The Maligned Per Curiam: A Fresh Look at an Old Colleague

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> Some judge of authors' names, not works, and then
> Nor praise nor blame the writings, but the men.
> —Alexander Pope

At the robing ceremony of Judge Lee Sarokin, a former colleague on the Third Circuit Court of Appeals, Chief Judge Sloviter said of courts of appeals, "We cannot work except as a team." That statement captures the essence of appellate-court decision-making. We accomplish little alone. As one of my other colleagues said of appellate work, "I sometimes feel I need a second vote to go to the men's room." And for those of us who were trial judges, decision-making by consensus or teamwork comes as an abrupt awakening from the independence of the trial court. Appellate judges, however, must cooperate. Indeed, we typically give much thought to intracourt relations and collegiality, and each of us exercises great care that we behave as a court — not just as individual judges.

That is why it is such an anomaly that an intermediate-appellate-court opinion, which speaks for the court, is nonetheless signed and personalized by a judge simply because he or she was assigned to write it. Often the result is that appellate judges think of "their" opinions rather than opinions "by the court." The consequence is an unfortunate blending of judicial ego into the institutional mixture. This I consider dysfunctional.

Let me begin by stating my not-so-tentative hypothesis that the practice by appellate-court judges of issuing signed opinions is obsolete and counterproductive. It should be abolished. I will also state my equally not-so-tentative conclusion that we never will do so.

Opinions are a type of judicial ancestor worship. We judges tend to respect and (for various reasons) venerate the opinions of our

predecessors — especially if they are dead. Indeed, among the statistics intoned with ritual regularity at the funerals and retirement gatherings for appellate judges is the number of opinions one has authored during the course of an illustrious career. Few of us seem to want to be remembered among our colleagues as the judge who wrote the fewest opinions while on a court. I suppose a part of the problem is that each of us secretly hopes to someday be accorded the recognition of having held the correct position in the face of opposition; or to have been the author of a famous, oft-quoted opinion; or perhaps even to have been the Benjamin R. Curtis or the John Marshall Harlan of a famous dissent vindicated by a later, and obviously more enlightened, court. Then too, our publisher rewards us with specially bound volumes of the Federal Reporter containing just "our" published opinions. I am afraid this is too much for most of us to resist.

So each of us is tempted to make each opinion our own literary creation. The problem is that few among us are really literary creators; and what we produce is not literature. We are, of course, professional writers. I quickly add, however, that we usually never quite achieve acclaim as such, even among our peers or the members of the bar. And for sure, an opinion that has achieved the status of literature outside the profession is a rare bird indeed. For example, whom do we judges consider to be among the greatest opinion writers? We may each have a different list, but on all would appear the name of Benjamin Cardozo. Nonetheless, a person who has been around law and lawyers for her entire adult life recently asked me, "Where have I heard the name 'Cardozo'?" So much for writing fame.

An anonymous writer said, "Anyone who has passed his bar examination can write a judicial opinion." At times when I read a passage of the pure blither written by some paragon sitting on an appellate bench, I am not sure that this anonymous writer was wrong. I *am* sure that we would all privately admit that if someone down the road remembers our name, it is not likely to be for an opinion we wrote. It may be, however, that we will be fondly remembered for having sat on a great court.

I suggest that the most we should be and the least we can be are simply judges deciding cases — judges called upon from time to time to explain our orders in opinions. But not all of us agree on that point, and the personality cult of the signed opinion has led one well-respected judge to refer to the opinions he created as his "children."[1] Although I neither wish to nor can dissociate myself from my decisions, I will with equal emphasis deny paternity. Opinions are the product of a consensus and should represent the composite view of a court; they should not be the clone or scion of their authors. We judges should be a bit like legal doctors writing post-op reports, preferably in language that both our patients and the other legal doctors who follow us can understand.

Justice Holmes said, "The rational study of law is still to a large extent the study of history."[2] He was correct, and that is really what we write in opinions: history — not literature, not humor, not essays or law-review articles, not clever or entertaining stories. We write history. Moreover, the history we write is indeed short-term, and if we really believe we write for posterity, we delude ourselves. Far from being the landmarks their writers hope them to be, most opinions are simply cenotaphs — erected with great fanfare and soon forgotten. Let me ask, for example, how often do you cite an opinion that is older than one court-generation? It is seldom indeed. We are just communicating explanations in reaction to past events, which form an evolving jurisprudence in the same way a dot-matrix forms pictures.

So where did this practice of the signed, personalized opinion begin? Why do we identify the author who speaks, after all, not personally but for the court? And why do we persist in this folly? First, however, let us recognize that the per curiam opinion does not run counter to or violate any revered tradition. It is a part of the American heritage from English law. It has its roots in that

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[1] FRANK M. COFFIN, THE WAYS OF A JUDGE 169 (1980).

[2] Oliver Wendell Holmes, *The Path of the Law*, in COLLECTED LEGAL PAPERS 167, 186 (1920).

period of English law when opinions were not only anonymous, but also sometimes represented the feelings of only a majority of the court, with no dissent permitted.

Publication of signed opinions, now an accepted and familiar characteristic in American reporters, was not done in either the English or the American courts when we declared our independence from England. The Privy Council in England performed the final review of decisions made by the American colonial courts.[3] The Council reached a decision only after the case was considered by all the judges sitting; then it adopted the decision favored by the majority. Once the Council made a decision, it was announced as the decision of the whole, regardless of what may have been the individual views or votes of the members. All opinions were "by the court." Indeed, Council rules forbade anyone to reveal individual votes from the conference. An opinion was that of the court, whether it was unanimous or decided by a margin of one vote. Thus, every opinion was per curiam and without dissent.

But early American governmental theorists favored the open expression of opinions — and sometimes not for the most valid of reasons. Thomas Jefferson wrote in 1822: "[T]he judges of England, in all but self-evident cases, delivered their opinions seriatim, with the reasons and authorities which governed their decisions. . . . Besides the light which their separate arguments threw on the subject, . . . it shewed whether the judges were unanimous or divided, and gave accordingly more or less weight to the judgment as a precedent."[4] Weight, however, is calculated neither by the depth of the majority nor by the author's personality. Each judgment is of the court and should have equivalent weight and precedential value.

The early practice in the U.S. Supreme Court was for each Justice to express an opinion, and each delivered his opinion in

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[3] *See* Karl M. ZoBell, *Division of Opinion in the Supreme Court: A History of Judicial Disintegration*, 44 CORNELL L.Q. 186, 187 (1959).

[4] Letter to Justice William Johnson, *quoted in* A.J. Levin, *Mr. Justice William Johnson, Creative Dissenter*, 43 MICH. L. REV. 497, 513 (1944).

turn. But Chief Justice John Marshall interrupted this procedure. He believed that whatever words were written into Supreme Court opinions should be considered of equal value without regard for the author. Each decision should bear the imprimatur of the Supreme Court of the United States, whose continuity was constitutionally assured, and not the mark of an individual justice limited by mortal tenure. He concluded that by canvassing the views of the Justices and issuing a single, collective opinion for the entire Court, the institution of the Court would be enhanced.[5]

Marshall was concerned with impressing upon the country the Supreme Court's unity on issues, not its divisions in individual philosophy. He sought to place emphasis on the serious nature of the Court's decisions, not on how scintillating or sparkling the language and writing style of its individual members might be. I am sure that many who read appellate-court opinions today — with florid prose that comes more from the thesaurus than the left side of the brain — will conclude that Marshall may have had something. But where he erred was in taking credit by signing those composite opinions. The Supreme Court may be able to handle this heady stuff. But after spending years reading countless opinions from many intermediate courts of appeal, I am convinced that *we* cannot. Perhaps an unfortunate by-product of the personally ascribed opinion has been a deterioration in the institutional diligence on some courts of appeals, leaving the judge who is assigned the opinion to write approximately as he or she pleases as long as the result represents the conference position. Unity, court teamwork, and good jurisprudence demand more.

Then too, in the great professional pastime of parsing opinions, it is easier for professors, counselors, or other critics to regard only lightly the opinions of one who has not acquired the stature of others on the court, or of one who is no longer sitting. There is also the obverse — a temptation to give extra credit to or patronize the judge who authored the opinion; that is, to say "Judge X held

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[5] *See id.* at 521.

in the *Blank* case" or "Judge X's opinion in the *Blank* case." Neither is legitimate. I believe that the use of per curiam opinions by intermediate courts of appeals would preempt the "new lords, new laws" approach to case analysis, make each opinion currency of equal value, and curb the temptation to remap old territory merely because new mapmakers, using the same old methods, have come along.

Humans accept only reluctantly the judgment of those whom they consider to be their peers. Yet federal district courts and courts of appeals are arranged hierarchically, giving the judges of one the power to review the decisions from judges of the other. This is not because the appellate judges are superior persons — more experienced, more intelligent, and hence more qualified to look over the collective shoulders of the district courts. It is simply because Congress has chosen through its judiciary acts to give the courts of appeals a titular and institutional superiority. And some of us, for factors known but to politics and God, became appellate judges. I believe it is of great significance that we speak institutionally rather than individually. An opinion rendered "by the court" would give an appellate decision the appearance of greater authority among intellectual equals, some of whom chance to sit on institutionally lower courts. I share Karl Llewellyn's view: "The effort is to make this opinion an opinion of the court."[6] How better to do so than by titling it as just that? The judgment of equal persons would be more readily acceptable if pronounced in the name of the court, not a person on it.

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[6] KARL LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 26 (1960).

According to a survey by the American Judicature Society, judges ranked opinion-writing as a significant cause of delay in the intermediate appellate courts.[7] The judges reported that writing opinions took more time than any other task, and they suggested increased use of unauthored opinions as the second-best solution for delay.[8] Considering the workload of the courts of appeals, ever increasing over the past decades, I am concerned that without remedial action we will become little more than retail dealers of error-correcting decisions, without adequate time to be learned interpreters of the law. Moreover, the trial court's most-often-voiced expression of discontent with appellate opinions is that they are simply too wordy. Hence, it is critically important that we devise ways to foster both an individual desire and an institutional pressure to write shorter opinions.

The proper functions of an opinion are to succinctly express the court's reasons why it decided as it did, to develop the law, and to force the author to think through the decision.

But of course nothing requires us to personify the opinion, to employ nifty zingers gleaned from the pages of *Roget's*, or to sprinkle it with apropos-sounding quotes, which unfortunately show less that the writer is well read than that he or she has a *Bartlett's*. All that is needed is an understandable, to-the-point explanation — preferably a short one. Without the allure of "NYGAARD, Circuit Judge" at the beginning of an opinion, it might well be shorter and more to the point, and have fewer bursts of rhetoric. Judge Per Curiam is statistically less windy than its named colleagues.

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[7] CONGESTION AND DELAY IN THE STATE APPELLATE COURTS 83 (1974); *cf.* FEDERAL JUDICIAL CENTER, PLANNING FOR THE FUTURE: RESULTS OF A 1992 FEDERAL JUDICIAL CENTER SURVEY OF UNITED STATES JUDGES 18 (1994) (reporting that well over half the federal appellate judges believe that courts should strive for shorter written decisions).

[8] *See* CONGESTION AND DELAY IN THE STATE APPELLATE COURTS, *supra* note 7, at 88 (suggesting as the best solution a limit on the number of appeals allowed as a matter of right).

I must also confess that I detest a concurrence in a decision from an intermediate appellate court. It is all too often either the opinion-equivalent of a "me too" or merely an ego trip for the writer. But more, a concurrence is an indictment. Unanimity is a much-discussed, commonly advocated appellate-court desideratum. Hence, the concurrence indicts the process by showing a failure to reach consensus. It also indicts the writer because it is often a red flag for an inflated ego. In one instance, the writer of a concurrence insisted that it not be incorporated into the majority opinion, even though the majority unanimously favored doing so. He took this position because, in his own words, "I have committed so much time to it."

Anonymity, on the other hand, has historically been successful in achieving unanimity. When one's ego is not on the line, the attention of court and reader alike shifts to the court's pronouncement. A concurrence on an intermediate appellate court is written for the court; it means nothing to the parties and little to the trial court and the attorneys. And if the opinion is truly the court's, I suggest that the effect will be greater molding of opinions, and fewer concurrences.

The concurrence has legitimate uses, but I suspect only occasionally and in extremely circumscribed situations. In the final analysis the weight of a silent concurrence is probably of far greater significance than some of the egoistic puffery that is passed in a written one. A sign of judicial maturity is the ability to subdue one's individual passions for the sake of the court, or to become, as Sir Walter Scott says, "sobered by age into patience." It *is* always necessary to give all cases our utmost attention. But it is neither necessary nor desirable to always express some nuance or, for that matter, to dissent simply to express some disagreement. It has been my experience that sometimes the damage already caused is of less importance than the fact that the storm is over. I am confident that if opinions of intermediate appellate courts were per curiam, the author of the concurrence — and indeed the dissenter — would withdraw to a more circumspect role.

Let us return, though, to the signed majority opinion. There is, I must grudgingly admit, some rationale for it: the reason I hear most often is pride of authorship. It is possible that a few writers would require less scholarship of themselves or give less attention to an opinion if their authorship was anonymous, although I suspect that none will admit it. I believe, however, that the judge who takes no pride in a per curiam will still research carelessly, reason loosely, and write poorly. So I reject this argument.

The second-most-often-heard criticism of my notion about the per curiam opinion is that there will be less personal responsibility for the decision announced in it. Rubbish! Indeed, that is my major point. The responsibility for the content of each opinion rests with the court. The internal operating procedures should require that before an opinion is issued, it be passed on and approved at least by the panel of judges that decided it. Indeed, in most courts of appeals the opinion must be given final approval by a majority of the entire court. I suggest that the per curiam would inspire greater institutional responsibility. Judges would read opinions with greater care and perform more editorial surgery, because opinions could no longer be explained as that of "SO-AND-SO, Circuit Judge." They would undeniably be labeled opinions of and by the court.

I find it easy to agree with Judge Learned Hand, who advocated that the institution of the *courts* should be the primary focus and not the individual "proclivities" of the judges.[9] Although an appellate court is certainly an institution of individual contributors, it is also more than the sum of its parts. In the 1924 edition of the American Bar Association's Canons of Judicial Ethics, Canon 19 stated that "[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." I fear that this canon was scrapped too soon. We appellate judges are not prima donnas and divas. We are

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[9] *See* LEARNED HAND, THE BILL OF RIGHTS 71-72 (1958).

but choristers, who need to sing our parts to form a harmonious, institutional voice.

The most famous opinion-writer in the history of American courts, "PER CURIAM" has gotten a bum rap. Per Curiam has been accused of writing the opinions for the court, when out of cowardice others do not wish to. Per Curiam has been accused of writing less-than-thorough explanations in simple affirmances. Per Curiam has been accused of being the handmaiden of law clerks. Indeed, Henry Manley recalls one New York judge's observation that "a per curiam opinion is one where we agree to pool our weaknesses."[10] But I think the intellectually honest approach requires that we designate all opinions from intermediate courts of appeal "per curiam." After all, they are simply opinions by the court. I suggest that we elevate Per Curiam to the well-deserved and venerated status of a full-fledged and respected — and indeed the predominant — colleague on intermediate courts of appeals.

[10] Henry Manley, *Nonpareil Among Judges*, 34 CORNELL L.Q. 50, 52 (1948).