CONCLUSION

To some of my closer colleagues on the Second Circuit with whose opinions I have occasionally differed, I have shown a cartoon, the point of which I have expressed verbally to them. This cartoon, my favorite of all dissents that was given to me in 1975 when I became a judge, is hereafter reproduced. Until now I have avoided the urge to see it republished:

75. *Darby v. Rozas*, 580 So. 2d 984, 989 (La. App. 3d Cir.) (Foret, J., dissenting), writ granted, dismissed by joint motion, 585 So. 2d 554 (1991).

76. 403 So. 2d 1157 (La. 1981).

77. *Id.* at 1163 (Redmann, J., dissenting).



***"My dissenting opinion will be brief:
'You're all full of crap!'"***

My review of the Civil Code dissents in Louisiana's published opinions, 1982-1997, supports two conclusions: Civility remains alive and well in the appellate judiciary. The occasional review of the tenor of dissents in Louisiana may nurture continued civility among civilians without fueling further debate about the worth of dissenting opinions.

