

2-1-1993

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Recommended Citation

Frank X. Altimari, *The Practice of Dissenting in the Second Circuit*, 59 Brook. L. Rev. 275 (1993).

Available at: <https://brooklynworks.brooklaw.edu/blr/vol59/iss2/1>

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BROOKLYN LAW REVIEW

Volume 59

1993

Number 2

FOREWORD

THE PRACTICE OF DISSENTING IN THE SECOND CIRCUIT

Frank X. Altamari

INTRODUCTION

When I chose to prepare this Foreword for the *Brooklyn Law Review's* Second Circuit Review on the topic of dissenting opinions, I was under the impression that I had filed few such dissents. However, a search of the data banks on Westlaw and Lexis provided factual information which I found surprising. History will record that in slightly less than eight years of service on the Court of Appeals, I have written to date¹ 174 majority opinions, 2 concurring opinions, and 18 dissents. While I have long believed that writing a principled dissent—when an appellate judge considers that such a dissent is warranted—is one of a judge's most important obligations and legacies, I was astonished to discover that I have dissented quite so often. I really should pay more attention to the wisdom of my sainted mother, who taught me at an early age to

* Judge, United States Court of Appeals for the Second Circuit.

¹ The search examined opinions authored through May 20, 1993.

"practice what you preach." Having steadfastly sought to impress upon my colleagues on the Second Circuit the importance of consensus, I find that, to my surprise, approximately ten percent of my opinions have taken the form of dissents.² Indeed, compared to the number of majority opinions I have authored, the number of dissents is somewhat greater than the average percentage of dissents filed in the Second Circuit over the last three years.³ Therefore, I find myself obliged to use this opportunity not only to explain but also to defend the practice of dissenting in the Second Circuit. I do this in part for my own edification, because we can never truly understand our behavior until we are forced to explain it.

Not all of my predecessors have chosen to defend this practice. Indeed one of the most distinguished jurists in the history of this court, Judge Learned Hand, complained that a dissenting opinion "cancels the impact of monolithic solidarity on which the authority of a bench of judges so largely de-

² This compares as follows to the other active members of the Circuit:

Judge	Majority Opinions	Dissents	As a %
Meskill	472	51	10.8
Newman	462	38	8.2
Kearse	443	45	10.0
Cardamone	359	25	7.0
Winter	378	30	7.9
Pratt	258	25	9.6
Miner	213	21	9.8
Altimari	174	18	10.3
Mahoney	151	23	15.2
Walker	91	6	6.5
McLaughlin	64	3	4.6

³ Records show that over the past three years, the average percentage of dissents filed in the Second Circuit ranged between seven and eight percent. For the period of November 1989 to November 1990, 548 opinions were filed with 43 dissents. For the following year, November 1990 to November 1991, 615 opinions were filed with 42 dissents. Finally, for the period of November 1991 to November 1992, a total of 532 opinions were filed with 44 dissents. Telephone Conversation with Elaine B. Goldsmith, Clerk, United States Court of Appeals for the Second Circuit (Jan. 21, 1993).

I must also note, however, that since my appointment to the Second Circuit in December of 1985, my records indicate that I have sat on panels which issued 609 written opinions, including my own majority opinions, and I have chosen to dissent in only 17 of those cases. Therefore, while my overall percentage of dissents may be lower than the average, when I choose to write it is somewhat more often in dissent than the overall average.

pendents.”⁴ No doubt there are judges on this circuit today, like judges on any appellate court assigned to write a majority opinion, who view the prospect of a dissenting opinion as “a perpetually recurring mortification, . . . a fly in [the] ointment . . . [or] the ounce of sour in a pound of sweet.”⁵ I, for one, do not hold such views. While I am unwilling to go so far as Justice William O. Douglas, who once remarked that “[t]he right to dissent is the only thing that makes life tolerable for a judge of an appellate court,”⁶ I hope to outline in this Foreword the numerous benefits of a reasoned dissent.

A reasoned dissent is proof positive that the law is not an accumulation of worn concepts and beliefs. It is a living, vibrant, ambulatory repository of reason and logic, and it lives for all future generations to read and dwell upon. Hopefully, a dissent is that rare combination of mind and heart which, for a singular moment, are in total harmony with each other. Above all, a dissent should make common sense, for what common sense tells us, the law ought to ordain. That singular moment to which I referred is best understood by the scholarly Greek expression “Chronos,” the moment when all things in life come together.

In this delicately balanced debate, which all judges struggle to resolve, it should always be remembered that a doctrinaire fixity of views is a judge’s anathema. Judges cannot and should not be staunch apostles or advocates of any creed no matter how lucid the vision—and yes, we all have a vision we know to be absolute truth.

I. COMPARING THE PRACTICE OF DISSENTING

Initially I must contrast the practice of dissenting in the Second Circuit with that of the United States Supreme Court. On average, dissents are filed in less than ten percent of all cases decided by written opinion in this circuit, whereas dissents are filed in approximately sixty-one percent of all Supreme Court decisions.⁷ There are obvious reasons for this

⁴ LEARNED HAND, *THE BILL OF RIGHTS* 72 (1958).

⁵ Stanley H. Fuld, *The Voices of Dissent*, 62 COLUM. L. REV. 923, 923 (1962) (citation omitted in original).

⁶ WILLIAM O. DOUGLAS, *AMERICA CHALLENGED* 4 (1960).

⁷ *Leading Cases*, 106 HARV. L. REV. 163, 380 (1992).

disparity. Unlike the Supreme Court, the Second Circuit by design has little or no control over its docket, because an appeal can be taken as of right. Consequently, the Second Circuit must dispose of cases which do not raise issues of constitutional proportions as well as cases which raise no genuine issues on appeal. I sometimes say to myself during the argument of a particular appeal, "Why is this case before us?" In contrast, the Supreme Court can refuse to grant certiorari. Furthermore, in many of the cases argued before the Second Circuit, the outcome is dictated by precedent.⁸ While the Supreme Court is only bound by prior case law to the extent that it values the principle of *stare decisis*, a panel of the Second Circuit is bound both by decisions of the Supreme Court and by the decisions of prior panels.⁹ Where a particular outcome is mandated by precedent, it is often pointless to dissent.¹⁰ Additionally, in disposing of many of the commercial and securities cases that arise in the Second Circuit, it is more important that the "rule of law be settled, than it be settled right,"¹¹ because once the law is settled parties can organize their activities accordingly.¹² In such cases the judge holding the minority view often defers to the judgment of the other two panel members. Finally, the Supreme Court simply has more members than any given panel of the Second Circuit, and it is much more likely that at least one Supreme Court Justice will have a different

⁸ Where no new law is being made, the Second Circuit will often dispose of the case by summary order—an unpublished opinion which can only be relied upon by the litigants. The percentages cited in this Foreword are based on only published opinions.

⁹ See, e.g., *Dunlap-McCuller v. Riese Org.*, 980 F.2d 153, 157-58 (2d Cir. 1992). Even though the members of the panel that heard *Dunlap-McCuller* were frustrated by the fact that precedent precluded us from reviewing the district court's grant of a new trial, we were bound to apply this precedent to the facts at hand. The opinion, however, does express the panel's frustration in the hope that the rule in the Second Circuit may someday be modified. *Id.*

¹⁰ Of course, if a judge believes that the rule being applied is unjust, a dissent may well be warranted. See *infra* Part II.

¹¹ *Di Santo v. Pennsylvania*, 273 U.S. 34, 42 (1927) (Brandeis, J., dissenting).

¹² *But see Peoples Westchester Sav. Bank v. FDIC*, 961 F.2d 327, 332 (2d Cir. 1992) (Altamari, J., dissenting), in which an important policy consideration drove me to dissent even though the parties could have reorganized their activities subsequent to the opinion in order to avoid future litigation. Specifically, I was concerned with the practical realities of the lawyer-client banking relationship, as well as the effect that reorganizing this relationship might have on the legal representation of indigents. *Id.* at 332-33.

view than that expressed in the majority opinion.

There is, however, one justification for a judge on the Second Circuit to write a dissent that is not of concern to Supreme Court justices. A dissent filed by a member of a Second Circuit panel often serves as a precursor for review either by the Supreme Court or by the entire Second Circuit through its in banc practice.¹³ It is much more likely for a case to be reviewed in banc when a dissent has been filed;¹⁴ often times the dissent serves as the blueprint for a new majority opinion.¹⁵ Certiorari is also granted much more frequently in a case where a dissent has been filed.¹⁶ Naturally, however, correlation does not prove causality. While a dissent helps to illustrate the difficult issues with which a panel has grappled, it is the importance and complexity of the issues that typically leads to a dissent, an in banc review or the grant of a writ of certiorari. Nevertheless, if the litigants wish to avail themselves of the remaining avenues of appeal, a dissent can illustrate for the other members of the circuit as well as for the Supreme Court where the line of battle should be drawn.

II. JUSTIFYING THE PRACTICE OF DISSENT

All that said, many of the justifications for filing a dissent hold true regardless of the appellate court on which one sits. Most notably, there are times when the principles that an individual holds dear forces a dissent. Such is the case for an appellate judge who, like Martin Luther, must sometimes conclude that "[h]ere I stand, I cannot do otherwise."¹⁷ While

¹³ See Jon O. Newman, *In Banc Practice In The Second Circuit 1984-1988*, 55 BROOK. L. REV. 355 (1989).

¹⁴ From January 1986 through January 1992 twelve panel opinions have been reheard in banc, and in nine of these twelve cases dissents were filed. Conversation with Elaine B. Goldsmith, Clerk, United States Court of Appeals for the Second Circuit (Jan. 21, 1993).

¹⁵ See, e.g., *Bellamy v. Cogdell*, 952 F.2d 626 (2d Cir. 1992), *vacated on reh'g*, 974 F.2d 302 (2d Cir. 1992), *cert. denied*, 113 S. Ct. 1383 (1993).

¹⁶ From January 1, 1991, through January 1, 1992, the Supreme Court granted certiorari in twenty-three cases decided by the Second Circuit. Dissents had been filed in nine of these cases, including dissents in two cases that had been reheard in banc. Conversation with Elaine B. Goldsmith, Clerk, United States Court of Appeals for the Second Circuit (Jan. 21, 1993).

¹⁷ ROLAND H. BAINTON, *HERE I STAND: A LIFE OF MARTIN LUTHER* 185 (1950) (quoting Martin Luther).

dissenting merely for the sake of dissenting is pointless, I believe that when a member of a panel disagrees over deeply felt values, he or she has a duty to articulate his or her disagreement.¹⁸ When writing such dissents, a jurist attempts to be a "prophet with honor"¹⁹ by trying to outline the "evolving standards of decency that mark the progress of a maturing society"²⁰ so as to "sow seeds for future harvest."²¹ Writing such a dissent is not "an egoistic act—it is [a] duty."²² It is not self-indulgence, but rather very hard work from which we cannot shirk.²³ For example, this was the result I humbly endeavored to achieve in the dissent that I filed in *Doherty v. Thornburgh*.²⁴ Permit me to apologize for the infamous "I." A dissent after all is a very subjective and personal endeavor, which is best described in the first person.

The long procedural and factual history surrounding Joseph Patrick Thomas Doherty's deportation from this country has been the subject of lengthy law review articles.²⁵ Suffice it to say that by the time Doherty's fourth appeal was heard, he had been detained in this country without bail for eight years.²⁶ Although Doherty was never charged with any crime in the United States, he remained incarcerated at the Metropolitan Correctional Center in New York City pending the conclusion of extradition and deportation proceedings which sought to return him to the United Kingdom.²⁷ Both the British and the United States Immigration and Naturalization Service ("INS") were quite anxious for Doherty's return be-

¹⁸ See generally William J. Brennan, Jr., *In Defense of Dissents*, 37 HASTINGS L.J. 427 (1986).

¹⁹ ALAN BARTH, *PROPHETS WITH HONOR: GREAT DISSENTS AND GREAT DISSENTERS IN THE SUPREME COURT* (1974).

²⁰ Brennan, *supra* note 18, at 431 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

²¹ *Id.*

²² *Id.* at 438.

²³ *Id.*

²⁴ 943 F.2d 204, 212 (2d Cir. 1991) (Altimari, J., dissenting), *cert. dismissed*, 112 S. Ct. 1254 (1992).

²⁵ See, e.g., James T. Kelly, *The Empire Strikes Back: The Taking of Joe Doherty*, 61 FORDHAM L. REV. 317 (1992); Jennifer M. Corey, Note, *Immigration and Naturalization Service v. Doherty: The Politics of Extradition, Deportation, and Asylum*, 16 MD. J. INT'L L. & TRADE 83 (1992).

²⁶ *Doherty*, 943 F.2d at 205.

²⁷ *Id.* at 212 (Altimari, J., dissenting).

cause, after escaping from Great Britain, Doherty had been convicted in absentia for the murder of a British army captain during a confrontation in Northern Ireland between the Provisional Irish Republican Army, of which Doherty was a member, and British soldiers.²⁸ In the United States, however, Doherty had won a number of legal victories that had prevented his extradition and deportation. Nevertheless, the British and the INS remained undeterred, and through the initiation of additional proceedings Doherty remained incarcerated without the possibility of being released on bond.

The United States District Court for the Southern District of New York (Cedarbaum, J.) denied Doherty's petition for a writ of habeas corpus, through which Doherty had sought to be released on bail, finding that Doherty's substantive due process rights had not been violated. In affirming, the Second Circuit's majority opinion held that aliens have a substantive due process right to be free of arbitrary confinement pending deportation, but concluded that Doherty's rights had not been so violated.²⁹ The majority reasoned that "[g]overnmental conduct that may be considered 'shocking' when it serves to deprive the life, liberty or property of a citizen may not be unconstitutional when directed at an alien."³⁰

I could not accept the majority's conclusion, because I did find shocking the result of allowing

the government to indefinitely pursue a litigation strategy, which was essentially designed to circumvent an extradition decision at the expense of an individual's right to liberty. At some time, the government's legitimate appeals impinge on the individual's rights to such an extent that the Due Process Clause requires us to say to the State—enough is enough—"Thou shalt not."³¹

I concluded my dissent in *Doherty* with the observation that

[i]t is a bitter irony that in this era in which totalitarian regimes are adopting the language of freedom and looking to the United States as a model of liberty and justice, we today find it acceptable that a man who has not been charged with a crime in this country may remain incarcerated here indefinitely. I have always believed that a

²⁸ *Id.* at 205.

²⁹ *Id.* at 209.

³⁰ *Id.*

³¹ *Id.* at 213 (citing *Solesbee v. Balkom*, 339 U.S. 9, 21 (1950) (Frankfurter, J., dissenting)).

major difference between our Constitution and those that speak of justice in bold terms, but fail to provide it in reality, is that our Constitution provides for a judicial branch that is charged with the task of safeguarding individuals' rights, be they citizens or not. Concededly, there is a difference between the rights of citizens as compared to those of non-citizens. The facts of this case, however, clearly transcend these differences. Ultimately, it is judges who must give substantive content to the meaning of the Constitution. Thus, I cannot in good conscience sit idly by and allow the Due Process Clause to become mere words. Because I believe that the Due Process Clause will not permit an indefinite confinement, or even the confinement for eight years, of an individual who has not been criminally charged and is merely awaiting deportation, I would reverse the judgment of the district court and remand with instructions to the court to set appropriate bail.³²

As one commentator has observed, perhaps those who agree with my conclusion discerned an ally in "establishment," such that the venting of my judicial frustration in dissent served to dissipate the anger of those who felt disenfranchised by the majority opinion.³³

In writing my dissent in *Doherty* I could only hope that Justice Cardozo was correct when he observed that

[t]he voice of the majority may be that of force triumphant, content with the plaudits of the hour, and recking little of the morrow. The dissenter speaks to the future, and his voice is pitched to a key that will carry through the years. Read some of the great dissents . . . and feel after the cooling time of the better part of a century the glow and fire of a faith that was content to bide its hour. The prophet and martyr do not see the hooting throng. Their eyes are fixed on the eternities.³⁴

Only time will tell.

Indeed, in time the persistent dissents of Judge Learned Hand in admiralty cases applying the longstanding practice of divided damages were rewarded. Despite his professed disap-

³² *Id.* at 214.

³³ Edward C. Voss, *Dissent: Sign of a Healthy Court*, 24 ARIZ. ST. L.J. 643, 655 (1992).

³⁴ BENJAMIN N. CARDOZO, LAW AND LITERATURE AND OTHER ESSAYS AND ADDRESSES 36 (1931).

Indeed, Justice Charles Evans Hughes, of similar mind, once stated that "a dissent in a Court of last resort is an appeal to the broadening spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error in which the dissenting judge believes the Court to have been betrayed." CHARLES EVANS HUGHES, THE SUPREME COURT OF THE UNITED STATES 68 (1928).

proval of the practice of dissenting,³⁵ Judge Hand in dissent twice called for overturning the longstanding admiralty practice of dividing the damages equally whenever two parties were at fault regardless of their comparative fault.³⁶ Some twenty-five years later, the Supreme Court in *United States v. Reliable Transfer Co.*³⁷ unanimously accepted Judge Hand's argument, and replaced the rule of divided damages with the rule advocated by Judge Hand that damages be allocated proportionally to the comparative fault of the parties.³⁸ In so doing the Court quoted at length Judge Hand's virulent critique of the divided damages rule in *National Bulk Carriers, Inc. v. United States*,³⁹ where Judge Hand had concluded that

[a]n equal division in this case would be plainly unjust; they ought to be divided in some proportion as five to one. And so they could be but for our obstinate cleaving to the ancient rule which has been abrogated by nearly all civilized nations. Indeed, the doctrine that a court should not look too jealously at the navigation of one vessel, when the faults of the other are glaring, is in the nature of a sop to Cerberus. It is no doubt better than nothing; but it is inadequate to reach the heart of the matter, and constitutes a constant temptation to courts to avoid a decision on the merits.⁴⁰

Some commentators have observed that an important purpose served by a dissent is to keep the majority vigilant, because the prospect of a dissenting opinion acts as "an antidote for judicial lethargy."⁴¹ While I believe that my colleagues and I always seek to do our very best, it may be that the possibility of a dissent compels the majority to be especially reflective and meticulous in drafting the opinion.⁴² Undoubtedly the author of a majority opinion tries to avoid a barbed rebuke, such as the one lobbed by an English jurist who reportedly declared that he was dissenting "for the rea-

³⁵ See HAND, *supra* note 4, at 72.

³⁶ See *Ulster Oil Transp. Corp. v. The Matton No. 20*, 210 F.2d 106, 110 (2d Cir. 1954) (L. Hand, J., dissenting); *National Bulk Carriers, Inc. v. United States*, 183 F.2d 405, 410 (2d Cir.) (L. Hand, J., dissenting), *cert. denied*, 340 U.S. 865 (1950).

³⁷ 421 U.S. 397 (1975).

³⁸ *Id.* at 411.

³⁹ 183 F.2d at 410 (L. Hand, J., dissenting).

⁴⁰ *National Bulk Carriers*, 183 F.2d at 410 (L. Hand, J., dissenting).

⁴¹ Fuld, *supra* note 5, at 927.

⁴² Voss, *supra* note 33, at 655.

sons so ably expressed in the majority opinion."⁴³

Finally, dissents not only indicate to the legal community that the panel was divided, but in many instances serve also to clarify and define the majority's holding. Indeed, I agree with the observation made by some detractors of the practice of dissenting, who argue that if attorneys want to know what the law is not, then they should read the dissent. By outlining what the law is not, dissents clarify what the law is and, in so doing, can provide a signpost to lawyers in subsequent cases when confronted with factual circumstances that may be distinguishable using the dissent as a springboard.⁴⁴

CONCLUSION

I would like to thank the *Brooklyn Law Review* for allowing me to reflect on the practice of dissenting in the Second Circuit. As this brief Foreword should suggest, I believe that the writing of a principled dissent is one of the most important obligations of an appellate judge. Dissents are not unwarranted annoyances, rather they contribute to the most important of all marketplaces—the marketplace of ideas. Indeed, I must conclude by noting that my colleagues on the Second Circuit “are such nice and accomplished men [and women], that it is almost a pleasure to be dissented from by them.”⁴⁵

⁴³ Fuld, *supra* note 5, at 924 (citation omitted in original).

⁴⁴ Voss, *supra* note 33, at 655.

⁴⁵ Fuld, *supra* note 5, at 929 (quoting Asquith, *Some Aspects of the Work of the Court of Appeal*, 1950 J. SOC'Y PUB. TCHRS. OF L. 350, 353).