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Separate Judicial Speech

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Domestic and international judges speak separately from their courts' institutional voice in myriad ways. Instances of separate judicial speech range from written and oral dissents, to posing questions from the bench, to an array of extrajudicial activities, such as media appearances and penning memoirs. In the United States, despite long-standing concerns that individual speech by judges will undermine the corporate vision of a court and erode "the cult of the robe," many now view separate judicial speech as serving a valuable function by contributing to the judiciary's authority and legitimacy. Yet, while legal scholars have devoted considerable attention to the practice of separate opinion writing, they often ignore differences in types of concurrences or dissents and largely gloss over the other ways in which judges speak separately on and off the bench. International legal scholars similarly focus on separate written opinions to the exclusion of the broader array of individual judicial speech, behavior, and practices. This Article interrogates the formal and informal ways in which judges make their voices heard and offers an interdisciplinary typology of separate judicial speech, suggesting that it falls along five dimensions of variance that transcend the domestic/international law divide. It argues that different forms of separate speech reveal markedly different understandings of the role judges do and should play within society. It concludes by considering the normative stakes involved in judges speaking separately and the implications for courts in an era of backlash against international institutions and growing challenges to the rule of law.

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I. INTRODUCTION

It was a frosty spring morning in the Hague on April 26, 2012, where a packed courtroom awaited the historic verdict of the Special Tribunal for Sierra Leone in the trial of former Liberian President Charles Taylor.¹ Taylor appeared unmoved as Presiding Judge Richard Lussick read out the forty-four page “summary” of the judgment unanimously finding him guilty of various crimes against humanity and war crimes.² As the three-member panel rose to leave the courtroom, things took a dramatic turn. Judge Ed Hadji Malik Sow, a Senegalese jurist appointed to serve as an “alternate judge,” began speaking to voice his disagreement.³ Undeterred, the judges continued to file out of the courtroom as Judge Sow, whose microphone had been cut off, persisted in speaking from behind the glass barrier until a metal grate was drawn across the public gallery.⁴ Later that day, a copy of his statement, recorded by the court stenographer as a routine matter, began to circulate amongst trial observers.⁵ In his “dissent” Judge Sow lamented that the absence of any deliberative process amongst the judges forced him to voice his disagreement within the courtroom. This process—as well as the verdict itself—made him fear for the legitimacy of the system of international criminal justice.⁶

Judge Sow’s public statement and the unexpected manner of its delivery provoked consternation amongst observers for exposing the strained relationships between the judges and for casting doubt on the strength of the prosecution’s case in one of most high-profile international criminal trials in history.⁷ While commentators uniformly acknowledged that Judge Sow’s opinion was of little consequence as a formal matter of law, there was concern that his public repudiation of the legal process would give credence to Taylor-apologists and undermine prospects for accountability and reconciliation in Liberia and Sierra Leone.⁸

1. Prosecutor v. Taylor, Case No. SCSL-03-01-T, Judgment (May 18, 2012).

2. Jennifer Easterday & Sara Kendall, *Judge Sow’s Struck Statement & Reflections on the Taylor Judgment & the SCSL’s Legacies*, INTLAWGRRLS (Apr. 28, 2012, 6:30 AM), <https://tinyurl.com/y6jrk74t>.

3. *Id.*; see Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone art. 12, Jan. 16, 2002, 2178 U.N.T.S. 137 (establishing the role of the “alternate judge”).

4. Easterday & Kendall, *supra* note 2.

5. *Id.*

6. William A. Schabas, *Charles Taylor Judgment Suggests a More Modest Level of Participation in the Sierra Leone Conflict*, PHD STUD. IN HUM. RTS. (Apr. 28, 2012, 7:31 AM), <https://tinyurl.com/y6qoznzt> (citing a public statement made by Judge Sow).

7. Charles Jalloh, *The Verdict in the Charles Taylor Case and the Alternate Judge’s “Dissenting Opinion,”* EUR. J. INT’L L. BLOG: EJIL: TALK! (May 11, 2012), <https://tinyurl.com/y4nh8ts3>.

8. See Kevin Jon Heller, *One “Dissent” in the Taylor Case*, OPINIOJURIS (Apr. 26, 2012), <https://tinyurl.com/y34jr8b8> (declaring the opinion as “legally irrelevant” but supporting the thesis as to the weakness of the prosecution’s case); Jalloh, *supra* note 7, at 4 (characterizing Judge Sow’s opinion

What motivates an adjudicator like Judge Sow to speak beyond and separately from a unanimous or majority verdict, especially when this speech will have no formal legal effect? Does the form (oral) and style (confrontational) of speech matter? Was Judge Sow justified in speaking out within the formal space of the courtroom immediately after the delivery of the “unanimous” judgment? Or would it have been more appropriate for him to air his views in an unofficial forum, as he in fact did a few months later?⁹ Was it correct to sanction him for his courtroom statement and/or was it sufficient to have his statement expunged from the official court records?¹⁰

These and related questions animate this Article on separate judicial speech, that is, any instance of a judge speaking individually and not for the court on which she sits. The Article demonstrates that not all such instances are alike, and that differences in form reveal markedly different judicial self-understandings and external perceptions of the role judges do and should play within society. They also have consequences for law-making and institutional politics. Despite this, scholarship in both domestic and international law tends to focus solely on written separate opinions, with some attention to oral dissents in the context of the Supreme Court of the United States.¹¹ While a distinction between dissents and concurrences is sometimes made in the American legal context and less frequently at the regional and international level, those studying judicial behavior tend to gloss over differences in *types* of concurrences and/or dissents,¹² and almost never focus on the other ways in which a judge can “speak” separately.

This Article asks what the structure, function, and role perception of courts would look like if one took the phenomenon of judicial speech seriously. One contribution of this Article is to identify and interrogate the formal and informal ways in which judges—both domestic and international—make their voices heard. When judges write or speak separately—as they often do when they dissent, concur, ask questions from the bench, publish academic articles, write memoirs, and sanction biographies and biopics—what function(s) do they perform? Do different forms of speaking separately carry the same connotation: does an academic article by a judge

as a “public statement” rather than a dissent, which would nonetheless undermine the verdict in the trial).

9. *Justice Sow: “Charles Taylor Should Have Walked Free,”* NEW AFR. MAG. (Dec. 14, 2012), <https://newafricanmagazine.com/3453/> (quoting an interview with Judge Sow).

10. Charles C. Jalloh, *Why the Special Court for Sierra Leone Should Establish an Independent Commission to Address Alternate Judge Sow’s Allegation in the Charles Taylor Case*, INT’L JUST. MONITOR (Oct. 1, 2012), <https://tinyurl.com/y6tfl7v3> (discussing disciplinary proceedings instituted against Judge Sow that concluded he was unfit to sit as a judge at the SCSL).

11. On the important differences between written versus oral communication in the judicial context, see, e.g., Lani Guinier, *Foreword: Demosprudence Through Dissent*, 122 HARV. L. REV. 4, 27 (2008).

12. *But see* Thomas B. Bennett et al., *Divide & Concur: Separate Opinions & Legal Change*, 103 CORNELL L. REV. 817 (2018).

discussing her judicial reasoning have the same resonance as a separate opinion? Is speaking separately an inherently public act or would a “graveyard dissent,”¹³ where the judge buries her dissent despite serious internal disagreement with the majority, count as a speech act?

Drawing from comparative, domestic, and international scholarship in the areas of law and political science, this Article offers a typology of separate judicial speech, claiming that it falls along at least five dimensions of variance. Some instances of speaking separately are more visible and institutionalized than others; others are hidden and informal. Some are expressly and dialogically directed at an immediate audience; others do not attempt to engage in a dialogue or are directed to some future audience. Some are purely individual acts, while others are collective speech acts that still remain separate from the court. These dimensions are neither exhaustive nor reflective of binary categories; rather, they represent layered continuums upon which we might place a judge’s separate speech act.

A second contribution of this Article is to suggest a different vantage point for addressing both long-standing and new controversies in international law with real-world consequences. International judicial bodies have been treated as monolithic entities for much of their history, rather than aggregates of distinct individuals with diverse experiences, interests, motivations, cultural backgrounds, and political preferences and constraints. In focusing on the various ways in which judges signal their individuality through separate speech, we seek to reorient this conversation to produce an account of international judicial behavior, practices, and consequences. Understanding separate judicial speech is not simply an academic exercise: judges wield considerable power and influence that should be exercised as appropriately as possible. This Article thus has both normative and practical implications for the design of international judicial institutions and for stakeholder buy-in for international courts at a time when their future looks far from secure.

Finally, this Article adds to the burgeoning literature challenging the traditional separation between international and domestic law-making and legal institutions.¹⁴ Empirical analysis of international judicial behavior has been sparse, hermetically sealed from domestic debates, and mostly oriented

13. See, e.g., Letter from Justice Harry A. Blackmun to Justice Lewis F. Powell Jr. (June 10, 1982) (on file with the Supreme Court Case Files Collection, Powell Papers, Lewis F. Powell Jr. Archives at Washington & Lee University School of Law), <https://scholarlycommons.law.wlu.edu/casefiles/409/> (“I do not feel strongly enough . . . to write separately and thus shall give you one of Charlie Whittaker’s ‘graveyard dissents.’”).

14. COMPARATIVE INTERNATIONAL LAW (Anthea Roberts et al. eds., 2018); Anthea Roberts et al., *Comparative International Law: Framing the Field*, 109 AM. J. INT’L L. 467 (2015); Anthea Roberts, *Comparative International Law? The Role of National Courts in Creating and Enforcing International Law*, 60 INT’L & COMPAR. L.Q. 57, 61-64 (2011).

towards technical, doctrinal questions that ignore the sociology of international judicial behavior. Likewise, even though there is a rich body of legal and non-legal scholarship that dissects and evaluates judicial behavior in the domestic context, it makes virtually no reference to courts outside the United States.¹⁵ Moreover, even this sophisticated domestic literature often fails to recognize and account for the different ways in which judges communicate amongst themselves, with other organs of the state, and with the public. This Article offers a typology of judicial speech that transcends the domestic/international divide. Thus, though it illustrates the consequences of different forms of individual judicial speech for international legal and political institutions, it simultaneously provides lessons for domestic judicial institutions and law-making.

This Article proceeds in four Parts. Part I describes the history of separate judicial speech in the American context and normative and ethical debates surrounding judges speaking apart from the corporate entity of a court. Part II analyzes the phenomenon of individual judicial speech at the international level both on and off the bench, describing the rules and practices that encourage or proscribe separate speech and unpacking the normative, policy, and pragmatic concerns that arise from judges speaking separately. Part III draws on the accounts of separate judicial speech in domestic and international law and adopts an interdisciplinary lens to argue that not all forms of speaking separately are alike; rather, judicial speech falls along five dimensions of variance, reflecting different approaches to the judicial role and function. Part IV draws from this typology to consider the consequences of and stakes involved in different forms of judicial separate speech and outlines an agenda for future research.

II. SPEAKING SEPARATELY IN U.S. COURTS

The practice of voicing separate opinions has a long—albeit contentious—pedigree in U.S. courts. Judges habitually make their views heard, both on and off the bench, exemplifying the Nation’s commitment to freedom of speech. This Part traces (1) the historical development of speaking separately on the American bench, (2) the various ways in which American judges “speak” off the bench and ethical rules governing these activities, and (3) the roles and values ascribed to the phenomenon of judges speaking separately. Since the Nation’s founding, lawyers, judges, and commentators have debated the virtues, harms, propriety, and constitutionality of speaking separately. This Part will further describe these normative debates and their implications for the practice of separate judicial speech.

15. *But see* John Alder, *Dissents in Courts of Last Resort: Tragic Choices?*, 20 OXFORD J. LEGAL STUD. 221 (2000).

A. *Speaking Separately from the Bench*

For the first dozen years after the founding of the new republic, Justices on the U.S. Supreme Court heard relatively few cases and spent most of their time “riding circuit” on one of three circuit court panels.¹⁶ When the Court did publish opinions, it followed the practice of the English Common Law Courts and issued opinions seriatim, with each published by reverse seniority.¹⁷ Occasionally—largely for uncomplicated unanimous cases that did not require extensive legal justification—opinions would be filed under the heading “By the Court.”¹⁸ This tradition changed in 1801 with the appointment of John Marshall as Chief Justice.

Marshall began issuing decisions through a single opinion, which he often authored. Marshall attempted to present the appearance of a unanimous Court, notwithstanding disagreement among Justices, in order to strengthen its authority vis-à-vis the other branches of government.¹⁹ The proclivity to author separate opinions increased slightly a few years later, with the appointment of William Johnson, the first Jeffersonian Republican on the Court.²⁰ Indeed, President Thomas Jefferson encouraged Johnson to write separately, and Johnson endeavored to do so “on all subjects of general interest; particularly constitutional questions.”²¹ Still, “go-along voting”²² or silent acquiescence remained common until the early twentieth century.²³

16. Meredith Kolsky, *Justice William Johnson and the History of the Supreme Court Dissent*, 83 GEO. L.J. 2069, 2071 (1995).

17. Karl M. ZoBell, *Division of Opinion in the Supreme Court: A History of Judicial Disintegration*, 44 CORNELL L.Q. 186, 192 (1958-1959). Notably, individual opinions were not published by either the Privy Council in England, which acted as the ultimate appellate body for the American colonial courts, or the House of Lords, the ultimate appellate body for cases arising in English courts of common law and equity. Instead of following the practice of either of these appellate bodies, “it is more probable that those who laid the foundations for Supreme Court practice drew primarily upon the customs and rules of the English Courts” with which the Justices were most familiar, namely the Common Law Courts such as The King’s Bench. *Id.* at 188, 190-92.

18. *Id.* at 192.

19. See Kolsky, *supra* note 16, at 2074 (noting that, of 1,244 total judgments, the Marshall Court issued only seventy dissents).

20. James Markham, *Against Individually Signed Judicial Opinions*, 56 DUKE L.J. 923, 928 (2006) (“[I]nitial forays into the practice of the Justices writing separately from the majority opinion of the Court, though the first true dissent was not issued until 1806 by Justice Paterson in *Simms & Wise v. Slacum*.”); MELVIN UROFSKY, *DISSENT AND THE SUPREME COURT: ITS ROLE IN THE COURT’S HISTORY AND THE NATION’S CONSTITUTIONAL DIALOGUE* 47 (2015).

21. Kolsky, *supra* note 16, at 2079 (quoting Letter from William Johnson to Thomas Jefferson (Apr. 11, 1823), *microformed on* The Thomas Jefferson Papers, Library of Congress Microfilm Series 1, Reel 53).

22. Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1, 2 (1993).

23. *Bank of U.S. v. Dandridge*, 25 U.S. 64, 90 (1827) (Chief Justice Marshall noting that it was his “custom, when I have the misfortune to differ from this Court, [to] acquiesce silently in its opinion.”); *see also* *The Nereide*, 13 U.S. (9 Cranch) 388, 455 (1815) (Justice Story noting in a rare dissent that “[h]ad this been an ordinary case I should have contented myself with silence.”).

Marshall's norm of consensus guided subsequent Chief Justices; between 1801 and 1940 the Court "was overwhelmingly likely to decide cases without either dissents or separate concurrences."²⁴ The American Bar Association (ABA) reflected this "spirit of the times"²⁵ in its 1924 Canons of Judicial Ethics, which discouraged dissenting opinions in most instances.²⁶ This norm slowly began to change after Congress granted the Court its certiorari authority in 1925.²⁷

An even more robust tradition of writing separately began to develop during the early 1940s and New Deal era. Chief Justice Harlan Fiske Stone valorized the ability to dissent in the search for sound legal principles and disapproved of efforts to discourage separate opinions, leading to separate opinions steadily becoming customary practice.²⁸ The modern Court has continued this tradition, despite current Chief Justice John Roberts' announcement that he would be "seeking greater consensus."²⁹ Federal circuit and state court appellate judges have similarly found value in issuing separate

24. Cass R. Sunstein, *Unanimity and Disagreement on the Supreme Court*, 100 CORNELL L. REV. 769, 771 (2015). During the 1920s, for instance, the Court under Chief Justice William Howard Taft decided more than eighty percent of its cases unanimously. See Robert Post, *The Supreme Court Opinion as Institutional Practice: Dissent, Legal Scholarship, and Decisionmaking in the Taft Court*, 85 MINN. L. REV. 1267, 1267, 1331, 1332 (2001).

25. Linda Greenhouse, *Ideas & Trends: Divided They Stand; The High Court and the Triumph of Discord*, N.Y. TIMES, July 15, 2001 (¶ 4), at 1.

26. Alex Simpson, Jr., *Dissenting Opinions*, 71 U. PA. L. REV. 205, 217 n.26 (1923) (quoting ABA Proposed Canons of Judicial Ethics No. 19, which provided that "except in case of conscientious difference of opinion on fundamental principle, dissents should be discouraged."). The ABA Model Code of Judicial Conduct, adopted in 1972, removed this provision. See Kermit V. Lipetz, *Some Reflections on Dissenting*, 57 ME. L. REV. 313, 315 (2005).

27. Greenhouse, *supra* note 25, at 1 (characterizing this discretionary authority as "bolster[ing] the concept of law as an evolutionary process rather than a static set of rules to be applied to particular facts and . . . made it less likely for justices to acquiesce in decisions with which they did not agree."). There is little consensus about what precisely led to the displacement of the consensus norm. Scholars often point to, *inter alia*, changes in chief justice leadership styles, increased ideological division among the justices, new legal issue areas, internal procedural and institutional changes, and discretionary control of the docket. See, e.g., Sunstein, *supra* note 24; Thomas G. Walker, Lee Epstein & William J. Dixon, *On the Mysterious Demise of Consensual Norms in the United States Supreme Court*, 50 J. POL. 361 (1988).

28. Sunstein, *supra* note 24, at 771, 790-91 ("5-4 divisions became unremarkable.").

29. *Chief Justice Says His Goal Is More Consensus on Court*, N.Y. TIMES (May 22, 2006), <https://tinyurl.com/y4ubezle>; M. Todd Henderson, *From Seriatim to Consensus and Back Again: A Theory of Dissent*, 2007 SUP. CT. REV. 283; Sunstein, *supra* note 24, at 783-84 (noting a slight decrease in separate opinions during the 2013 term).

opinions,³⁰ although they tend to issue fewer of them than Supreme Court Justices.³¹

Written separate opinions are now commonplace across the judiciary.³² At the level of the Supreme Court, there is also a long history of reading individual opinions aloud. Since its first decision in 1792, the Court almost always announced an opinion orally prior to its transcription. When it began to submit written opinions to the Court Reporter in 1834, Justices continued to announce their opinions, through either a verbatim reading or a summary description.³³ In an extreme instance of this practice, each Justice wrote and read his own opinion in *Dred Scott v. Sandford*,³⁴ with the ruling's announcement taking two full days to complete.³⁵

Oral separate opinions remained fairly common through the 1960s, a practice that changed in 1969 with Warren Burger's appointment as Chief Justice. Burger sought to reduce the visibility of decision announcements, and thus attempted to abandon the Court's unique practice of reading opinions from the bench; the Associate Justices resisted this proposal but ultimately agreed to limit announcements to summaries of opinions.³⁶ The practice of reading separate opinions from the bench in turn became

30. Kolsky, *supra* note 16, at 2073 (quoting an early decision of the Pennsylvania Supreme Court, in which Justice Rush wrote "[h]owever disposed to concur with my brethren in this cause, I have not been able to do it. Unanimity in courts of justice, though a very desirable object, ought never to be attained at the expense of sacrificing the judgment."); see also Frank X. Altimari, *The Practice of Dissenting in the Second Circuit*, 59 BROOK. L. REV. 275 (1993); Jesse W. Carter, *Dissenting Opinions*, 4 HASTINGS L.J. 118 (1953); Robert G. Flanders, Jr., *The Utility of Separate Judicial Opinions in Appellate Courts of Last Resort: Why Dissents Are Valuable*, 4 ROGER WILLIAMS U. L. REV. 401 (1999); Stanley H. Fuld, *The Voices of Dissent*, 62 COLUM. L. REV. 923 (1962); Lipez, *supra* note 26; Randall T. Shepard, *Perspectives: Notable Dissents in State Constitutional Cases - What Can Dissents Teach Us*, 68 ALB. L. REV. 337 (2005); Edward C. Voss, *Dissent: Sign of a Healthy Court*, 24 ARIZ. ST. L.J. 643 (1992); Diane P. Wood, *When to Hold, When to Fold, and When to Reshuffle: The Art of Decisionmaking on a Multi-Member Court*, 100 CALIF. L. REV. 1445 (2012).

31. Lee Epstein, William M. Landes & Richard A. Posner, *Why (and When) Judges Dissent: A Theoretical and Empirical Analysis*, 3 J. LEGAL ANALYSIS 101, 106-07 (2011) (finding that between 1990 to 2007, 62% of Supreme Court opinions contained a dissent compared to 2.6% percent for the federal courts of appeals); see also R. Perry Sentell, Jr., *Dissenting Opinions: In the Georgia Supreme Court*, 36 GA. L. REV. 539 (2002); Voss, *supra* note 30; Wood, *supra* note 30. Similar to the Supreme Court, state court appellate judges wrote fewer dissents in the nineteenth as compared to the twentieth century. See, e.g., Flanders, *supra* note 30, at 417-20.

32. Scholars often contrast the prevalence of separate opinions in the common law tradition with the relative secrecy of deliberations and absence of separate opinions in civil law or European continental systems. However, the publication of separate opinions is now permitted by the majority of European constitutional courts (except for Austria, Belgium, France, Italy, and Luxembourg) and has a long history in a number of continental judiciaries. See Katalin Kelemen, *Dissenting Opinions in Constitutional Courts*, 14 GERMAN L.J. 1345 (2013).

33. Christopher W. Schmidt & Carolyn Shapiro, *Oral Dissenting on the Supreme Court*, 19 WM. & MARY BILL RTS. J. 75, 89 (2010).

34. 60 U.S. (19 How.) 393 (1857).

35. Schmidt & Shapiro, *supra* note 33, at 92-93.

36. *Id.* at 108.

relatively less common.³⁷ Since the beginning of the Roberts Court in 2005, the Court has begun to harken back to past practice of more frequent oral dissents.³⁸ Journalists often characterize this act of speaking separately as a dramatic and profound expression of disagreement.³⁹ Notably, however, not all oral dissents are reported in the media,⁴⁰ even though Justice John Paul Stevens has described oral dissenting as a way to ensure that the media does not overlook the separate opinion.⁴¹

A number of empirical studies seek to explain when and why judges pen separate opinions.⁴² Judges tend to issue separate opinions more frequently when there is greater ideological diversity on the bench,⁴³ a norm favoring separate opinions authorship,⁴⁴ and for highly salient or legally complex cases.⁴⁵ Conversely, judges issue fewer separate opinions when a court's caseload is heavier.⁴⁶ A few studies similarly seek to understand why justices choose to orally dissent, pointing to many of the same motivations: ideological distance; political and legal salience, including whether a case involves judicial review of legislation or overturning of precedent; norms of cooperation and reciprocity; and annual caseload.⁴⁷

37. William D. Blake & Hans J. Hacker, "The Brooding Spirit of the Law": *Supreme Court Justices Reading Dissents from the Bench*, 31 JUST. SYS. J. 1, 2 (2010) (finding that between 1969 and 2007, Justices read only 3.2% of the dissents they penned).

38. Schmidt & Shapiro, *supra* note 33, at 111-12.

39. Joan Biskupic, *Voicing Supreme Dissent: Rare, Loud and Clear*, WASH. POST, July 5, 1999, at A19 (characterizing an oral dissent as "a demand for special attention" that is "not a path for the timid."); Linda Greenhouse, *Oral Dissents Give Ginsburg a New Voice on Court*, N.Y. TIMES (May 31, 2007), <https://tinyurl.com/y63wrlf8> (characterizing an oral dissent as "an act of theater that justices use to convey their view that the majority is not only mistaken, but profoundly wrong.>").

40. Schmidt & Shapiro, *supra* note 33, at 79, 95 (arguing that "extrajudicial actors largely control, even create, [their] significance" with coverage having "as much to do with the emotional delivery or quirky personality on display as with the legal importance of the dissent itself.>").

41. RICHARD DAVIS, JUSTICES AND JOURNALISTS: THE U.S. SUPREME COURT AND THE MEDIA 144 (2011).

42. For one of the earliest such studies, see C. Herman Pritchett, *Divisions of Opinion Among Justices of the U.S. Supreme Court, 1939-1941*, 35 AM. POL. SCI. REV. 890 (1941). For similar studies on foreign courts, see, e.g., Lydia B. Tiede, *The Political Determinants of Judicial Dissent: Evidence from the Chilean Constitutional Tribunal*, 8 EUR. POL. SCI. REV. 377 (2016).

43. Epstein et al., *supra* note 31; Virginia A. Hettinger, Stefanie A. Lindquist & Wendy L. Martinek, *Comparing Attitudinal and Strategic Accounts of Dissenting Behavior on the U.S. Courts of Appeals*, 48 AM. J. POL. SCI. 123, 134 (2004). *But cf.* Deborah Beim & Jonathan P. Kastellec, *The Interplay of Ideological Diversity, Dissents, and Discretionary Review in the Judicial Hierarchy: Evidence from Death Penalty Cases*, 76 J. POL. 1074 (2014) (finding that dissents rarely occur for ideologically-mixed panel death penalty cases that produce majority-inconsistent decisions, or decisions not in line with the preferences of the ideological majority on a panel).

44. Hettinger et al., *supra* note 43.

45. Epstein et al., *supra* note 31; Hettinger et al., *supra* note 43.

46. Epstein et al., *supra* note 31. *But cf.* Hettinger et al., *supra* note 43, at 134 (finding no evidence that caseload impacts the likelihood of circuit court judges writing separate opinions).

47. *See, e.g.*, Blake & Hacker, *supra* note 37; Timothy R. Johnson, Ryan C. Black & Eve M. Ringsmuth, *Hear Me Roar: What Provokes Supreme Court Justices to Dissent from the Bench?*, 93 MINN. L. REV. 1560 (2009).

While most commentary focuses on substantive separate opinions, judges routinely dissent from a broad range of decisions. These include procedural or jurisdictional orders, dismissals for mootness, referrals to a state court, per curiam opinions, and circuit or state appellate court denials of rehearing cases en banc (often called dissents or concurrences).⁴⁸

To be sure, appellate judges do not always see the value in penning separate opinions. “Dissent aversion” sometimes leads judges to join majority opinions even when they disagree with the outcome or legal reasoning.⁴⁹ Judges often engage in silent acquiescence with majority opinions, whether to avoid the burdens and risks associated with speaking separately⁵⁰ because they do not view a case as sufficiently important, or because the issue is so salient that they view unanimity as imperative.⁵¹ Supreme Court Justices have resorted to sending memos to their colleagues noting their “graveyard dissent” while still joining the majority opinion.⁵²

Rather than silently acquiesce, an appellate judge may also issue a dubitante opinion, indicating doubt about some aspect of a decision but an unwillingness to place a public dissent on the record.⁵³ Indeed, noting concurrences or dissents without providing a reasoned opinion has been common practice throughout the Supreme Court’s history,⁵⁴ though comparatively rare for the modern Court.⁵⁵ One final way in which judges speak separately

48. See Marsha S. Berzon, *Dissent, “Dissents,” and Decision Making*, 100 CALIF. L. REV. 1479, 1491 (2012) (viewing dissents as “thinly (or not so thinly) veiled entreaties to the Supreme Court.”); Alex Kozinski & James Burnham, *I Say Dissent, You Say Concurral*, 121 YALE L.J. F. 601 (2012); Markham, *supra* note 20.

49. Epstein et al., *supra* note 31.

50. Flanders, *supra* note 30, at 401.

51. Greg Goelzhauser, *Silent Acquiescence on the Supreme Court*, 36 JUST. SYS. J. 3 (2015) (finding that silent acquiescence is less likely to occur in cases that raise constitutional issues or are either publicly or personally salient).

52. See, e.g., Greg Goelzhauser, *Graveyard Dissents on the Burger Court*, 40 J. SUP. CT. HIST. 188 (2015).

53. Jason J. Czarnecki, *The Dubitante Opinion*, 39 AKRON L. REV. 1 (2006); Roscoe Pound, *Cacothetes Dissentiendi: The Heated Judicial Dissent*, 39 A.B.A. J. 794, 795 (1953) (“[T]he dissenting judge can satisfy his conscience by the bare announcement of his dissent.”).

54. Madelyn Fife et al., *Concurring and Dissenting Without Opinion*, 42 J. SUP. CT. HIST. 171 (2017) (tracing the history of noting disagreement on the Supreme Court between 1791 and 2014 and providing potential explanations for its usage); see also RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 174-75 (1999) (calling noted concurrences and dissents “nonreasoned” opinions that help maintain collegiality and legal certainty).

55. *But see* William Baude, *Foreword: The Supreme Court’s Shadow Docket*, 9 N.Y.U. J.L. & LIBERTY 1 (2015) (identifying modern instances of noting dissent in orders and summary opinions from the Court’s “shadow docket”).

Differently but relatedly, lower courts sometimes depublish/unpublish opinions, which serves to conceal individual judicial speech. See Arthur J. Jacobson, *Publishing Dissent*, 62 WASH. & LEE L. REV. 1607, 1607 (2005) (arguing that this practice “erases from the public record an important jurisprudential phenomenon: judicial regret.”).

on the bench is via questioning during oral arguments, although little has been written about this practice.⁵⁶

American judges have not always and consistently spoken separately from the courts on which they sit. The practice has waxed and waned over time and has taken myriad forms, both oral and written. At times, separate speech on the bench has sparked controversy; at other moments, these acts have drawn little to no attention. More centrally, the reasons why judges decide to make their voices heard are manifold and likely vary over time and across courts.

B. *Separate Speech off the Bench*

Much like separate speech on the bench, extrajudicial speech has been common and contentious since the early days of the new republic.⁵⁷ Early Supreme Court Justices followed the lead of openly partisan state judges, engaging in a range of political commentary, stumping for political candidates, and even running for political office themselves.⁵⁸ This changed after 1810, as Justices slowly began to develop traditions of avoiding partisan activities and became more reticent to speak publicly, for fear of rebuke by the press or impeachment charges launched by Congress.⁵⁹ Any extrajudicial commentary largely focused on legal issues and judicial roles.⁶⁰ Congress did seek to prescribe early statutory limitations on federal judicial conduct, but

56. While there is considerable literature on the value and purpose of oral arguments, few scholars examine the practice of asking questions in and of itself. Some studies find that Justices pose more questions to and use more unpleasant language with the advocate representing the eventual losing side, particularly for ideological cases. *See, e.g.*, Ryan C. Black et al., *Emotions, Oral Arguments, and Supreme Court Decision Making*, 73 J. POL. 572 (2011); Timothy R. Johnson et al., *Inquiring Minds Want to Know: Do Justices Tip Their Hands With Questions at Oral Argument in the U.S. Supreme Court?*, 29 WASH. U. J.L. & POL'Y 241 (2009); LAWRENCE WRIGHTSMAN, *ORAL ARGUMENTS BEFORE THE SUPREME COURT: AN EMPIRICAL APPROACH* (2008). A growing body of research demonstrates that Justices use oral argument as part of a coalition-building process, to re-evaluate their own preliminary position on the case, and to seek out additional information. *See, e.g.*, RYAN C. BLACK, TIMOTHY R. JOHNSON & JUSTIN WEDEKING, *ORAL ARGUMENTS AND COALITION FORMATION ON THE U.S. SUPREME COURT: A DELIBERATE DIALOGUE* (2012); Ryan C. Black et al., *Toward an Actor-Based Measure of Supreme Court Case Salience: Information-Seeking and Engagement during Oral Arguments*, 66 POL. RSCH. Q. 804 (2013); TIMOTHY R. JOHNSON, *ORAL ARGUMENTS AND DECISION MAKING ON THE UNITED STATES SUPREME COURT* (2004); Eve M. Ringsmuth et al., *Voting Fluidity and Oral Argument on the U.S. Supreme Court*, 66 POL. RSCH. Q. 429 (2013).

57. William G. Ross, *Extrajudicial Speech: Charting the Boundaries of Propriety*, 2 GEO. J. LEGAL ETHICS 589, 591 (1989) (noting that early judges frequently “expressed their views on a wide range of political issues with a partisan zeal that reflected an indistinct line between the judicial and political spheres.”).

58. DAVIS, *supra* note 41, at 36-37; Alan F. Westin, *Out-of-Court Commentary by United States Supreme Court Justices, 1790-1962: Of Free Speech and Judicial Lockjaw*, 62 COLUM. L. REV. 633, 637-38 (1962).

59. Westin, *supra* note 58, at 641-50.

60. *Id.* at 650 (“[O]ut-of-court commentary was very sparse and guarded between 1865 and the late 1880’s.”).

such limits as were adopted gave judges considerable discretion.⁶¹ Extrajudicial activity during the republic's early years was thus largely guided by a judge's personal ethical code.⁶²

The ABA sought to address this lack of ethical standardization when it adopted Canons of Judicial Ethics in August 1924, emphasizing principles of independence, impartiality, and the avoidance of impropriety.⁶³ Most federal courts began to cite these guidelines,⁶⁴ although the Supreme Court held that a particular canon "has of itself no binding effect on the courts but merely expresses the view of the [ABA]."⁶⁵ Practice followed suit; extrajudicial speech increased slightly after 1885 but then dropped to historic lows between 1920 and 1940.⁶⁶

With the large number of Franklin D. Roosevelt judicial appointees between 1937 and 1943, off-the-bench commentary by judges began to increase dramatically after 1940, despite recurrent debates over judicial ethics and the adoption of more detailed guidelines on appropriate extrajudicial activity. Explanations for this shift include a changing American political climate, expanding judicial review and intervention in government policy-making, and jurisprudence that increasingly addressed issues relating to status and group rights.⁶⁷

Controversies surrounding the judicial branch re-emerged in the 1960s, including but not limited to Supreme Court Justice Abe Fortas's resignation following the revelation that he had accepted extrajudicial compensation.⁶⁸ These controversies prompted the ABA to replace its Canons with a Model Code of Judicial Conduct, adopted in 1972.⁶⁹ The new Code permitted judges to speak, write, lecture, teach, and participate in activities concerning the law and the administration of justice, but non-legal extrajudicial activities were permitted only insofar as they did not detract from the dignity of the office, interfere with judicial duties, or compromise the appearance of

61. See Andrew J. Lievens & Avern Cohn, *The Federal Judiciary and the ABA Model Code: The Parting of the Ways*, 28 JUST. SYS. J. 271, 272 (2007).

62. ERWIN C. SURRENCY, *HISTORY OF THE FEDERAL COURTS* 292 (1987) (noting that early judges "felt governed by Christian ethics as expressed in the Bible.").

63. A.B.A., *REPORT OF THE FORTY-SEVENTH ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION* 65-71 (1924).

64. Lievens & Cohn, *supra* note 61, at 274.

65. *Estes v. Texas*, 381 U.S. 532, 535 (1965).

66. Ross, *supra* note 57, at 591; Westin, *supra* note 58, at 654.

67. Westin, *supra* note 58, at 656.

68. Robert F. Cople, *From the Cloister to the Street: Judicial Ethics and Public Expression*, 64 DENV. U. L. REV. 549, 560-61 (1988).

69. *New Code of Judicial Conduct is Adopted by the American Bar Association*, 58 A.B.A. J. 1207, 1207 (1972) (making a number of changes to the 1924 Canons, including mandatory language prohibiting, *inter alia*, public commentary on pending cases); see *id.* at 1208, canon 3A(6) ("A judge should abstain from public comment about a pending or impending proceeding in any court.").

impartiality.⁷⁰ Moreover, the Code mandated that a “judge should refrain from political activity inappropriate to his judicial office,” with narrow exceptions made for judges who must compete electorally for their position.⁷¹ Spurred in part by the Model Code’s adoption, as well as greater public scrutiny of government officials’ conduct, the Judicial Conference of the United States⁷² adopted its own nearly identical Code of Judicial Conduct for United States Judges on April 5, 1973.⁷³

The ABA Model Code has undergone a number of substantive revisions and clarifications since the 1970s.⁷⁴ The Judicial Conference has also undertaken several revisions of the federal Code, such as in 2009 when it was concerned with public and congressional scrutiny of judges attending privately funded seminars.⁷⁵ Notably, the federal Code is a set of aspirational guidelines, although federal judges who fail to abide by it risk judicial discipline or disqualification from a case. Moreover, it does not formally apply to Supreme Court Justices, even though they often consult it for guidance.⁷⁶

Despite increasing ethical scrutiny of extrajudicial speech, judges at all levels have frequently spoken separately and publicly on a range of topics, political and personal.⁷⁷ They participate in off-the-bench activities such as giving public speeches, attending awards ceremonies, participating in

70. *Id.* at 1209, canon 4.

71. *Id.* at 1211-12, canon 7.

72. Congress established the Judicial Conference in 1922 “to monitor the business of the federal courts.” See Judicial Conference Act of 1922, ch. 306, 42 Stat. 837, 837-40 (1922).

73. Judicial Conference of the United States, 28 U.S.C. § 331. The name was changed to Code of Conduct for United States Judges in March 1987. CODE OF CONDUCT FOR U.S. JUDGES (JUD. CONF. OF U.S. 2019).

74. The ABA revised the Model Code in 1990. MODEL CODE OF JUD. CONDUCT Canons 4-5 (AM. BAR ASS’N 1990). It largely retained previous restrictions on extrajudicial activities, *id.* canon 4, and similarly mandated that a judge “shall refrain from inappropriate political activity,” *id.* canon 5 (emphasis added). The 2002 Supreme Court ruling in *Republican Party of Minn. v. White*, 536 U.S. 765 (2002), led to renewed discussion of the appropriate balance between judicial free speech and independence, prompting the ABA to again revise its Code. See MODEL CODE OF JUD. CONDUCT (AM. BAR ASS’N 2007).

The present Code, adopted in 2011, stipulates that a judge “shall not engage in political or campaign activity that is inconsistent with the independence, integrity, or impartiality of the judiciary.” MODEL CODE OF JUD. CONDUCT Canon 4 (AM. BAR ASS’N 2011). Most states have incorporated Model Code provisions into their own judicial codes. Katherine A. Moerke, *Must More Speech Be the Solution to Harmful Speech? Judicial Elections After Republican Party of Minnesota v. White*, 48 S.D. L. REV. 262, 267-69 (2003).

75. The Judicial Conference was concerned by “reports implying that judges who have attended private seminars have accepted substantial benefits from companies in litigation before them and/or that such companies have dictated the content of seminars.” See Lievens & Cohn, *supra* note 61, at 279. The most recent Code was adopted in March 2019. CODE OF CONDUCT FOR U.S. JUDGES (JUD. CONF. OF U.S. 2019).

76. KEVIN M. LEWIS, CONG. RSCH. SERV., LSB10255, A CODE OF CONDUCT FOR THE SUPREME COURT? LEGAL QUESTIONS AND CONSIDERATIONS 1 (2019).

77. Westin, *supra* note 58, at 635-36 (characterizing this tradition as “one of wide-ranging and frank out-of-court commentary.”).

educational programs, or teaching courses. In doing so, they rely on travel, speeches, and academic publications⁷⁸ in order to extend their reach off the bench.⁷⁹

Extrajudicial speech sometimes entails personal reflections about oneself and one's colleagues, but much of it is educational, aimed at increasing public awareness of the judiciary or the judicial process. Justices today engage in considerable outreach, making a public appearance nearly every other day⁸⁰ and extensively traveling.⁸¹ They frequently use these activities to defend the Supreme Court as an institution and, more controversially, discuss recently decided cases.⁸² Some argue that the Court enjoys high levels of public support when Justices refrain from making public and vocal any internal disagreements,⁸³ yet several studies find that greater public awareness of the Court's activities can in fact build its institutional legitimacy.⁸⁴

Judicial involvement in the business of the executive and legislative branches represents perhaps the most controversial form of extrajudicial activity, in that it is seen as "political" activity inappropriate for the judicial role. A striking example occurred in 1937, following President Roosevelt's push for the Judicial Procedures Reform Bill (the so-called "court packing plan"). Then-Chief Justice Charles Evans Hughes wrote a letter to the Senate Judiciary Committee challenging the plan.⁸⁵ The letter focused on why increasing the number of Court Justices would contribute to greater inefficiency, but it included a final passage which *The New Republic* described as "an advisory opinion run riot."⁸⁶ Seemingly breaching the Supreme Court's

78. S. Scott Gaille, *Publishing by United States Court of Appeals Judges: Before and After the Bork Hearings*, 26 J. LEGAL STUD. 371 (1997) (finding that in the 1980s, a relatively high percentage of circuit court judges (ten to thirty percent) published at least one journal or law review article per year).

79. LAWRENCE BAUM, *JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR* 40 (2006) ("Expressions outside court can also be used to win support for judges' conceptions of good judicial policy.").

80. Christopher N. Krewson, *Save This Honorable Court: Shaping Public Perceptions of the Supreme Court Off the Bench*, 72 POL. RSCH. Q. 686 (2018).

81. Ryan C. Black et al., *A Well-Traveled Lot: A Research Note on Judicial Travel by U.S. Supreme Court Justices*, 37 JUST. SYS. J. 367, 371 (2016) (finding that between 2002-2012, seventy-five percent of Justices' travel was to deliver a speech).

82. *See, e.g.*, Christopher W. Schmidt, *Beyond the Opinion: Supreme Court Justices and Extrajudicial Speech*, 88 CHI.-KENT L. REV. 487 (2013).

83. JOHN R. HIBBING & ELIZABETH THEISS-MORSE, *STEALTH DEMOCRACY: AMERICANS' BELIEFS ABOUT HOW GOVERNMENT SHOULD WORK* 158-59 (2002).

84. *See, e.g.*, Gregory A. Caldeira & James L. Gibson, *The Etiology of Public Support for the Supreme Court*, 36 AM. J. POL. SCI. 635, 649-50 (1992); Krewson, *supra* note 80 (finding that attending a speech by a Justice and exposure to news coverage of the speech improved individuals' favorability toward the Justice and increased institutional loyalty toward the Court).

85. *See* Richard D. Friedman, *Chief Justice Hughes' Letter on Court-Packing*, 22 J. SUP. CT. HIST. 76 (1997).

86. *The Chief Justice's Letter*, NEW REPUBLIC, Apr. 7, 1937, at 254.

position against advising on constitutional questions outside the context of a case, Hughes wrote that “[t]he Constitution does not appear to authorize” division of the Court into panels.⁸⁷ While Hughes refrained from taking an actively political stance, the letter did give rise to commentary about appropriate judicial roles and highlighted the controversial nature of judicial intervention in other branches of government.

Hughes’ letter also increased news inquiries and press demands on the Court. Faced with such an onslaught, Hughes appointed a clerk staff member to handle these demands, a first step in institutionalizing the Court’s press relations.⁸⁸ The press clerk first carried out largely administrative tasks, then moved to advising the Justices on press relations, sending them newspaper clippings, publishing an in-house newsletter, and proposing changes to Court practices to accommodate the press.⁸⁹ In the 1960s and 1970s, “new journalism” increasingly investigated and scrutinized public officials,⁹⁰ pushing Chief Justice Warren E. Burger in 1973 to create a new, formal Public Information Office headed by someone with substantial journalism experience.⁹¹

To be sure, judicial press relations have varied over the years and across individuals. During the nineteenth century, Justices were both more familiar with and accessible to the press than their predecessors. The media criticized individual Justices “at a personal level that is unusual today,”⁹² and unlike the modern era, Justices responded to such attacks directly, via letters to the editor, pseudonymous essays, or leaks to the press.⁹³ This changed over the course of the twentieth century, as Justices began to refrain from press conferences and avoid extensive interviews, even when faced with public attacks.⁹⁴ Still, twentieth-century Justices continued to seek to shape press coverage of themselves or the Court, even if not always successfully.⁹⁵ Over the past few decades, with increasingly public profiles, today’s Justices (with

87. Friedman, *supra* note 85, at 81-82.

88. *Supreme Court Gets a ‘Press Contact Man’; Appointment Was Requested by Newspapers*, N.Y. TIMES, Jan. 1, 1936, at 2.

89. Jonathan Peters, *Institutionalizing Press Relations at the Supreme Court: The Origins of the Public Information Office*, 79 MO. L. REV. 985, 989-94 (2014).

90. DAVIS, *supra* note 41, at 25.

91. Peters, *supra* note 89, at 995, 997 (noting that in line with Burger’s approach to the press, many reporters saw the new head of office as working more “to preserve secrecy and to insulate the justices, rather than help the press.”).

92. DAVIS, *supra* note 41, at 69-71 (suggesting this was due to increasing pre-Civil War societal polarization and the nature of press coverage of decisions such as *Dred Scott*).

93. *Id.* at 76-79.

94. In the words of Chief Justice Earl Warren: “A man in politics can fight back . . . but the courts just can’t fight back. It isn’t in the nature of the position to do it.” *Id.* at 124.

95. *Id.* at 123-53.

a few outliers) seem quite comfortable with and adept at using press coverage for strategic ends.⁹⁶

C. *The Value of Separate Judicial Speech*

1. *On the bench*

Debate over the value and propriety of separate speech has persisted since the foundation of the American judiciary. Judges and lawyers alike have long sought to silence those who hold different views and to discourage dissents in particular.⁹⁷ As early as 1874, the *Albany Law Journal* wrote that suppressing dissent would not only economize space within reporters, but would further enhance “the dignity and influence” of judicial decisions.⁹⁸ The state of Louisiana even adopted a constitutional amendment in 1898 prohibiting publication of dissents,⁹⁹ and other states considered similar measures.¹⁰⁰ Opponents viewed the publication of dissents as harmful and inappropriate, contributing to perceptions that the law is indeterminant and courts are fallible.¹⁰¹ Dissents further risk undermining a corporate vision of the court¹⁰² and contribute to the “cult of the judge superseding the cult of the robe.”¹⁰³ Even the Great Dissenter himself, Justice Oliver Wendell Holmes Jr., noted that they are generally “useless” and “undesirable.”¹⁰⁴ Perpetual dissents—the practice of continually voicing disagreement with a

96. For example, Justice Clarence Thomas’ autobiography and subsequent press appearances have been portrayed as an attempt to humanize the Court and bridge the distance between the Justice and the broader public, with one review characterizing these appearances as attempts to “portray himself as a persecuted, almost Christlike figure singled out by the liberal establishment.” William Grimes, *The Justice Looks Back and Settles Old Scores*, N.Y. TIMES, Oct. 10, 2007, at E1, 9; see also DAVIS, *supra* note 41, at 176-85.

97. Flanders, *supra* note 30, at 403; Kolsky, *supra* note 16, at 2091 (recounting a successful suppression of dissent in the mid-1950s, when the Pennsylvania state reporter refused to publish the dissenting opinion of a Pennsylvania Supreme Court justice).

98. *Current Topics*, 10 ALB. L.J. 324, 325 (1874).

99. The constitutional prohibition on dissent was maintained when Louisiana adopted another constitution in 1913, only to be removed when Louisianans adopted yet another constitution in 1921. See Hunter Smith, *Personal and Official Authority: Turn-of-the-Century Lawyers and the Dissenting Opinion*, 24 YALE J.L. & HUMAN. 507, 515 (2012).

100. *Id.* at 510.

101. *Id.* at 517-18 (providing an overview of arguments voiced for and against publishing dissents during this period).

102. C.A. Hereschoff Bartlett, *Dissenting Opinions*, 32 LAW MAG. & REV. Q. REV. JURIS. 54, 55 (1906) (“[T]he legal profession wants . . . the judgments of its Courts as a united body and not the individual opinions of judges.”).

103. JOHN BRIGHAM, *THE CULT OF THE COURT* 64 (1987); see also LEARNED HAND, *THE BILL OF RIGHTS* 72 (1958) (claiming that a dissenting opinion “cancels the impact of monolithic solidarity on which the authority of a bench of judges so largely depends.”).

104. *N. Sec. Co. v. United States*, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting).

decision years after it has become precedent—perhaps exhibit these tendencies to the extreme.¹⁰⁵

Critiques of separate opinion writing continue to this day, particularly for dissents viewed as unnecessary or superfluous. Yet judges and commentators widely view separate opinion writing as a healthy and democratic practice that contributes to the strength of the judiciary. Publication of dissents may even be required by democratic norms of transparency and publicity.¹⁰⁶ Considerable scholarly writing has thus been dedicated to cataloguing the roles and values of separate opinions.¹⁰⁷

Most commentators agree that one of the primary values of a dissent rests with its future corrective power,¹⁰⁸ in that it reveals perceived flaws in the majority's legal analysis "in the hope that the Court will mend the error of its ways in a later case."¹⁰⁹ While this occurs relatively infrequently, such "great dissents" are lauded as demonstrating the "power of a single justice to shape future decisions while preserving the moral righteousness of the court."¹¹⁰ Such is the case with Justice John Marshall Harlan's lone dissent in the racial segregation case of *Plessy v. Ferguson*¹¹¹ that eventually carried the

105. Allison Orr Larsen, *Perpetual Dissents*, 15 GEO. MASON L. REV. 447, 449 (2008) (arguing that issuing perpetual dissents is akin to "pursuing a sort of 'self stare decisis' – elevating . . . commitment to an internally consistent jurisprudence over a commitment to adhere faithfully to the Court's precedents.").

106. See, e.g., *Notes: Dissenting Opinions*, 20 AM. L. REV. 428, 429 (1886) (noting that publication is required by a "fundamental principle of Anglo-American law that the courts of justice shall be *open*"); Carter, *supra* note 30, at 118 ("The right to dissent is the essence of democracy—the will to dissent is an effective safeguard against judicial lethargy—the effect of a dissent is the essence of progress."); Emlin McLain, *Dissenting Opinions*, 14 YALE L.J. 191, 192 (1905) (arguing that non-publication "would probably lead to the disquieting belief that the real uncertainties of litigation are much more numerous and dangerous.").

107. See, e.g., Altimari, *supra* note 30, at 279-84; ALAN BARTH, PROPHETS WITH HONOR: GREAT DISSENTS AND GREAT DISSENTERS IN THE SUPREME COURT 3-21 (1974); William J. Brennan, Jr., *In Defense of Dissents*, 37 HASTINGS L.J. 427, 430, 435 (1986); Carter, *supra* note 30, at 118-19, 121; Flanders, *supra* note 30, at 406-08, 410; Fuld, *supra* note 30, at 927-28; Ruth Bader Ginsburg, *Remarks on Writing Separately*, 65 WASH. L. REV. 133, 143, 145 (1990); Ruth Bader Ginsburg, *The Role of Dissenting Opinions*, 95 MINN. L. REV. 1, 3-4, 6 (2010); Kolsky, *supra* note 16, at 2082; Lipez, *supra* note 26, at 322-27; Pound, *supra* note 53, at 795; Voss, *supra* note 30, at 653-57; Wood, *supra* note 30, at 1454-56.

108. See, e.g., BENJAMIN N. CARDOZO, LAW AND LITERATURE AND OTHER ESSAYS AND ADDRESSES 36 (4th prtg. 1938) ("The dissenter speaks to the future, and his voice is pitched to a key that will carry through the years.").

109. Brennan, *supra* note 107, at 430. As Hughes famously wrote, "[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." CHARLES EVANS HUGHES, THE SUPREME COURT OF THE UNITED STATES: ITS FOUNDATION, METHODS AND ACHIEVEMENTS: AN INTERPRETATION 68 (1928).

110. Randall T. Shepard, *What Can Dissents Teach Us?*, 68 ALB. L. REV. 337, 338 (2005); see also MARK TUSHNET, I DISSENT: GREAT OPPOSING OPINIONS IN LANDMARK SUPREME COURT CASES, at xxii-xxiv (2008) (identifying vindication by the future as a characteristic of great dissents).

111. 163 U.S. 537, 552-64 (1896) (Harlan, J., dissenting).

day in *Brown v. Board of Education*¹¹² more than a half-century later.¹¹³ Dissents within lower appeals courts may similarly play a future corrective role by signaling to higher courts cases worthy of reconsideration and pointing out perceived flaws in the majority's reasoning.¹¹⁴ Indeed, circuit court decisions are more likely to be reviewed en banc when a dissent has been filed¹¹⁵ and "often times the dissent serves as the blueprint for a new majority opinion."¹¹⁶

Separate opinions are further viewed as safeguarding the integrity of the judicial decision-making process by keeping the majority accountable for its rationale, something Karl Llewellyn dubbed "rid[ing] herd on the majority."¹¹⁷ Justice William J. Brennan lauds separate opinions for contributing to the quality of the majority opinion by "forcing the prevailing side to deal with the hardest questions urged by the losing side."¹¹⁸ Relatedly, separate opinions can act as "damage control" mechanisms, in that they "emphasize the limits of a majority decision that sweeps, so far as the dissenters are concerned, unnecessarily broadly."¹¹⁹

Separate opinions often provide practical guidance for litigants, other courts, and Congress.¹²⁰ They also serve symbolic values, in that they may assuage the losing side and serve to "dissipate the anger of those who felt disenfranchised by the majority opinion."¹²¹ Judges further point to the symbolic value of separate opinions as a form of self-expression and as "an antidote for judicial lethargy."¹²² As for oral dissents, Lani Guinier highlights

112. 347 U.S. 483 (1954).

113. Brennan, *supra* note 107, at 430-32 (quoting Alan Barth calling such dissenters "Prophets with Honor" and pointing to Justice Harlan's dissent in *Plessy* as an example of the "quintessential voice crying in the wilderness.").

114. Vanessa Baird & Tonja Jacobi, *How the Dissent Becomes the Majority: Using Federalism to Transform Coalitions in the U.S. Supreme Court*, 59 DUKE L.J. 183, 238 (2009).

115. *See, e.g.*, Beim & Kestellec, *supra* note 43, at 1075-76 (finding that majority-inconsistent death penalty decisions are more likely to be reviewed en banc when there is a dissent); Tracey E. George, *The Dynamics and Determinants of the Decision to Grant En Banc Review*, 74 WASH. L. REV. 213, 250, 260 (1999) (finding that between 1956 and 1996, the Second, Fourth, and Eighth Circuits were nearly thirty-nine times more likely to review en banc a divided panel decision compared to a unanimous one); Douglas H. Ginsburg & Donald Falk, *The Court En Banc: 1981-1990*, 59 GEO. WASH. L. REV. 1008, 1047 (1991) (finding that between 1987 and 1990, the D.C. Circuit was eighteen times more likely to grant en banc review of a non-unanimous panel decision than a unanimous one).

116. Altimari, *supra* note 30, at 279.

117. KARL LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 26 (1960).

118. Brennan, *supra* note 107, at 430.

119. *Id.*

120. *Id.*; *see also* Indraneel Sur, *How Far Do Voices Carry: Dissents from Denial of Rehearing En Banc*, 2006 WIS. L. REV. 1315, 1319 (noting that circuit panel dissents often "telegraph to other courts, litigants, and the legislature that the majority's reasoning is incorrect.").

121. Altimari, *supra* note 30, at 282 (quoting Edward C. Voss, *Dissent: Sign of a Healthy Court*, 24 ARIZ. ST. L.J. 643, 655 (1992)).

122. Fuld, *supra* note 30, at 927.

their dialogue-enhancing value, in that justices may use them to engage with the public in a democratically deliberative manner.¹²³

2. *Off the bench*

As with separate on-the-bench speech, there exists considerable normative debate about the appropriateness of extrajudicial speech. Commitment to judicial independence has led many to argue against public, extrajudicial speech.¹²⁴ Critics express a variety of concerns with such activities, such as the need to preserve public respect for the judiciary, maintain separation of powers, and ensure impartial judicial proceedings. Further, the fact that much extrajudicial speech is autobiographical and personalized potentially undermines the ideal of impersonal justice and the belief that we “live under a government of laws, not of men,”¹²⁵ although no empirical evidence supports the contention that extrajudicial speech undermines the judiciary’s legitimacy.¹²⁶

Still, debate and critiques persist, particularly for activities that seem to straddle the line between judicial propriety and impropriety. For example, in the 1980s and 1990s, public and media allegations of judicial non-independence generated vigorous discussion among members of the bar about the appropriateness of judges publicly responding to such critiques. The widely held view of the legal profession was that judges “are to sit silently on the sidelines even in the face of false and vitriolic attacks directed at their integrity and impartiality.”¹²⁷ Although judges in the early days of the republic frequently spoke extrajudicially to defend themselves,¹²⁸ many judges now view extrajudicial silence in these instances as ethically imperative¹²⁹ and perhaps even required by the Code of Judicial Conduct.¹³⁰ As Judge

123. Guinier, *supra* note 11, at 13 (discussing the democracy-enhancing potential of oral dissents).

124. See, e.g., Dean Acheson, *Removing the Shadow Cast on the Courts*, 55 A.B.A. J. 919, 920 (1969) (“The most important extrajudicial assignments distract from judicial tasks, and lesser ones may bring involvement in controversies detracting from judicial impartiality and aloofness.”); Black et al., *supra* note 81, at 367 (noting the normative debate over private judicial travel).

125. Schmidt, *supra* note 82, at 520-21.

126. See *supra* note 84 and accompanying text.

127. Stephen J. Fortunato, Jr., *On a Judge’s Duty to Speak Extrajudicially: Rethinking the Strategy of Silence*, 12 GEO. J. LEGAL ETHICS 679, 681 (1999); see also Ross, *supra* note 57.

128. See *supra* note 93 and accompanying text.

129. Fortunato, *supra* note 127, at 689; Judith S. Kaye, *Safeguarding a Crown Jewel: Judicial Independence and Lawyer Criticism of Courts*, 25 HOFSTRA L. REV. 703, 714 (1997) (expressing her view as Chief Judge of the New York State Court of Appeals that “judges are bound to silence when facing their critics about particular cases.”).

130. Roy D. Simon, Jr. & Karen E. Baldwin, *Interview: A Unique Perspective on Judicial Independence*, 25 HOFSTRA L. REV. 799, 801 (1997) (interviewing United States District Court Judge Harold Baer, who is quoted as stating that judges are “not permitted to fight back under the Code of Judicial Conduct”).

Guido Calabresi of the United States Court of Appeals for the Second Circuit has put it: “silence is the price of life tenure.”¹³¹

A minority of commentators takes the opposite view: judges have both a right and an obligation to respond directly to personal attacks,¹³² and that doing so is beneficial for their own accountability, as well as the integrity of the judiciary.¹³³ To remain silent leaves the public dissemination of information on the judiciary “to people who are often neither informed nor concerned about this branch of government.”¹³⁴ This is particularly the case when such attacks are not credible or are inaccurately reported by the press.¹³⁵ In fact, since the earliest days of the Court, Justices have strategically engaged in public relations in the face of such external threats and attacks to defend the institution and, more recently, themselves.¹³⁶

At times, the value of such extrajudicial defenses—in addition to attempts to humanize the judiciary and personalize judges—may be far greater than the costs incurred by perceptions of judicial impropriety. Yet debates about the added value of separate judicial speech in the United States—both on and off the bench—occur insulated from the activities of domestic judges’ international counterparts. In turn, the dialogue-enhancing value of separate speech and its potential for increasing deliberative engagement is largely ignored by international judges now faced with increasing public backlash. The next Part turns to these international experiences in order to bring these two domains into conversation.

III. JUDICIAL SPEECH IN INTERNATIONAL COURTS

Despite the exponential increase in international tribunals and dispute settlement mechanisms in the past few decades, literature on courts’ internal decision-making processes remains in its infancy. This Part will describe (1) the extent to which rules in various international courts permit, cabin, or encourage judges to speak separately, (2) the ways in which judges have used the ability to speak separately both on and off the bench, and (3) the values implicated by the phenomenon of separate international judicial speech. International courts vary considerably in their treatment of these issues, and a comprehensive account of the norms and practice at every single tribunal

131. Michael Daly Hawkins, *Dining with the Dogs: Reflections on the Criticism of Judges*, 57 OHIO ST. L.J. 1353, 1354 (1996).

132. Fortunato, *supra* note 127, at 681.

133. Schmidt, *supra* note 82, at 522.

134. Fortunato, *supra* note 127, at 687.

135. For instance, after being subjected to blogger accusations of lying in his confirmation process, Justice Samuel Alito, Jr. voiced concern that judicial independence is threatened and public confidence undermined by such false media reports. See Michael Scholl, *Alito Fears ‘Real Damage’ from Attacks on Judges*, N.Y. L.J., Oct. 2, 2006, at 1, 1-3.

136. DAVIS, *supra* note 41, at 181, 185.

would be neither feasible nor useful. This Part will therefore focus on a sample of the most visible mechanisms that cover a range of substantive areas of law, while simultaneously reflecting institutional variance.

A. Rules on Separate Judicial Speech

With a few limited, but important, exceptions, the busiest and most prominent international courts countenance the possibility of judges speaking separately in the form of concurring and dissenting opinions. This Part highlights the different models of individual opinions permitted—or more exceptionally, discouraged—in: (a) courts of general jurisdiction (the International Court of Justice (ICJ)); (b) global bodies with limited subject matter jurisdiction (the dispute settlement panels and Appellate Body of the World Trade Organization (WTO) and the International Criminal Court (ICC)); (c) influential regional courts with large caseloads (the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR)); and (d) ad hoc dispute settlement mechanisms, such as arbitral tribunals.

Given its pedigree as the successor to the Permanent Court of International Justice (PCIJ) and its status as the “world court,” it is not surprising that the ICJ’s position on individual judicial speech has been much debated and has formed a benchmark for subsequent tribunals. The framework governing separate opinions at the ICJ borrows heavily from the law and practice of the PCIJ, which proved repeatedly controversial during various revisions to its Statute and Rules.¹³⁷ Eventually, the PCIJ permitted individual opinions in all types of cases (contentious as well as advisory), agreed on publishing the number of votes in the judgment, and banned the practice of issuing “secret” dissents.¹³⁸

137. R. P. Anand, *The Role of Individual and Dissenting Opinions in International Adjudication*, 14 INT’L & COMPAR. L.Q. 788, 796-98 (1965) (describing the negotiations during the 1926 Conference for the Revision of Rules of the Court and the 1929 Conference of the Committee of Jurists, which proposed a range of solutions, from an outright ban on dissenting opinions to making public the number of judges in the majority without revealing the names of individual dissenters).

138. *Id.* at 796, 798; Edward Dumbauld, *Dissenting Opinions in International Adjudication*, 90 U. PA. L. REV. 929, 943-44 (1942) (noting that the practice of filing “secret dissenting opinions with the minutes of the Court’s deliberations” was initially abandoned by a resolution passed by the court). Interestingly, dissenting and concurring opinions were not introduced simultaneously at the PCIJ. *See* Farrokh Jhabvala, *The Scope of Individual Opinions in the World Court*, 13 NETH. Y.B. INT’L L. 33, 35-36 (1982) (describing how separate opinions were introduced later by the judges in the 1920s and were only given a firm constitutional foundation with the passage of the 1945 Statute of the ICJ).

Following the PCIJ, ICJ judges have the right, but not an obligation, to deliver separate opinions.¹³⁹ While the initial Rules of Court resembled the PCIJ in not requiring identification of the judges in the majority, they were amended in 1978 to provide that the judgment must contain the “number and names of the judges constituting the majority,” effectively revealing the identity of judges not part of the majority.¹⁴⁰

ICJ judges retain considerable leeway as to the form and content of separate opinions, though they have sought to limit their discretion in this respect. In 1948, the court clarified that while a “dissenting opinion” represents a disagreement with the judgment or advisory opinion, an “individual opinion” is reserved for cases where the judge supports the decision, but not the reasoning, of the majority.¹⁴¹ What constitutes a “declaration” has been more difficult to determine, with judges using “declarations” as a vehicle for a variety of opinions.¹⁴² Amongst the explanations offered for the eclectic use of declarations is that they are published immediately after the court’s decision, followed by concurrences and dissents, always in order of the judge’s seniority. Thus, merely by labelling their separate opinion a “declaration,” a judge could have her individual opinion published ahead of more senior colleagues.¹⁴³

Mirroring the ICJ’s legal framework,¹⁴⁴ the ECtHR permits judges who do not agree with any part of the judgment to deliver “either a separate opinion, concurring with or dissenting from that judgment,” or a “bare

139. Rules of Court, 1978 I.C.J. Acts & Docs art. 95 (“Any judge may . . . attach his individual opinion to the judgment, whether he dissents from the majority or not; a judge who wishes to record his concurrence or dissent without stating his reasons may do so in the form of a declaration.”).

140. Jeffrey L. Dunoff & Mark A. Pollack, *The Judicial Trilemma*, 111 AM. J. INT’L L. 225, 255 (2017).

141. Anand, *supra* note 137, at 788.

142. Farrokh Jhabvala, *Declarations by Judges of the International Court of Justice*, 72 AM. J. INT’L L. 830, 835-37, 841-45 (1978). Historically, a declaration was intended to cover cases where the judge was inclined to issue a brief statement of dissent without elaborating his reasoning. However, in the first few decades of the court’s existence, declarations took the place of partially reasoned dissenting and concurring statements, additional remarks, attacks on concurring and dissenting statements, and even fully reasoned dissents. *Id.*

143. *Id.* at 853. This judicial practice prompted the introduction of Article 95(2) of the Rules of Court in 1978. Rules of Court, 1978 I.C.J. Acts & Docs art. 95. However, as the subsequent practice of declarations at the ICJ demonstrates, this change to the Rules has not had the desired effect. *See, e.g.*, Jadhav (India v. Pak.), Judgment, 2019 I.C.J. 418, 494, 510, 520 (July 17) (separate opinions by Sebutinde, J., Robinson, J. & Iwasawa, J.) (containing reasoned individual “declarations” by Judges Sebutinde, Robinson, and Iwasawa); Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Rep. 136, 240 (July 9) (declaration by Buergenthal, J.) (appearing as a declaration although it is effectively a dissent).

144. *See* Dunoff & Pollack, *supra* note 140, at 249-50 (noting the drafting history of the European Convention on Human Rights (ECHR), in particular Article 1 of the draft Statute, which explicitly stated that it is “based on the Statute of the International Court of Justice”).

statement of dissent.”¹⁴⁵ ECtHR judges are thus free to dissent without being under any obligation to out themselves as dissenters. Individual opinions are also permitted, though by no means encouraged, at the ICC.¹⁴⁶ While no explicit provision on separate opinions exists for the Pre-Trial Chamber, judges in the Trial Chamber are encouraged to strive for unanimity, failing which a decision shall be taken by majority vote.¹⁴⁷ The corresponding provision for the Appeals Chamber omits a preference for unanimity, stating that the “judgement of the Appeals Chamber shall contain the views of the majority and the minority, but a judge may deliver a separate or dissenting opinion on a question of law.”¹⁴⁸ The difference in wording has led some to argue that separate opinions are intended to be discouraged at the Trial Chamber, and that minority and majority views may even be featured in one single decision rather than being appended separately.¹⁴⁹

Other international courts, especially those dealing with international commercial or economic law, appear more reluctant to embrace individual opinions. Barring a few instances, arbitration rules neither encourage, nor prohibit, separate opinions. This silence is especially pronounced in international commercial arbitration.¹⁵⁰ For example, the Model Law on International Commercial Arbitration drafted by the United Nations Commission on International Trade Law (UNCITRAL) refrains from providing any

145. Convention for the Protection of Human Rights and Fundamental Freedoms art. 49, Nov. 4, 1950, 213 U.N.T.S. 221; Eur. Ct. H.R., Rules of Court, rule 74(2) (1959) (as amended Sept. 9, 2019), https://www.echr.coe.int/Documents/Rules_Court_ENG.pdf.

146. Nina Jorgensen & Alexander Zahar, *Deliberation, Dissent, Judgment*, in INTERNATIONAL CRIMINAL PROCEDURE: PRINCIPLES AND RULES 1151, 1178-79 (Göran Sluiter et al. eds., 2013) (referring to the drafting history of the Rome Statute of the ICC, which suggests that some countries favored unanimous opinions). International criminal law, in general, has always countenanced the possibility of separate opinions as evidenced by the practice at different international and hybrid courts: the International Criminal Tribunal for the Former Yugoslavia (S.C. Res. 827, art. 23(2) (May 25, 1993)); the International Criminal Tribunal for Rwanda (S.C. Res. 955, art. 22(2) (Nov. 8, 1994)); the Special Court for Sierra Leone (U.N. Secretary-General, *Rep. on the Establishment of a Special Court for Sierra Leone*, art. 18, U.N. Doc. S/2000/915 (Oct. 4, 2000)); and the Special Tribunal for Lebanon (S.C. Res. 1757, art. 23 (May 30, 2007)).

147. Rome Statute of the International Criminal Court art. 74(3), 74(5), July 17, 1998, 2187 U.N.T.S. 90.

148. *Id.* art. 83(4).

149. See Göran Sluiter, *Separate and Dissenting Opinions*, in THE OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE 510, 511 (Antonio Cassese ed., 2009); Otto Triffterer, *Article 74*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 1387, 1398 (Otto Triffterer ed., 2d ed. 2008). However, the Trial Chamber has interpreted its freedom more broadly in this respect. See *infra* Section II.B.1.

150. Peter J. Rees & Patrick Rohn, *Dissenting Opinions: Can They Fulfil a Beneficial Role?*, 25 ARB. INT’L 329, 331 (2009) (on the absence of specific rules on separate opinions in national and international laws and regulations); Hans-Patrick Schroeder & Tanja V. Pfitzner, *Recent Trends Regarding Dissenting Opinions in International Commercial Arbitration*, 2 Y.B. ON INT’L ARB. 133, 135 (2012) (“[T]he absence of regulation does not imply that dissenting opinions were impermissible.”).

specific rule.¹⁵¹ This was also the official stance of the 1985 Working Party on Dissenting Opinions and Interim and Partial Awards established by the International Chamber of Commerce's Commission on International Arbitration.¹⁵² In the event of a dissent, it is left to the discretion of the Court of Arbitration of the International Chamber of Commerce to either attach the separate opinion to the arbitral award or refuse to do so, on the grounds that it might negatively impact the award's validity and enforceability.¹⁵³

In comparison, international investment treaties adopt a more liberal stance towards individual opinions, even as norms in international investment arbitration generally favour unanimity.¹⁵⁴ Prominent international regulations that explicitly recognize individual opinions include the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) and the Rules of the Iran-U.S. Claims Tribunal.¹⁵⁵

A strong preference for unanimity also appears in the rules for dispute settlement at the WTO, as set out in the Dispute Settlement Understanding (DSU).¹⁵⁶ For the first instance three-member dispute panels, the DSU does not explicitly provide a right to issue a separate opinion; rather it stipulates

151. HOWARD M. HOLTZMANN & JOSEPH E. NEUHAUS, A GUIDE TO THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION: LEGISLATIVE HISTORY AND COMMENTARY 837 (1989); *see also* U.N. COMM'N ON INT'L TRADE, UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION 1985 WITH AMENDMENTS AS ADOPTED IN 2006, ¶ 43, U.N. Sales No. E.08.V.4 (2008) ("It may be added that the Model Law neither requires nor prohibits 'dissenting opinions.'").

152. *Final Report on Dissenting and Separate Opinions*, 2 ICC INT'L CT. ARB. BULL. 32 (1991) ("[I]t is neither practical nor desirable to attempt to suppress dissenting opinions in ICC arbitrations . . . the prevailing view was that the ICC should neither encourage nor discourage the giving of such opinions.").

153. Richard M. Mosk & Tom Ginsburg, *Dissenting Opinions in International Arbitration*, 15 MEALEY'S INT'L ARB. REP. 16, 18 (2000).

154. *See, e.g.*, Alan Redfern, *The 2003 Freshfields - Lecture Dissenting Opinions in International Commercial Arbitration: The Good, the Bad and the Ugly*, 20 ARB. INT'L 223, 242 (2004) ("[T]he time has perhaps come to enquire whether the present leniency towards dissenting opinions . . . has gone too far."). This charge of excessive leniency is leveled despite the fact that separate opinions are relatively infrequent in investment arbitration. *See* Ruth Breeze, *Dissenting and Concurring Opinions in International Investment Arbitration: How the Arbitrators Frame Their Need to Differ*, 25 INT'L J. FOR SEMIOTICS L. 393, 396 (2012) ("[U]nanimity is highly desirable in arbitration procedures, and opting to put one's dissent on record is a last resort."); Catharine Titi, *Investment Arbitration and the Controverted Right of the Arbitrator to Issue a Separate or Dissenting Opinion*, 17 LAW & PRAC. INT'L CTS. & TRIBUNALS 197, 197 (2018) ("Although dissents are not generally encouraged in international arbitration, they are a reality of investment treaty disputes.").

155. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States art. 48(4), Mar. 18, 1965, 575 U.N.T.S. 159; ICSID, Rules of Procedure for Arbitration Proceedings (Arbitration Rules), rule 47(3) (2006); Iran-U.S. Cl. Trib., Tribunal Rules of Procedure, art. 32(3) (1983).

156. Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401

that individual opinions expressed in panel reports must be anonymous.¹⁵⁷ This formulation is repeated in DSU provisions for appellate review by the standing Appellate Body (AB).¹⁵⁸ However, the AB has drafted its own Working Procedures for Appellate Review that depart from this neutral stance and encourage Members to “make every effort to take their decisions by consensus.”¹⁵⁹ The first AB Members took this admonition to heart and went even further in reaching a mutual commitment “not to render any separate opinion” so as to build the legitimacy of a new system.¹⁶⁰

The requirement of anonymous opinions is intended to preserve the confidentiality of the dispute settlement process and keep the focus on the objective merits of the arguments and reasoning, while simultaneously preventing Members from using the opinion as a platform for airing their personal agendas.¹⁶¹ Additionally, it is expected that the anonymity criterion shields the opinion writer from undue political pressure by member states, especially when it comes to reappointment to the AB.

Among the courts surveyed in this Article, the CJEU is unique in completely eschewing all forms of separate opinions.¹⁶² Various historical and institutional reasons have been given for this absolute prohibition. The CJEU is modeled heavily on the French judicial system, where all decisions are considered to be made and delivered in the name of the court as an institution, rather than by the individuals comprising the court.¹⁶³ Moreover, supporters of unanimous decision-making argue that these judgments are complemented by the opinion of the CJEU’s Advocate General (AG),

157. *Id.* art. 14(3).

158. The Appellate Body is a seven-member standing body which sits in three-member Divisions to decide on appeals. *Id.* art. 17.

159. *Id.* art. 17(11); Working Procedures for Appellate Review, art. 3(2), WTO Doc. WT/AB/WP/6 (adopted Aug. 16, 2010).

160. See Dunoff & Pollack, *supra* note 140, at 265; A.V. Ganesan, *The Appellate Body in its Formative Years: A Personal Perspective*, in A HISTORY OF LAW AND LAWYERS IN THE GATT/WTO 517, 531 (Gabrielle Marceau ed., 2015); Claus-Dieter Ehlermann, *Reflections on the Appellate Body of the WTO*, 6 J. INT’L ECON. L. 695, 697 (2003) (“[T]he spirit of Rule 3.2 first sentence of the Working Procedure has clearly prevailed over the possibility offered by Article 17.11 DSU.”).

161. James Flett, *Collective Intelligence and the Possibility of Dissent: Anonymous Individual Opinions in WTO Jurisprudence*, 13 J. INT’L ECON. L. 287, 307-08 (2010).

162. The requirement of a unanimous judgment is based on an interpretation of Protocol (No 3) on the Statute of the Court of Justice of the European Union, 2010 O.J. (C 83) 218, art. 36 (“Judgments shall state the reasons on which they are based. They shall contain the names of the Judges who took part in the deliberations.”).

163. Sophie Turenne, *Advocate Generals’ Opinions or Separate Opinions: Judicial Engagement in the CJEU*, 14 CAMBRIDGE Y.B. EUR. LEGAL STUD. 723, 727 (2012); Iyiola Solanke, *The Advocate General: Assisting the CJEU of Article 13 TEU to Secure Trust and Democracy*, 14 CAMBRIDGE Y.B. EUR. LEGAL STUD. 697, 705 (2012) (describing this institutional posture as “corporatist” in contrast with courts that adopt a more deliberative style).

which forms an adequate substitute for the role normally performed by separate opinions.¹⁶⁴

The AG's opinion is functionally and institutionally quite distinct from a judicial separate opinion. The AG does not participate in the deliberations of the court, and the Opinion—rendered after the hearing and prior to the close of deliberations—is not legally binding.¹⁶⁵ Rather, it is advisory in nature and merely intended to assist the CJEU in its own deliberations.¹⁶⁶ As such, the Opinion's reach remains tied to and constrained by the CJEU's terse style of argumentation.¹⁶⁷ In practice, while studies have shown that the AG's Opinion has been moderately influential in the CJEU's decision-making, the CJEU has also departed from the AG's reasoning or failed to acknowledge points raised in the Opinion altogether.¹⁶⁸

B. *The Phenomenon of Separate Judicial Speech*

International rules on individual opinions provide the governing framework, but the exercise of the freedom to speak separately varies markedly, shaped by factors such as institutional culture, political pressure, career incentives, and personal inclinations and preferences. Similarly, differences in professional backgrounds results in a wide range of practices by judges opining on legal and institutional issues not within their official capacity.

1. *The rise and rise of individual opinions*

ICJ judges are perhaps the most prolific users of separate opinions, and continuing in the tradition of the PCIJ, they have exercised this right since

164. This position has been articulated by both former Advocates General and judges of the CJEU. See Walter van Gerven, *The Role and Structure of the European Judiciary Now and in the Future*, 21 EUR. L. REV. 211, 222 (1996); Francis Jacobs, *Advocates General and Judges in the European Court of Justice: Some Personal Reflections*, in JUDICIAL REVIEW IN EUROPEAN UNION LAW 17, 21-22 (David O'Keeffe ed., 2000); Josef Azizi, *Unveiling the EU Courts' Internal Decision-Making Process: A Case for Dissenting Opinions?*, 12 ERA F. 49, 59, 63 (2011) (“[T]he submission of the Advocate General certainly has not the character of a separate opinion . . . but – since it is mostly very profound and well reflected – it still helps the parties and third persons to put—by contrast—some light upon possible unclear passages of the later judgment.”).

165. Azizi, *supra* note 164, at 63; Vlad Perju, *Reason and Authority in the European Court of Justice*, 49 VA. J. INT'L L. 307, 355-56 (2009) (pointing out the reasons for not treating AG Opinions as the functional equivalent of separate opinions).

166. MITCHEL DE S.-O.-L'E. LASSER, JUDICIAL DELIBERATIONS: A COMPARATIVE ANALYSIS OF JUDICIAL TRANSPARENCY AND LEGITIMACY 115-41 (2004) (identifying ways in which AG Opinions may assist the CJEU, by summarizing and assessing the strength of the case law and referencing principles and doctrines relevant to the dispute).

167. Turenne, *supra* note 163, at 734; see also Perju, *supra* note 165, at 340 (arguing that the AG's Opinion is not a substitute for separate opinions because what is required is open contestation amongst judges and a public defense of the majority judgment).

168. Turenne, *supra* note 163, at 734 (referring to the “practice of the Court to not comment on novel points raised solely by the AG and not by the parties”); Solanke, *supra* note 163, at 698.

the earliest days of the court.¹⁶⁹ Indeed, a unanimous judgment is a vanishingly rare phenomenon at the ICJ.¹⁷⁰ Individual opinions cover the whole gamut of issues, from fact to law to policy, and are not always limited to expressions of support or disagreement with the reasoning or decision of the majority. Rather they are “polyphonic” and can be fairly discursive in character, touching upon a range of matters that are not, strictly speaking, within the scope of dispute.¹⁷¹

Some suggest that the nature of the ICJ’s internal deliberative process helps to account for the large number of separate opinions, in that each ICJ judge drafts tentative opinions for circulation prior to collective deliberations.¹⁷² This practice may result in significant amendments to the majority view, which take into account or respond to minority positions. But it also incentivizes a judge in the minority—who has already spent the time and energy to draft an opinion—to then finalize and publish her opinion separately.¹⁷³ National bias for one’s “home country” or for countries with similar political and cultural characteristics may also lead a judge on the losing side to publish her separate opinion.¹⁷⁴

The ECtHR follows closely behind the ICJ’s near perfect record of judgments with individual opinions, with estimates ranging from between sixty to eighty percent of ECtHR cases including at least one separate opinion.¹⁷⁵ Several studies have sought to identify the factors that contribute to ECtHR judges’ propensity to write separately. National bias has been suggested as a

169. Dunoff & Pollack, *supra* note 140, at 256; *see also* Anand, *supra* note 137, at 789 (noting that the PCIJ delivered only three unanimous judgments in thirty five contentious cases and fifteen unanimous opinions in twenty five advisory opinions over the course of its tenure).

170. Dunoff & Pollack, *supra* note 140, at 256 (“[I]n its first 243 decisions (90 judgments, 25 advisory opinions, 128 orders), the Court also released 1,017 individual opinions, including 349 dissenting opinions, 406 separate opinions, and 262 declarations.”).

171. *See* Hemi Mistry, ‘The Different Sets of Ideas at the Back of Our Heads’: Dissent and Authority at the International Court of Justice, 32 LEIDEN J. INT’L L. 293, 296-97 (2019).

172. *Id.* at 311 (referring to the internal ICJ procedure established under Resolution Concerning the Internal Judicial Practice of the Court, 1976 I.C.J. Acts & Docs art. 4).

173. *See* Mistry, *supra* note 171, at 311-12.

174. Eric A. Posner & Miguel F. P. de Figueiredo, *Is the International Court of Justice Biased?*, 34 J. LEGAL STUD. 599, 624 (2005) (analyzing all ICJ opinions from 1946 to Mar. 1, 2004 to argue that ICJ judges “vote for their home states about 90 percent of the time”).

175. Jeffrey L. Dunoff & Mark A. Pollack, *International Judicial Dissent: Causes and Consequences* (Mar. 5-7, 2015) (unpublished manuscript), <http://aei.pitt.edu/78999/1/Dunoff.Pollack.pdf>; Robin C.A. White & Iris Boussiakou, *Separate Opinions in the European Court of Human Rights*, 9 HUM. RTS. L. REV. 37, 53 (2009) (conducting a more fine-grained analysis to show that, in the period from 1999 to 2004, roughly twenty-five percent of judgments at the ECtHR were unanimous, fifteen percent had at least one dissenting opinion, and sixty percent at least one concurrence). As scholars have pointed out, the rates of dissent are higher in the seventeen-member Grand Chamber, which only hears exceptional cases. *See* Fred J. Bruinsma, *The Room at the Top: Separate Opinions in the Grand Chambers of the ECHR (1998-2006)*, ANCILLA IURIS 32, 33 (2008) (analyzing data from ECtHR judgments between 1960 and 1997 to conclude that seventy-eight percent of all Grand Chamber judgments and forty-two percent of all Chamber judgments featured separate opinions).

contributing factor, with studies indicating that judges from the respondent state tend to dissent more frequently. However, this practice is more common for ad hoc judges appointed only for specific cases than it is for elected judges.¹⁷⁶ There are very few instances of sole dissenting opinions by the national judge, which weakens the claim of proxy voting by states.¹⁷⁷ Studies on this topic also suggest a number of cultural and behavioral factors. For instance, judges from pre-enlargement member states (i.e. Western Europe) tend to append more separate opinions, as do judges with an activist background in human rights lawyering.¹⁷⁸

Similar reasoning has been offered to explain rising dissents in investment arbitration. Several empirical studies demonstrate that roughly a fifth of all published cases in investment arbitration include a separate or dissenting opinion.¹⁷⁹ The conduct of arbitral proceedings varies widely across panels. While some presiding arbitrators convene and exchange views with fellow panelists throughout the proceedings, others ask for written notes from each party-appointed arbitrator and then express their preference for one or the other side without following a deliberative process. The arbitrator whose reasoning is not necessarily taken into account may then feel motivated to

176. Fred J. Bruinsma & Matthijs de Blois, *Rules of Law from Westport to Wladivostok. Separate Opinions in the European Court of Human Rights*, 15 NETH. Q. HUM. RTS. 175, 181-82 (1997) (analyzing court judgements from 1991 to 1995 to conclude that, with the exception of ad hoc judges, ECtHR judges do not exhibit a strong national bias); Bruinsma, *supra* note 175, at 37-39 (suggesting that ad hoc judges may not feel solidarity with or peer pressure from their fellow judges in the same way as elected judges); see also Erik Voeten, *The Impartiality of International Judges: Evidence from the European Court of Human Rights*, 102 AM. POL. SCI. REV. 417, 430 (2008) (“[A]lthough there is strong evidence that ECtHR judges displayed more national bias on politically sensitive Article 3 cases, the overall effect of career motivations on the behavior of ECtHR judges appears modest.”).

177. White & Boussiakou, *supra* note 175, at 52-53.

178. Bruinsma, *supra* note 175, at 40-42; White & Boussiakou, *supra* note 175, at 57 (reporting that judges themselves also seem to think that prior professional background—in academia, civil service, or the judiciary—might influence the likelihood of writing a separate opinion); Voeten, *supra* note 176, at 430 (arguing that ECtHR judges are motivated by policy considerations, with judges from former socialist countries more likely to find violations by their own and other socialist governments, and judges who were formerly private practitioners more likely to find violations compared to diplomats and non-private practitioners).

179. Albert Jan van den Berg, *Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration*, in LOOKING TO THE FUTURE: ESSAYS ON INTERNATIONAL LAW IN HONOR OF W. MICHAEL REISMAN 824 (Mahnoush Arsanjani et al. eds., 2011) (showing that, as of 2011, dissents were issued in 34 out of 150 published ICSID arbitration awards and that nearly all 34 were issued by the arbitrator appointed by the party on the losing side); Titi, *supra* note 154, at 198 (“About one in five cases includes at least one separate or dissenting opinion.”); Anton Strezhnev, *You Only Dissent Once: Re-Appointment and Legal Practices in Investment Arbitration 2* (Nov. 8, 2015) (unpublished manuscript), http://scholar.harvard.edu/files/astrezhnev/files/dissent_draft_1.pdf (coding ICSID cases from 1972–2015 to claim that roughly 80% were unanimous, with a dissenting opinion in only about 14.5% of decisions).

pen a dissenting opinion. This is often the case for the arbitrator appointed by the party on the losing side of the dispute.¹⁸⁰

Notwithstanding the small number of cases handled by the ICC, separate opinions also seem to be an increasingly significant fixture at all levels of the judicial process. Despite the Rome Statute's clear preference for unanimity at the Trial level, only two Trial Chamber judgments have ever been rendered unanimously. Every other judgment has been accompanied by concurring, "minority," and dissenting opinions.¹⁸¹ Scholars suggest that the Appeals Chamber seems to display a fair amount of consensus, with a not-insignificant number of its decisions rendered unanimously.¹⁸² A few outlier Appeals Chamber judges, such as Judge Anita Usacka and Judge Giorgios Pickis, have been responsible for a disproportionate number of separate opinions.¹⁸³ However, the majority of Appeals Chamber judgments contain at least one separate opinion, including the recent *Bemba* case, with its profuse and high-profile dissents and concurrences.¹⁸⁴

180. van den Berg, *supra* note 179, at 830 (suggesting that, in fact, the party-appointed arbitrator is expected to dissent in favor of the party that loses the case); *cf.* Strezhnev, *supra* note 179, at 5 (surveying ICSID awards to conclude that "by bearing the social costs of dissent, arbitrators credibly signal their support for a party's position and increase their chances of being re-appointed by that party in the future even as they forego more prestigious appointments as presiding member."). *But see* Charles N. Brower & Charles B. Rosenberg, *The Death of the Two-Headed Nightingale: Why the Paulsson-van den Berg Presumption that Party-Appointed Arbitrators are Untrustworthy is Wrongheaded*, 29 *ARB. INT'L* 7, 29 (2013) ("A number of the dissents in van den Berg's survey . . . are benign or actually disfavor the party that appointed the dissenter.").

181. Of the unanimous judgments, one involves a confession (Prosecutor v. Al Mahdi, ICC-01/12-01/15-171, Judgment and Sentence, ¶ 3 (Sept. 27, 2016)) and the other deals with offenses related to the obstruction of justice (Prosecutor v. Gombo, ICC-01/05-01/13-1989-Red, Judgment Pursuant to Article 74 of the Statute, ¶ 15 (Oct. 19, 2016)). All other judgments have been accompanied by at least one separate opinion: Prosecutor v. Lubanga, ICC-01/04-01/06-2842, Separate Opinion of Judge Fulford (Apr. 5, 2012); Prosecutor v. Lubanga, ICC-01/04-01/06-2842, Separate and Dissenting Opinion of Judge Benito (Apr. 5, 2012); Prosecutor v. Gombo, ICC-01/05-01/08-3343-AnxI, Separate Opinion of Judge Steiner (Mar. 21, 2016); Prosecutor v. Gombo, ICC-01/05-01/08-3343-AnxII, Separate Opinion of Judge Ozaki (Mar. 21, 2016); Prosecutor v. Ngudjolo, ICC-01/04-02/12-4, Concurring Opinion of Judge Van den Wyngaert (Dec. 18, 2012); Prosecutor v. Katanga, ICC-01/04-01/07-3436-tENG, Minority Opinion of Judge Van den Wyngaert (Mar. 7, 2017); Prosecutor v. Katanga, ICC-01/04-01/07-3436-tENG, Concurring Opinion of Judges Diarra and Cotte (Mar. 7, 2017); Prosecutor v. Gbagbo, ICC-02/11-01/15-1234, Dissenting Opinion to the Chamber's Oral Decision of 15 January 2019 (Jan. 15, 2019) (with Judge Carbucciona writing the Dissenting Opinion).

182. WILLIAM SCHABAS, *AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT* 316 (5th ed. 2017).

183. *Id.*

184. Prosecutor v. Lubanga, ICC-01/04-01/-06-3121-Anx2, Judgment on the Appeal of Mr Thomas Lubanga Dyilo Against His Conviction, at 6 (Dec. 1, 2014) (noting the Dissenting Opinion of Judge Usacka and Partly Dissenting Opinion of Judge Song); Prosecutor v. Ngudjolo, ICC-01/04-02/12-271-AnxA, Judgment on the Prosecutor's Appeal Against the Decision of Trial Chamber II Entitled "Judgment Pursuant to Article 74 of the Statute," at 6 (Apr. 7, 2015) (noting the Dissenting Opinion of Judges Trendafilova and Tarfusser); Prosecutor v. Gombo, ICC-01/05-01/13-2275-Anx, Judgment on the Appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido Against the Decision of Trial Chamber VII Entitled "Judgment Pursuant to Article 74 of the Statute," ¶ 1631 (Mar. 8, 2018)

In contrast to these tribunals, the strong norm for consensus decision-making at the WTO has led to remarkably few separate opinions.¹⁸⁵ Several legal, institutional, cultural, and cognitive factors have contributed to this result. At the Appellate level, working procedures encourage collegiality and consensus decision-making,¹⁸⁶ with all seven AB Members—including the three Division Members in charge of hearing the case and conducting the process—exchanging views and deliberating on a given dispute.¹⁸⁷ This carries over to the drafting of the report by the three Division Members sitting on the dispute, each of whom bears equal responsibility for the drafting process.¹⁸⁸

Notwithstanding the normative and procedural pressures for unanimity, occasional differences of opinion are bound to emerge on contentious issues. The near complete absence of separate opinions in the AB of the WTO thus may be further due to internal self-policing by AB Members. The initial agreement to refrain from dissents has been followed by a strong institutional culture in favor of conformity, bolstered by the Members' desire to avoid costs such as increased work-load under tight time pressure and potential loss of collegiality.¹⁸⁹ In the rare instances where they do appear, separate opinions tend to be fairly brief and are typically subsumed within the body of the report instead of being appended at the end or as a separate

(noting the Separate Opinion of Judge Henderson); Prosecutor v. Gombo, ICC-01/05-01/08-3343, Judgment Pursuant to Article 74 of the Statute, ¶ 753 (Mar. 21, 2016) (noting the Separate Opinions by Judges Steiner and Ozaki); Prosecutor v. Gombo, ICC-01/05-01/08-3636-Anx1-Red, Judgment on the Appeal of Mr Jean-Pierre Bemba Gombo Against Trial Chamber III's "Judgment Pursuant to Article 74 of the Statute," at 80 (June 8, 2018) (noting the Dissenting Opinion of Judges Monageng and Hofmanski, Separate Opinion of Judges Van den Wyngaert and Morrison, and Separate and Concurring Opinion of Judge Eboe-Osui).

185. See Dunoff & Pollack, *supra* note 140, at 264 ("In the first eighteen years of WTO dispute settlement, fewer than 8 percent of the panel reports, and fewer than 5 percent of AB reports, contained dissents or separate opinions.")

186. Appellate Body Report, *Working Procedures for Appellate Review*, Rule 4, WTO Doc. WT/AB/WP/6 (Aug. 16, 2010).

187. Alberto Alvarez-Jimenez, *The WTO Appellate Body's Decision-Making Process: A Perfect Model for International Adjudication?*, 12 J. INT'L ECON. L. 289, 302-04 (2009); see also Meredith Kolsky Lewis, *The Lack of Dissent in WTO Dispute Settlement*, 9 J. INT'L ECON. L. 895, 908 (2006) (arguing that this level of collegiality can partly be attributed to the fact that, unlike in the ICJ, members do not represent any particular geographical region or "seat").

188. Alvarez-Jimenez, *supra* note 187, at 309-10.

189. Alvarez-Jimenez, *supra* note 187, at 317-20; see also Tomer Broude, *Behavioral International Law*, 163 U. PA. L. REV. 1099, 1149 (2015) (suggesting that at the panel level, panel chairs who have been acculturated into the WTO system over time and favor consensus building have a major influence on the outcomes, hence discouraging formal dissents); Lewis, *supra* note 187, at 915 (arguing that the AB's non-discretionary case-load coupled with a high volume of cases discourages dissent).

document.¹⁹⁰ While putatively anonymous, the identity of the opinion writer is usually either known or heavily speculated upon by insiders and states.¹⁹¹

2. *Other forms of judicial speech*

Individual written opinions are not the only form of international judicial speech that have risen in prominence. Indeed, judges in different arenas of international adjudication have become more visible actors, with their pronouncements — both inside and outside the courtroom — being subject to greater scrutiny and comment.

One of the most controversial fallouts of this hypervisibility has been the ostensible policing of oral questioning from the bench during proceedings. This was brought into focus by the refusal of the U.S. in 2016 to endorse the reappointment of a WTO AB Member, Seung Wha Chang, on the basis that he had exceeded his authority in deciding issues not necessary for the resolution of the dispute. Although there was nothing to suggest that the “activist” parts of the reports—signed collectively by all AB members—should be attributed to Mr. Chang, the U.S. pointed to questions he posed during hearings as evidence of authorship.¹⁹² Apart from the dubiousness of this evidentiary standard, the incident gave rise to concerns that Members will now face incentives to be strategic in their conduct during proceedings, with an eye to how their behavior will be perceived by states and other constituencies.¹⁹³

Judges and arbitrators have taken to various academic outlets to air their views on a range of legal issues. This trend seems to be especially pronounced in areas of international law where there is a close connection between one’s academic credentials and prospects for appointment to an international tribunal. In the world of investment arbitration, a significant number of elite arbitrators cycle between academia and stints as arbitrators in specific disputes, but even those in private practice are prolific authors in trade and research outlets.¹⁹⁴ Indeed, arbitrators writing and speaking in

190. Flett, *supra* note 161, at 303-04.

191. Dunoff & Pollack, *supra* note 140, at 267-68 (giving examples of ostensible state retaliation against Members who were suspected of having voted against state interests in the form of failure to nominate/re-nominate the Member). As they show, not only may states believe that they can identify who issued the separate opinion, but also that the failure to issue a dissent in a system where dissent is permissible may be taken as a Member’s acquiescence in the reasoning and result reached by the AB). *Id.*; see also Flett, *supra* note 161, at 306-07 (remarking that the identity of the separate opinion writer “may be a matter of common knowledge” in WTO litigation circles).

192. *United States Blocks Reappointment of WTO Appellate Body Member*, 110 AM. J. INT’L L. 573, 574, 578 (2016).

193. Dunoff & Pollack, *supra* note 140, at 270-71.

194. For the career profiles and publication records of such arbitrators, like Gabrielle Kaufmann-Kohler, Brigitte Stern, Charles Brower, Albert Jan Van Den Berg, and Karl Heinz Bockstiegel, see, e.g., *Gabrielle Kaufmann-Kohler*, LÉVY KAUFMANN-KOHLER, <https://lk-k.com/team/gabrielle-kaufmann->

academic fora have driven much of the debate on the value of separate opinions in investment arbitration.¹⁹⁵

The same is true of judges of the ICJ and the ECtHR, where there is a strong tradition of judges authoring scholarly works and making frequent appearances on the conference circuit. ECtHR judges have also been remarkably candid in public about their views on separate opinions, holding interviews, writing, and speaking on the topic, both in the context of the ECtHR's institutional posture and their personal stance on the practice.¹⁹⁶

Academic fora might in fact be one of the few “respectable” avenues for voicing individual opinions open to judges in courts like the CJEU, where the legal framework precludes separate speech on the bench. The CJEU requires judges to obtain prior authorization from the Court for external activities, including teaching, participation in conferences, and other activities of an academic nature.¹⁹⁷ However, the process does not appear to constitute a serious barrier to CJEU judges exercising their freedom to weigh in on institutional issues in academic fora, including on the desirability of reforms to introduce separate opinions at the court.¹⁹⁸

C. *The Value of Separate International Judicial Speech*

Given that international judiciaries drew from domestic models, it is not surprising that arguments in support of (or against) international separate speech are parallel to those made domestically. First, separate opinions are

kohler-lawyer/ (last visited Sept. 10, 2020); Prof. Brigitte Stern, GENEVA CTR. FOR INT'L DISP. SETTLEMENT, <https://www.cids.ch/mids/the-program/the-faculty/494-brigitte-stern> (last visited Sept. 10, 2020); The Honorable Charles N Brower, TWENTY ESSEX, <https://twentyessex.com/people/charles-brower/> (last visited Sept. 10, 2020); Albert Jan van den Berg, HANOTIAU & VAN DEN BERG, <http://www.hvdb.com/albert-jan-van-den-berg/> (last visited Sept. 10, 2020); Prof. Dr. Karl-Heinz Bockstiegel, INT'L COUNCIL FOR COM. ARB., <https://tinyurl.com/y3teqega> (last visited Sept. 10, 2020).

195. See, e.g., van den Berg, *supra* note 179, at 825-36 (arguing against dissenting opinions on the ground that they mostly demonstrate bias on the part of party-appointed arbitrators). *But cf.* Brower & Rosenberg, *supra* note 180, at 7 (challenging the data in van den Berg's thesis and arguing that dissenting opinions contribute to the legitimacy of international arbitration).

196. See, e.g., Fred J. Bruinsma & Stephan Parmentier, *Interview with Mr. Luzius Wildhaber, President of the ECHR*, 21 NETH. Q. HUM. RTS. 185, 187 (2003) (where Judge Wildhaber not only speaks about activism versus judicial restraint as factors influencing the propensity to issue separate opinions, but also discusses his personal views on a range of provisions in the ECtHR); see also White & Boussiakou, *supra* note 175, at 57-58 (interviewing ECtHR judges to conclude that the majority are overwhelmingly in favor of separate opinions at the court).

197. Code of Conduct, art. 5, 2007 O.J. (C 223) 1-2; see Christoph Krenn, *Self-Government at the Court of Justice of the European Union: A Bedrock for Institutional Success*, 19 GERMAN L.J. 2007, 2024-25 (2018) (noting that a similar rule applies to other members of the CJEU, including law clerks).

198. See, e.g., Azizi, *supra* note 164 (arguing against the introduction of separate opinions at the CJEU). See generally Harm Schepel & Rein Wesseling, *The Legal Community: Judges, Lawyers, Officials and Clerks in the Writing of Europe*, 3 EUR. L.J. 165, 178-80 (1997) (for a sampling of the kinds of legal issues addressed by CJEU judges in their academic writing).

lauded as contributing to the quality of the majority judgment¹⁹⁹ and the overall architecture of international law.²⁰⁰ International separate opinions—perhaps more so than their domestic brethren—play a critical corrective role for *law making*, especially in nascent areas of international law,²⁰¹ or in identifying and aiding gap-filling in treaty instruments,²⁰² due to the absence of formal precedent internationally.

Second, as is the case domestically, separate opinions play a symbolic role in assuring the losing party that the court gave its position and arguments full consideration. Even more critically at the international level, such recognition may directly shape stakeholder confidence in the court. Considerable evidence demonstrates that such confidence is essential for continued reliance on the institution as well as compliance with its judgments.²⁰³

Third, separate opinions contribute to norms of transparency and accountability in the judicial decision-making process.²⁰⁴ Some argue that individual opinions help to ensure diversity in approaches for courts such as the ICJ that seek to represent the “main forms of civilisation and principal

199. See Lewis, *supra* note 187, at 905 (arguing that forcing a false consensus in decision-making will result in poor WTO jurisprudence in the long term).

200. See HERSCH LAUTERPACHT, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT* 66 (1958) (arguing that individual opinions “greatly facilitate the fulfilment of the indirect purpose of the Court, which is to develop and clarify international law.”); Breeze, *supra* note 154, at 407 (noting that notwithstanding the lack of a doctrine of stare decisis in investment arbitration, ICSID decisions frequently cite other ICSID decisions as well as awards rendered by other arbitral tribunals); Lewis, *supra* note 187, at 902 (“Although as a technical matter stare decisis does not apply in the WTO context, as a practical one, panels and the Appellate Body do appear to rely heavily on the logic in past reports.”).

201. Titi, *supra* note 154, at 203-05 (arguing that the *ad hoc* nature of investment arbitration means that one tribunal’s minority opinion can become another’s majority opinion and citing multiple means by which dissents contribute to the development of the law in investment arbitration); *cf.* van den Berg, *supra* note 179, at 831 (“[A] party-appointed arbitrator does not have the expectation that his or her dissent will contribute to the development of investment law because . . . dissents are virtually never relied upon in subsequent investment cases.”).

202. Lewis, *supra* note 187, at 927, 930 (suggesting that dissenting opinions may spur WTO Members to negotiate amendments to WTO Agreements); *cf.* Flett, *supra* note 161, at 314 (arguing generally against dissents at the WTO on the basis that it is equally possible for alternative viewpoints to be aired by the litigants rather than by panel or AB members).

203. Anand, *supra* note 137, at 794 (alluding to the political and psychological importance of individual opinions for the losing party).

204. Adam M. Smith, “*Judicial Nationalism*” in *International Law: National Identity and Judicial Autonomy at the ICJ*, 40 *TEX. INT’L L.J.* 197, 226 (2005) (claiming that dissents secure individual judicial accountability as well as institutional integrity); *see also* Mistry, *supra* note 171, at 310 (arguing that separate opinions “serve as a potential check on the use or abuse of judicial authority by other political actors.”); Pedro J. Martinez-Fraga & Harout Jack Samra, *A Defense of Dissents in Investment Arbitration*, 43 *U. MIA. INTER-AM. L. REV.* 445, 470 (2012) (emphasizing the “necessary connection between the tenets of *transparency, reason, and objectivity, and the jurisprudence of dissents.*”); Meredith Kolsky Lewis, *Dissent as Dialectic: Horizontal and Vertical Disagreement in WTO Dispute Settlement*, 48 *STAN. J. INT’L L.* 1, 11 (2012) (describing WTO adjudication “as a type of dialectical process, whereby ‘opinions communicate to audiences beyond the immediate parties to the dispute.’”).

legal systems of the world.”²⁰⁵ This relationship between individual opinions and adherence to democratic values and principles by international courts has been especially prominent in proposals for reform at tribunals that currently prohibit or discourage separate opinions, for example the WTO and the CJEU.²⁰⁶

As is the case domestically, separate international opinions also have their detractors. Critics worry that individual judicial voices muddy the central message of the court and erode the authority and legitimacy that a unanimous judgement commands. This danger is pronounced in the case of new tribunals that are still in the process of building a reputation and goodwill.²⁰⁷ Some scholars suggest that separate opinions are counterproductive at a court such as the ICC. Differences in judicial opinion on the guilt or innocence of an individual, especially a high-level accused alleged to have committed horrific crimes, can erode credibility in the judgment and weaken its law-guidance function.²⁰⁸ In addition, parties and states express concern about the utility of dissents that are acrimonious in tone and do not seem to add anything of substance to the reasoning of the court.²⁰⁹

Notwithstanding these critical voices, the law and practice of international tribunals evince a clear trend in favor of separate judicial speech, both on and off the bench.

IV. A TYPOLOGY OF JUDICIAL SPEECH

This Part offers a typology of separate judicial speech. Its purpose is not to exhaustively catalogue every possible instance of such speech. Rather,

205. See Anand, *supra* note 137, at 801; Mistry, *supra* note 171, at 310 (arguing that individual opinions, by the very fact of their existence, are expressive of the diversity of ICJ judges). In addition, individual opinions open up the possibility for different legal traditions to be voiced and given effect to in the adjudicatory process. *Id.*; see also Bruinsma & Blots, *supra* note 176, at 185-86 (suggesting that individual opinions at the ECtHR enable the different national traditions of the Member States to feel at home in the common European project); cf. Flett, *supra* note 161, at 317 (contrasting this vision of international courts with that of the *raison d’être* and composition of the WTO panel and AB Members, which eschew this geographical link).

206. See, e.g., Lewis, *supra* note 187, at 923 (arguing that lack of dissents is representative of broader complaints about the lack of transparency in the WTO dispute settlement process); Turenne, *supra* note 163, at 743 (“[I]t would be desirable to have separate opinions, as they permit the tensions and conflicts of the social order to be played out in the jurisdictional structure of the European system.”); Solanke, *supra* note 163, at 708 (“[A] corporate court is no longer appropriate for the post-Lisbon democracy in the EU.”).

207. See, e.g., James Bacchus, *Lone Star: The Historic Role of the WTO*, 39 TEX. INT’L L.J. 401, 409 (2004) (arguing that the lack of dissent in the initial years of the WTO system was a deliberate move to build respect for its decisions); Lewis, *supra* note 204, at 10 (conceding that a persistent failure to achieve consensus could have destabilizing effects given the WTO’s relative youth).

208. See, e.g., Leila N. Sadat, *Fiddling While Rome Burns? The Appeals Chamber’s Curious Decision in Prosecutor v. Jean Pierre Bemba-Gombo*, EUR. J. INT’L L. BLOG: EJIL: TALK! (June 12, 2018), <https://tinyurl.com/y65se2j6>.

209. Anand, *supra* note 137, at 789 (referring to the “general decline in courtesy and good manners” as manifested in some dissenting opinions at the ICJ).

combining the analysis of the laws and practice of speaking separately in Parts I and II with insights from political science, sociology, law, and language, this Part suggests that separate judicial speech falls along five dimensions of variance. These dimensions represent layered continuums upon which we might place the most salient forms of judicial speech, and reflect different approaches to the role and function of judges in the creation, development, application, and reception of international and domestic law.

A. *Formal-Informal*

The prototypical separate speech is the dissent—mostly written, but occasionally oral—or less commonly, the concurrence. These, however, represent only a small fraction of the numerous ways in which judges make their individual voices heard. Judicial speech occurs in multiple fora outside of the courtroom, straddling the divide between formality and informality. ‘Formal’ refers to judicial speech that is part of courtroom proceedings, such as a written dissenting opinion; ‘semi-formal’ to speech that is extrajudicial in character but which may nonetheless be considered an extension of the judicial role, for example an academic article; and ‘informal’ to statements made in the public sphere without any explicit reference to the speaker’s judicial identity.

Scholarship on domestic and international courts focuses primarily on the first category, and largely on dissenting opinions. Other forms of speech that a judge might employ during courtroom proceedings have been largely ignored. After separate written opinions, oral dissents are perhaps the most commented upon type of formal judicial speech. As discussed in Part I, oral dissents have a long history in the U.S. context, and are often characterized as a more profound act of disagreement and a way of speaking to a wider constituency of political actors.²¹⁰

There is virtually no scholarly analysis of oral dissents in international tribunals. Judge Sow’s “dissent” in the Charles Taylor trial attracted some attention, only to be dismissed as a public statement rather than a bona fide oral dissent.²¹¹ What seems clear is that choosing to speak from the bench in oral form has a different resonance from doing so in writing. Through its nearly simultaneous delivery with the majority judgment, the oral opinion conveys and embodies immediacy, especially in a world of live media updates and the Twitterverse. When delivered in charged circumstances such

210. *See supra* note 39 and accompanying text.

211. *See* Charles Jalloh, *The Verdict in the Charles Taylor Case and the Alternate Judge’s “Dissenting Opinion,”* EUR. J. INT’L L. BLOG: EJIL: TALK! (May 11, 2012), <https://tinyurl.com/y4nh8ts3> (arguing that Alternate Judge Sow’s views in the Charles Taylor case at the Special Court for Sierra Leone were a “public statement” rather than a dissent, on account of Judge Sow’s status as an ad hoc judge).

as the Taylor trial, an oral dissent not only demands but *commands* public and media attention in a way that a written legal text can rarely imitate.

Beyond the oral dissent, judges formally speak from the bench in the form of questions or statements during the course of a hearing. Some studies consider the strategic reasons behind oral questioning by U.S. Supreme Court justices or its use as a substitute for judicial deliberation,²¹² but little attention has been devoted to the practice at other levels of the judiciary or its use in other tribunals. International tribunals differ significantly in the extent to which oral questioning is commonplace and expected. Different chambers within the same tribunal may also follow a range of practices, depending on the composition of a specific bench. For instance, some but not all of the ICC chambers follow an informal convention whereby other judges channel questions through the Presiding Judge, permitting little space for identifiable separate speech. An outlier among international criminal tribunals, the Extraordinary Chambers in the Courts of Cambodia (ECCC) follows the civil law model, with judges largely displacing the parties' lawyers and assuming primary responsibility for questioning witnesses.²¹³

Interpreting judicial questioning can be complicated. For instance, judicial questioning during the hearing might be motivated by seeking to better understand an argument, or as a way to play devil's advocate to test a party's arguments and assumptions. Neither of these aspects are true of separate written or oral opinions. Interpreting judicial speech gets even trickier once we move outside the courtroom to semi-formal situations in which judges deliver public lectures, participate in symposia, and publish academic articles. In doing so, they typically signal that anything they say or write is not in their judicial capacity. Nonetheless, it is difficult to fully isolate formal judicial utterances from the speech of individual judges in other public fora. Nor is it entirely clear that the audience is meant to do so. A prime example of this elision are the frequent statements on a range of legal issues by CJEU judges—barred from voicing their individual positions within the courtroom—in academic outlets, presumably with a view to at least partially influencing the political debate on reform of the CJEU.²¹⁴

Another instance of controversial semi-formal speech occurred when AB Member Thomas Graham purportedly threatened to resign unless the WTO adopted reforms to address U.S. criticisms, and subsequently unless

212. See *supra* note 56 and accompanying text.

213. INTERNATIONAL CRIMINAL PROCEDURE: PRINCIPLES AND RULES 703 (Göran Sluiter et al. eds., 2013).

214. See generally Mitchel Lasser, *European Judicial Appointments Reform: A Neo-Institutionalist Approach*, in JUDICIAL POWER: HOW CONSTITUTIONAL COURTS AFFECT POLITICAL TRANSFORMATIONS 82, 103-04 (Christine Landfried ed., 2019) (explicating the influence of judges on the European judicial appointments process).

member governments removed the Director of the AB Secretariat, Werner Zdouc.²¹⁵ Two AB Members (although not Graham himself) and one former Member responded in an open letter to counter these “misrepresentations” about the AB’s position on Zdouc.²¹⁶

Codes of ethics and rules governing conflicts of interest typically cabin the ability of a judge to speak in these fora. While the U.S. government largely enforces these at the domestic level, it is rare to see any formal sanctions for their violation by international judges. Indeed, as with U.S. Supreme Court justices, judicial candor and the willingness to ‘call things out’ might make the judge a much sought-after invitee in non-courtroom settings, especially for judges who have close links with academia. These semi-formal ways of engaging with legal and political communities could significantly shape the interpretation and reception of a formal judicial opinion, and may have broader institutional ramifications, a point to which the next Part returns.

Finally, informal judicial speech may take the form of statements by judges that are ostensibly divorced from the judicial role but are nonetheless intended for public consumption. This mode of speaking separately is more common in legal systems like that of the U.S. where judges, particularly those appointed to the Supreme Court, have significant public profiles.²¹⁷ Supreme Court justices have been remarkably willing to embrace blurring the boundary between their judicial and non-judicial lives at different points in history, including through authorizing biographies, writing memoirs, and authoring works of fiction and non-fiction, becoming household names in the process. The latest example is Justice Ruth Bader Ginsburg’s ascendance as a pop culture icon, who transcends both the generational divide and low and high-brow culture, inspiring biopics, opera, a Saturday Night Live character, action figures, tattoos, t-shirts and even memes with the phrase “I dissent.”²¹⁸ A similar trend seems to be taking hold in the United Kingdom, with the public labeling the President of the Supreme Court, Lady Hale, as the “Beyoncé” of the legal profession.²¹⁹

No international judge has acquired a public profile to this extent, but examples abound of cults of celebrity in specific areas of international law, both inspiring and inspired by informal judicial speech. Examples include the recent Netflix historical drama miniseries that offers a revisionist history

215. Steve Charnovitz, *Comments on the Appellator Graham Affair*, INT’L ECON. L. & POL’Y BLOG (Dec. 2, 2019), <https://tinyurl.com/y4c6lafc>.

216. Hannah Monicken, *WTO Appellate Body Members Condemn ‘Misrepresentations’ in Media*, WORLD TRADE ONLINE (Dec. 3, 2019, 2:04 PM).

217. *See generally* DAVIS, *supra* note 41.

218. Stephanie Francis Ward, *Supreme Icon*, 104 A.B.A. J. 34 (2018).

219. Caroline Binham, *Brenda Hale, a Judge with the Human Touch*, FIN. TIMES (Sept. 20, 2019), <https://www.ft.com/content/826cefc0-db8a-11e9-8f9b-77216ebe1f17>.

of the International Military Tribunal for the Far East (IMFTE) through the eyes of its main protagonist, dissenting justice Radhabinod Pal.²²⁰ Recent memoirs also fall into this category, such as those of Carl Baudenbacher, former judge and President of the Court of Justice of the European Free Trade Association States, and former Judges Weeramantry and Buergenthal of the ICJ.²²¹ Can commentators isolate the philosophical, political, and normative positions contained in these reflections from efforts to predict or construe a judge's legal opinion? Does such informal speech possess independent legal salience given that the judge's voice is solicited and amplified by virtue of their former or current role as a judge?

B. *Visible-Obscured*

Must a judge voice an opinion publicly and prominently in order for it to count as separate judicial speech? While there are numerous examples of judges with a penchant for issuing distinctive and extremely visible separate opinions, this propensity is invariably mediated by the procedures and conventions of the specific court or tribunal.

An individual opinion does not, however, need to be prominently labelled and displayed as such. In the United States, prior to the introduction of a syllabus appended to each opinion under the Burger Court, it was difficult to discern the composition of voting coalitions; in addition, when justices merely noted disagreements without an opinion, these were buried deep within Supreme Court rulings.²²² The civil-law-influenced ECCC has at least one instance of a dissenting opinion embedded within a judgement—the few paragraphs contained within the Trial Chamber's judgment in the *Duch* case.²²³ Similarly, separate opinions in the WTO—whether concurring or dissenting—are anonymously embedded in the dispute reports, or in some cases included within footnotes.²²⁴ Even less visible are instances

220. *Tokyo Trial*, NETFLIX (2017), <https://www.netflix.com/title/80091880>.

221. CARL BAUDENBACHER, *JUDICIAL INDEPENDENCE: MEMOIRS OF A EUROPEAN JUDGE* (2019) (containing a blurb for the book that describes it as “[r]ichly seasoned with personal memories and anecdotes, it offers unique insights into how European courts actually work.”); 3 CHRISTOPHER GREGORY WEERAMANTRY, *TOWARDS ONE WORLD: THE MEMOIRS OF JUDGE C.G. WEERAMANTRY: THE INTERNATIONAL COURT AND THEREAFTER* (2014); THOMAS BUERGENTHAL, *A LUCKY CHILD: A MEMOIR OF SURVIVING AUSCHWITZ AS A YOUNG BOY* (2009).

222. Fife et al., *supra* note 54, at 185; *see also* PAMELA C. CORLEY, AMY STEIGERWALT & ARTEMUS WARD, *THE PUZZLE OF UNANIMITY: CONSENSUS ON THE UNITED STATES SUPREME COURT* 86-87 (2013) (suggesting that the introduction of a syllabus “made each justice publicly responsible for his or her votes” and may have “led to the death of acquiescence and notation.”).

223. In the Trial Chamber, Judge Cartwright's dissent on a point of law was embedded within the decision. *Prosecutor v. Eav*, Case No. 001/18-07-2007-ECCC/TC, Judgement, ¶¶ 397-99 (Extraordinary Chambers in the Courts of Cambodia, July 26, 2010).

224. Flett, *supra* note 161, at 303-04.

when a judge expresses disagreement internally over procedure, reasoning, or outcome, with no written or public trace of its expression.

On the far end of the spectrum, there are cases where a judge would be inclined to issue an individual opinion but instead silently acquiesces in the majority judgment, as in the case with the U.S. domestic practice of issuing “graveyard dissents.”²²⁵ Judges might also circulate and exchange memoranda, letters, notes, and emails that may never see the light of day unless they are revealed through the publication of official archives.²²⁶ At the international level, some indications of a similar practice might be found in the procedure for producing written opinions at various tribunals. For instance, the ICJ requires each individual judge to formulate and circulate a tentative written opinion as the basis for internal judicial deliberation. Thus, there is at least a possibility that some of these individual opinions are eventually buried, for the sake of unanimity, in a high-stakes dispute.²²⁷ Similarly, due to the single judgment requirement at the CJEU, “whatever cannot be agreed to is simply excised from the judgment,” rendering it largely invisible to those outside the court.²²⁸

A number of personal and institutional considerations may influence the decision to refrain from visibly nailing one’s colors to the mast, including the desire to avoid incurring the wrath of those who appointed you, career ambitions, preserving an outwardly united judicial front, and surrendering to the majority on an issue one does not care too much about in order to increase one’s bargaining power on future issues that are more important.²²⁹ The choice to do so, however, will impact the reach of the reasons that animated the separate opinion, since it may be partially or completely obscured from public knowledge and scrutiny.

Off the bench, separate speech is highly visible when judges give public talks, publish op-eds, or give interviews. Both international and domestic judges frequently engage in these activities, typically on the subject of the institution in which they serve(d). Academic publications acquire some degree of visibility as well, and quite a few judges publish on legal subjects both

225. See *supra* note 52 and accompanying text.

226. See Kathryn A. Watts, *Judges and Their Papers*, 88 N.Y.U. L. REV. 1665, 1669 (2013) (noting that federal judges’ working papers are considered private property, leading to inconsistent publication across judges).

227. Mistry, *supra* note 171, at 311-12.

228. Sally J. Kenney, *Beyond Principals and Agents: Seeing Courts as Organizations by Comparing Référendaires at the European Court of Justice and Law Clerks at the U.S. Supreme Court*, 33 COMPAR. POL. STUD. 593, 598 (2000).

229. For a sophisticated analysis of the factors influencing judicial transparency in international tribunals, see Dunoff & Pollack, *supra* note 140, at 236-38.

domestically and internationally.²³⁰ This practice is perhaps more common at the international level, as many judges hail from academia and often continue in their positions after being elected or return to them after serving their terms.

Judges also engage in practices that bury, at least temporarily, their off-the-bench remarks. For instance, judges maintain private papers, diaries, and notes on a range of legal and non-legal issues, including but not limited to their judicial career. These may never be published, be made available selectively upon their death, or be embargoed in other ways till some specified future date or event.²³¹

C. *Individual-Collective*

Collegiality on multi-member courts is typically lauded. Indeed, critiques of separate opinion writing point to the costs of separate opinions on interpersonal and working relationships.²³² On any multi-member court, one can expect judges to value collegiality given that an individual has little to no authority alone; substantive judgments require agreement amongst at least a majority of judges.²³³ In the U.S. context, some judges even point to collegiality considerations when explaining why they sometimes silently acquiesce.²³⁴ Collegiality dictates that judges should work “closely together with ‘respect for the strengths of the others,’ with restraint on ‘one’s pride of authorship’ . . . in the pursuit of ‘excellence in the court’s decision.’”²³⁵ In this view, the romanticized ‘lone dissenter’²³⁶ or the proliferation of strident separate opinions represents a threat to collegiality.²³⁷ Yet even in the formal

230. For instance, many CJEU judges have published extensively on European Union law. *See, e.g.*, G. F. MANCINI, DEMOCRACY AND CONSTITUTIONALISM IN THE EUROPEAN UNION: COLLECTED ESSAYS (2000).

231. *See* Watts, *supra* note 226, at 1674-75.

232. *See, e.g.*, FRANK M. COFFIN, ON APPEAL: COURTS, LAWYERING, AND JUDGING 224 (1994) (noting that separate opinions are “ruptures in the cloak of consensus ordinarily worn by collegiality. To the extent that separate opinions are deemed necessary by the writers, to that extent is collegiality diluted.”); Sur, *supra* note 120.

233. Ginsburg & Falk, *supra* note 115, at 1017 (making this point with respect to the U.S. courts of appeals).

234. Ginsburg, *supra* note 107, at 141 (noting the “competing tugs of collegiality and individuality.”).

235. Frank B. Cross & Emerson H. Tiller, *Understanding Collegiality on the Court*, 10 J. CONST. L. 257, 258 (2008) (quoting COFFIN, *supra* note 232, at 215).

236. *See* THE GREAT DISSENTS OF THE “LONE DISSENTER”: JUSTICE JESSE W. CARTER’S TWENTY TUMULTUOUS YEARS ON THE CALIFORNIA SUPREME COURT, at VII (David B. Oppenheimer & Allan Brotsky eds., 2010). To be sure, conformity to group pressure makes dissenting alone difficult for judges. *See* Donald Granberg & Brandon Bartels, *On Being a Lone Dissenter*, 35 J. APPLIED SOC. PSYCH. 1849, 1857 (2005) (finding that Supreme Court justices “apparently find it easier to be in the minority if there is at least one other Justice seeing things their way.”).

237. COFFIN, *supra* note 232, at 224.

judicial context, separate speech is not always individualistic and may even exhibit or contribute to collegiality on the court.

At times, a judge speaks separately as a member of a collective, such as when issuing a jointly penned separate opinion. Despite the prevalence of joint separate opinions domestically and internationally, we know very little about the reasons why a judge chooses to join an opinion penned by a colleague or—in a distinct act of group-think-and-write—jointly pen a separate opinion. When one examines joining behavior itself, it is typically in the context of the decision to join a majority or plurality opinion.

What might explain why a judge would choose to collectively speak separately? The prevalence of this practice likely increases as the number of judges on a given bench increases, and decreases as their diversity does. With more colleagues on the bench, there is a greater likelihood that a judge will agree with at least one of them—or can find an acceptable compromise—such that penning together or joining makes sense for both efficiency reasons and the strength of speaking together. Conversely, if ideological or other forms of diversity on the bench are extreme, the probability of finding a like-minded co-author is smaller. These two factors alone, however, provide an insufficient account of why and when this practice emerges.

For example, while the fifteen ideologically and culturally diverse ICJ judges frequently append separate opinions, they do so as individuals as often as they do collectively, with the practice of joint separate opinions present since the court's inception.²³⁸ In contrast, despite the relatively large size of the WTO's Appellate Body, seven members hailing from diverse cultures and legal systems, it has adhered to a position of strict collegiality. This has led to intense bargaining and deliberation internally, but a near perfect record of unanimous—or by consensus—decisions.²³⁹ The large size and toward individualized views

Workload constraints, legal culture, or professional incentives may shape the practice of joint separate opinions. In the context of the ECtHR, joint separate opinions are ubiquitous, which may be due to the fact that separate opinion writers receive no drafting support from the Court's Registry.²⁴⁰ Most cases that pass the admissibility stage are ultimately decided by seven-judge Chambers, where separate opinions are less frequent and tend

238. A joint separate opinion was appended to the ICJ's first 1948 judgment on Preliminary Objections in the *Corfu Channel* case. *Corfu Channel (U.K. v. Alb.)*, Judgment on Preliminary Objection, 1948 I.C.J. 15, 31 (Mar. 25) (separate opinion by Basdevant, J., Alvarez, J., Winiarski, J., Zoricic, J., De Viisscher, J., Badawi Pasha, J. and Krylov, J.).

239. See, e.g., Alvarez-Jimenez, *supra* note 187, at 289-90.

240. Cosette D. Creamer & Zuzanna Godzimirska, *Trust in the Court: The Role of the Registry of the European Court of Human Rights*, 30 EUR. J. INT'L L. 665, 679 (2019).

toward individualized views.²⁴¹ The plethora of joint separate opinions, however, is readily apparent for Grand Chamber judgments, which are reserved for cases that raise serious interpretation problems and are decided in a chamber of seventeen judges.

Judges also speak separately together with their clerks when they rely on them to conduct legal research and draft opinions, a widespread practice both domestically and internationally.²⁴² Despite the ubiquity of reliance on clerks or judicial assistants, there is comparatively little written about their role in foreign courts²⁴³ and even less for international ones.²⁴⁴ American judges frequently describe these relationships as collaborative, with clerks as “partners,” “alter-egos,” or a “team of horses in a harness,”²⁴⁵ and the relationship as “the most intense and mutually dependent one . . . outside of marriage, parenthood, or a love affair.”²⁴⁶

At the international level, a judge’s dependency on the equivalent of a clerk may reduce the proclivity to pen separate opinions. In the WTO, for example, Secretariat officials (who assist panelist adjudicators) perform much of the legal research and writing of panel reports, which may help explain the low number of dissents.²⁴⁷ In the CJEU, *référéndaires* perform many of the same tasks as domestic clerks, including drafting opinions and orders when their judge is *rapporteur*. These drafts ultimately result in a single judgment—thus not technically separate speech—but the drafting process

241. Studies have found that separate opinions are more common in Grand Chamber than in Chamber judgments. See, e.g., Fred J. Bruinsma, *The Room at the Top: Separate Opinions in the Grand Chambers of the ECHR (1998-2006)*, 2008 ANCIILLA IURIS 32, 32-33 (additionally suggesting that national judges may be *more* likely to dissent when their country is found in violation of the Convention or *more* likely to write a separate concurrence as an “effort to justify the majority judgment in terms domestically understood.”).

242. On the desirability of identifying judicial self-authorship in the domestic context, see Stephen J. Choi & G. Mitu Gulati, *Which Judges Write Their Opinions (And Should We Care)?*, 32 FLA. ST. U. L. REV. 1077 (2005). For an overview of research in the U.S. context, see Artemus Ward, *Law Clerks*, in THE OXFORD HANDBOOK OF U.S. JUDICIAL BEHAVIOR 100 (Lee Epstein & Stefanie A. Lindquist eds., 2017).

243. See, e.g., Joachim Wieland, *The Role of the Legal Assistants at the German Federal Constitutional Court*, in CONSTITUTIONAL COURTS IN COMPARISON: THE U.S. SUPREME COURT AND THE GERMAN FEDERAL CONSTITUTIONAL COURT 197 (Ralf Rogowski & Thomas Gawron eds., 2002); Kelly Bodwin, Jeffrey S. Rosenthal & Albert H. Yoon, *Opinion Writing and Authorship on the Supreme Court of Canada*, 63 U. TORONTO L.J. 159 (2013).

244. See, e.g., LEGITIMACY OF UNSEEN ACTORS IN INTERNATIONAL ADJUDICATION (Freya Baetens ed., 2019); Creamer & Godzimirska, *supra* note 240; Kenney, *supra* note 228.

245. Rick A. Swanson & Stephen L. Wasby, *Good Stewards: Law Clerk Influence in State High Courts*, 29 JUST. SYS. J. 24, 39-40 (2008).

246. Patricia M. Wald, *Selecting Law Clerks*, 89 MICH. L. REV. 152, 153 (1990).

247. Joost Pauwelyn & Krzysztof J. Pelc, *Who Writes the Rulings of the World Trade Organization? A Critical Assessment of the Role of the Secretariat in WTO Dispute Settlement* (Sept. 26, 2019) (unpublished manuscript), <https://ssrn.com/abstract=3458872>.

itself does represent an instance of the judge rapporteur ‘speaking together’ with her *référéndaire*.²⁴⁸

Both domestic and international judges further rely on clerks to assist in preparation for oral argument and to suggest questions for the judge to pose to parties.²⁴⁹ For instance, WTO panelists sometimes ask questions clearly prepared for them by the Secretariat.²⁵⁰ In a number of international courts, one or more judicial assistants attend hearings or oral arguments, sometimes passing notes and communicating about arguments being made. Such practices raise a host of challenging conceptual and normative questions: when judges pose questions prepared by their judicial assistant(s), should we consider this an act of individual or collective separate speech? Who bears responsibility for what is said, or put differently, who is speaking?

D. Present-Future Oriented

Judicial speech has a temporal orientation, often linked to the motivation behind speaking separately. If the intent is to persuade colleagues or influence the thinking of litigants, a judge will orient her remarks to the present context and audience.²⁵¹ At other times, she is oriented to the proximate or even distant future, with the intent to influence the thinking of legislatures, future litigants, other courts, future judicial majorities, or the next generation of law students, in the hopes of shaping policy or jurisprudence. These signals—attempts at persuasion about appropriate policies or legal principles—to the public and the future, often at quite a distance, outline an alternative vision.

This is particularly true for dissents, which Justice Brennan characterized as “appeal[s] to the future.”²⁵² Concurrences may be oriented more to the immediate future, in terms of encouraging lawyers and litigants to focus their efforts in a specific direction, or to make a “record for the future.”²⁵³

248. Kenney, *supra* note 228. A few studies have examined the opinion writing process at the CJEU, noting that the style and language of the judgments are heavily determined by the working language of the Court (French) and the single judgment requirement. Sivaram Cheruvu, *How Do Institutional Constraints Affect Judicial Decision-Making? The European Court of Justice's French Language Mandate*, 20 EUR. UNION POL. 562, 565-568 (2019); Angela Huyue Zhang, *The Faceless Court*, 38 U. PA. J. INT'L L. 71, 112 (2016) (“Sometimes ambiguity and unequivocal language are used to cloak disagreement.”); Karen McAuliffe, *Hybrid Texts and Uniform Law? The Multilingual Case Law of the Court of Justice of the European Union*, 24 INT'L J. FOR SEMIOTICS L. 97, 98-99 (2011).

249. Timothy R. Johnson et al., *Advice from the Bench (Memo): Clerk Influence on Supreme Court Oral Arguments*, 98 MARQ. L. REV. 21, 36 (2014); Todd C. Peppers et al., *Surgeons or Scribes? The Role of United States Court of Appeals Law Clerks in “Appellate Triage,”* 98 MARQ. L. REV. 313, 320 (2014).

250. Anonymous Interview with Secretariat Off., in Geneva, Switz. (Jan. 13, 2014).

251. See Wood, *supra* note 30, at 1456.

252. Brennan, *supra* note 107, at 432, 438.

253. Wood, *supra* note 30, at 1453.

or in Justice Frankfurter's words, "record prophecy and shape history."²⁵⁴ All acts of speaking separately are further oriented to the proximate future when they seek to spark deliberation or provide impetus for activists and broader social movements to push back against majority opinions that are "inconsistent with the values of the community they represent."²⁵⁵

Other ways of speaking separately—such as academic articles or policy memos on court operations—similarly orient the performative force of separate judicial speech to future developments. A striking example is how heavily involved previous and sitting judges of the ECtHR have been in debates surrounding reform of the European Convention on Human Rights. A number of judges have written policy papers, articles, and given speeches that weigh in on the reform debates from Protocol 11 to Interlaken and beyond.²⁵⁶

It is worth noting, however, that there will be occasions where there is a disjunction between the intended temporal orientation of the separate speech and its actual impact, if and when it materializes. While judges may intentionally choose to focus on specific types of content—legal or extra-legal—or adopt a particular style or form of speech—colloquial or technical—with a certain audience in mind, they will have precious little control over how and when this speech gets taken up by various audiences. Present-oriented individual speech may take months or even years to percolate into wider public consciousness and debate, though a judge might try to influence the pace and reach of its dissemination by generating the appropriate publicity.²⁵⁷ This might in turn raise concerns about judicial propriety and the limits of direct judicial engagement with external stakeholders. Part IV returns to these considerations.

E. Monologic-Dialogic

Not all instances of speaking separately are acts of defiance or rebellion. Indeed, appending a separate opinion, or even a dissent, may be motivated by a desire to bolster the reasoning or conclusion reflected in a majority judgment. Dissents and concurrences could also serve as a medium for engaging one's fellow judges in a visible dialogue on the substance of the legal dispute. Separate opinions can thus be more or less monologic or dialogic, based on whether the speech is directed towards and in conversation with

254. Felix Frankfurter, *Mr. Justice Holmes and the Constitution: A Review of His Twenty-Five Years on the Supreme Court*, 41 HARV. L. REV. 121, 162 (1927).

255. Guinier, *supra* note 11, at 13-14.

256. *See, e.g.*, Sir Nicolas Bratza, President, Eur. Ct. Hum. Rts., Speech at the Brighton Ministerial Conference (Apr. 18-20, 2012), <https://tinyurl.com/y49hw53a>.

257. *See* Neha Jain, *Radical Dissents in International Criminal Trials*, 28 EUR. J. INT'L L. 1163, 1172, 1181 (2017) (citing instances where judges have themselves sought to publicize their separate opinions).

the other members of the bench, or if it is primarily individualistic and oppositional in character.

Dialogic separate opinions include a wide range of voices, in terms of style and content; what is common to this category is that although the judge chooses to speak individually, she refrains from questioning the bona fides or the legitimacy of the judicial body, of the fellow members of the court, or of the majority opinion. Dialogic concurrences, dissents, and declarations may be terse and legalistic on the one hand, or eloquently poetic on the other. In every case, the judge seeks to add her voice, in the form of a set of reasons or in the fashioning of the ultimate verdict, to the voice of the court. A dialogic separate opinion will engage with the reasoning and conclusions of the majority while charting a different course for assessing the legal dispute at issue. Whether assertive or deferential, the dialogic opinion is typically respectful of the authority of the legal process and of the institution of which it is a part. Its reasoning will be directed towards the fellow members of the court, as well as to other stakeholders in the legal process with a view to encouraging legal debate, development, and change in a constructive spirit.

In contrast, monologic separate opinions are not addressed only—or even primarily—to fellow judges. The monologic separate opinion typically avoids a point-by-point rebuttal of the legal or factual analysis set out in the majority judgment; instead, it seeks to construct its own version of the dispute and refutes the majority's argumentation within the structure of the separate opinion's discourse. In this sense, it aspires to equal the stance of the majority opinion: it appropriates alternative voices and allows differences to be aired, but only to the extent they can be addressed and answered within the controlling narrative of the individual opinion.²⁵⁸

The monologic opinion may be forcefully individualistic in its tone. To the extent that remarks are addressed to other members of the court, they do not exhibit the hope or expectation of a continued dialogue and at times veer towards the other extreme of reproachful or even accusatory. In some cases, the refusal to engage comes at a serious cost to civility and to institutional legitimacy.

This danger is evident in monologic opinions both on and off the bench. A good example of the former is Judge Flavia Lattanzi's "partially dissenting opinion" in the *Šešelj* case at the International Criminal Tribunal for Yugoslavia. From the very outset, she makes no effort to conceal her contempt for the majority judgment, claiming that the qualifier "partial" to her dissent is but a euphemism, given that her disagreement could hardly be more

258. *Id.* at 1171-72.

complete on every aspect of the case.²⁵⁹ She upbraids the majority for blaming the prosecution for poor case handling and consistently criticizes the judgment for its failure to apply correct law, properly evaluate the evidence, and supply clear—or indeed any—reasoning for its conclusions.²⁶⁰ Her closing statement could not be more damning: “[W]ith this Judgment we have been thrown back centuries into the past, to a period in human history when we used to say — and it was the Romans who used to say this to justify their bloody conquests and the assassinations of their political enemies during civil wars: *Silent enim leges inter arma*.”²⁶¹ Judge Lattanzi doubled down on this official opinion with off-the-bench remarks on the judgment during an interview, claiming the “ruling amounts to nothing” because “it is done so poorly, both in fact and law, that it is a nullity.”²⁶²

A more recent and bizarre form of a monologic extra-judicial opinion is Australian Judge David Re’s litigation before the Appeals Chamber of the Special Tribunal for Lebanon (STL) (to which he had been appointed as Presiding Judge in Trial Chamber I). In a series of motions filed before the STL, he contested the appointment of judges to Trial Chamber II, sought to prevent the swearing-in of a fellow judge, and subsequently accused the President of the STL and a fellow judge on the Appeals Chamber of breaching the fundamental rule of judicial impartiality.²⁶³ A judge—as opposed to a party to the dispute—filing a motion before the very court of which he is a member to disqualify another judge is unprecedented in both domestic and international law.

This choice of argumentative style is consequential for the force with which it conveys the author’s values; in short, “words are politics.”²⁶⁴ When a judge elects to voice a monologic separate opinion, she explicitly or implicitly challenges the institutional authority of the court, the legitimacy of the majority opinion, or both. In contrast to a dialogic opinion, which may be interpreted as an act of participating in a collective judicial enterprise, a monologic separate opinion constitutes a self-conscious denunciation of it.

259. Prosecutor v. Šešelj, Case No. IT-03-67-T, Partially Dissenting Opinion of Judge Flavia Lattanzi, ¶ 1 (Int’l. Crim. Trib. for the Former Yugoslavia Mar. 31, 2016).

260. *Id.* ¶¶ 3, 10-13, 15, 18, 22, 32, 72, 74, 78, 89, 115.

261. *Id.* ¶ 150.

262. Andrea Oskari Rossini, *Šešelj Verdict: The Dissenting Judge*, OBC TRANSEUROPA (Apr. 8, 2016), <https://tinyurl.com/y27nxph6> (recounting an interview with Judge Flavia Lattanzi).

263. See Cale Davis, *Judge David Re Cautioned Against Further Litigation, Proceeds with Further Litigation*, OPINIOJURIS (Jan. 30, 2020), <https://tinyurl.com/y5knqznt>; Cale Davis, *Judge Fights for Another Trial at the Special Tribunal for Lebanon*, OPINIOJURIS (Jan. 1, 2020), <https://tinyurl.com/y2f6cc3u> (detailing the twists and turns in this high-profile litigation).

264. Martti Koskenniemi, *Miserable Comforters: International Relations as New Natural Law*, 15 EUR. J. INT’L RELS. 395, 395 (2009).

V. RETHINKING THE ROLE OF JUDGES AND JUDICIARIES

What is at stake in disaggregating separate judicial speech and identifying dimensions along which these acts vary? Understanding the reasons behind and effects of different ways of speaking separately is central to a comprehensive evaluation of the role that judges—as individuals—do and should play within society, domestic or international. Moreover, mapping what judges are actually doing—on and off the bench—improves our ability to weigh the tradeoffs embodied in particular design choices for judicial institutions and ethical rules. This section first identifies some of the stakes in recognizing and being attentive to the forms of separate judicial speech and the various ways in which speaking separately is consequential. It then outlines directions for future research in this area.

A. *The Consequences of Separate Judicial Speech*

When a judge speaks separately, she potentially speaks to multiple audiences, both intended and unintended. The extent to which the different forms of judicial speech have ‘effects’ can vary from broad and significant, to less impactful but still wide-reaching consequences, to consequential for a limited audience only.

A judge’s colleagues represent her most proximate audience. Speaking separately can be consequential for fellow judges on the bench, in that doing so may convince colleagues to adopt a different finding or line of reasoning. Even if this attempt at persuasion is unsuccessful, separate opinions can force the majority into a dialogue with the opinion,²⁶⁵ either in private—in the hope that the judge inclined to speak separately might limit their disagreement to a graveyard dissent or a dubitante opinion—or in public, with the expectation that the majority opinion will be the better for having demonstrated that it has considered the minority viewpoint. A failure to engage with the individual opinion may have consequences for collegiality on the bench, though the type of the separate speech will mitigate such consequences, with dialogic or collective separate opinions more likely to persuade and less likely to corrode collegiality.

Parties to a case represent the next immediate audience. Speaking separately—when visible and not obscured—may either vindicate the position of the losing party to some extent or provide alternative support for the winning party. Lines of questioning can also be consequential for parties, by signaling arguments that a judge may ultimately find persuasive, whether at the appellate stage or in future litigation. However, separate opinions may have negative consequences vis-à-vis the parties, particularly at the

265. Antonin Scalia, *The Dissenting Opinion*, 1994 J. SUP. CT. HIST. 33, 41-42.

international level. For example, many worry that for tribunals like the ICJ that deal with high stakes political disputes without any corresponding power to enforce their judgments, the increased cacophony produced by a band of “in-house official critics” will negatively impact the enforcement of judgments.²⁶⁶ Opposition to separate opinions seems particularly acute in areas of international economic law such as trade and arbitration.²⁶⁷ The fear is that even the option to dissent incentivizes the judge or arbitrator to go their own way rather than do the more difficult work of trying to achieve consensus. It also increases the risk that the judgment will be ignored or challenged.²⁶⁸ This risk is particularly high with monologic separate speech—whether formal or semi-formal—that challenges the institutional legitimacy of the tribunal. Likewise, collective separate speech might undermine the majority judgment more than separate speech by a single judge, especially if she is a habitual dissenter.

The legal profession as a whole, including other courts and the legislature, constitutes the next proximate audience for separate judicial speech.²⁶⁹ At their most consequential, visible separate opinions become future law.²⁷⁰ This change can be mediated by courts through jurisprudential developments alone, but can also occur more immediately, if lawmakers and lobbyists rely on or draw inspiration from formal, semi-formal and extra-judicial statements to propose legislative changes in line with the separate view. Separate judicial speech may be consequential for lawyers thinking about future cases and potential litigation strategies, by suggesting ways in which litigants and lower courts can reframe case facts and legal arguments to garner

266. Anand, *supra* note 137, at 791 (discussing this objection in the context of an increasing volume of separate opinions at the ICJ); Jörg Kammerhofer, *Oil's Well That Ends Well? Critical Comments on the Merits Judgment in the Oil Platforms Case*, 17 LEIDEN J. INT'L L. 695, 716 (2004).

267. Flett, *supra* note 161, at 309 (“When one considers the cost to the system, it must be questionable whether or not an individual opinion in the Appellate Body is ever worth it.”); C. Mark Baker & Lucy Greenwood, *Dissent - But Only If You Really Feel You Must. Why Dissenting Opinions in International Commercial Arbitration Should Only Appear in Exceptional Circumstances*, 7 DISP. RESOL. INT'L 31, 32 (2013) (distinguishing between “arbitrators” and “judges” in that the former merely settle disputes and are not lawmakers and that there is no need for arbitrators who disagree to have to make their disagreement public); van den Berg, *supra* note 179, at 831 (conceding only two situations that could justify a dissenting opinion by an arbitrator: serious due process violation in the process and potential physical danger to the arbitrator who fails to dissent).

268. Azizi, *supra* note 164, at 66 (“[A]s soon as the publication of dissenting opinions were admitted, the dissenting judge . . . would leave the internal deliberation process and concentrate solely on the elaboration of a formal dissenting opinion.”); Flett, *supra* note 161, at 319 (favoring unanimity on the ground that WTO litigation is primarily intended to resolve confrontations between domestic political constituencies); Baker & Greenwood, *supra* note 267, at 32; *cf.* Breeze, *supra* note 154, at 397 (stating that attempts at achieving consensus can be severely time-consuming and effectively leave the dissenting arbitrator without a voice in the award).

269. Post, *supra* note 24, at 1304.

270. Francis P. O'Connor, *The Art of Collegiality: Creating Consensus and Coping with Dissent*, 83 MASS. L. REV. 93, 95 (1998).

majority support;²⁷¹ or by signaling that it might be more productive to seek relief in a different forum.²⁷²

Separate opinions can also be consequential for the legal public by restraining the reach of the majority decision, weakening its persuasive authority, or making it more vulnerable to reconsideration in the future. They may provide other courts with a justification for an alternative conclusion. Given the extent of judicial borrowing across international courts,²⁷³ separate opinions, including off the bench statements by judges in private exchanges, closed door workshops, symposia, lectures, and academic outlets, may shape jurisprudential developments in other courts.

Speaking separately together rather than individually presents a distinct set of issues for law-making and institutional design. If the same constellation of judges regularly pens joint separate opinions, changes in a court's composition may signal to litigants the possibility of winning over a majority in a subsequent case before a bench with a particular "coalition." Joint separate opinions by judges at lower levels might be given more serious consideration at the appellate level compared to lone voices, and may also be less easily prone to the charge that they undermine collegiality.

When judges speak separately together with their clerks, this may have further jurisprudential consequences. Research on law clerk influence in the domestic context demonstrates they play a central role in the opinion-writing process, with consequences for the decision to pen a separate opinion,²⁷⁴ stylistic choice, and variation across opinions.²⁷⁵ Stylistic decisions—such as word choice, phrasing, sentence and paragraph construction, and opinion

271. Baird & Jacobi, *supra* note 114 (finding that this occurs relatively successfully when Supreme Court dissents suggests that future cases ought to be framed in terms of federal-state powers); Bennett et al., *supra* note 12 (finding that lower courts frequently rely on pivotal concurrences in Supreme Court opinions—those concurrences that undercut the majority's rule in a case—to disregard that majority rule in similar subsequent cases).

272. Bennett et al., *supra* note 12; Brennan, *supra* note 107, at 430.

273. See, e.g., Cesare P.R. Romano, *Deciphering the Grammar of the International Jurisprudential Dialogue*, 41 N.Y.U. J. INT'L L. & POL. 755 (2009); Erik Voeten, *Borrowing and Nonborrowing Among International Courts*, 39 J. LEGAL STUD. 547 (2010); Angelika Nußberger, *The ECtHR's Use of Decisions of International Courts and Quasi-Judicial Bodies*, in JUDICIAL DIALOGUE AND HUMAN RIGHTS 419 (Amrei Müller ed., 2017).

274. See generally BRADLEY J. BEST, LAW CLERKS, SUPPORT PERSONNEL, AND THE DECLINE OF CONSENSUAL NORMS ON THE UNITED STATES SUPREME COURT, 1935-1995 (2002) (using statistical analysis to show that the number of concurrences and dissents has increased with the number of law clerks on the Supreme Court); ARTEMUS WARD & DAVID L. WEIDEN, SORCERERS' APPRENTICES: 100 YEARS OF LAW CLERKS AT THE UNITED STATES SUPREME COURT (2006) (describing the increasing influence of law clerks on the content of Supreme Court opinions).

275. See, e.g., Kelly Bodwin, Jeffrey S. Rosenthal & Albert H. Yoon, *Opinion Writing and Authorship on the Supreme Court of Canada*, 63 U. TORONTO L.J. 159 (2013); Jeffrey S. Rosenthal & Albert H. Yoon, *Judicial Ghostwriting: Authorship on the Supreme Court*, 96 CORNELL L. REV. 1307 (2011).

structure—are not trivial and may even have lasting effects on legal doctrine.²⁷⁶

Speaking separately may also be consequential for more distant stakeholders, constituencies, and the broader public. Visible separate judicial speech can “spark[] . . . deliberation” amongst the broader public,²⁷⁷ which may either contribute to or undermine the legitimacy and authority of the court in the eyes of various stakeholders.²⁷⁸ On one end of the spectrum, concurrences and even dialogic opinions are unlikely to pose much danger to the judgment or the court’s authority. On the other end, monologic opinions and oral dissents could be used by judges to “signal their displeasure to the press, the American people, and the other branches of government”²⁷⁹ and “to dramatize disagreements and tensions within the Court.”²⁸⁰ Further, semi-formal and informal forms of engagement with legal and political communities and civil society may significantly shape the interpretation and reception of a formal judicial opinion, and thus have broader ramifications.

Finally, separate judicial speech can be directly consequential for a judge’s own career prospects. Oral questioning, for example, may be taken as evidence of a judge’s formal position on a legal or factual issue and have serious political repercussions, both for the individual judge, and for the dispute settlement mechanism as a whole. The controversy surrounding the U.S. decision to block the reappointment of the WTO Appellate Body member Seung Wha Chang illustrates this possibility. As Jeffrey Dunoff and Mark Pollack have shown recently, increasing the individual accountability of judges—by making visible the authors of separate opinions—can come at a cost to judicial independence if governments decide to punish such separate speech.²⁸¹ Off the bench, speaking separately through academic publications, interviews, or public appearances can be similarly consequential for a judge’s professional trajectory.²⁸²

It is worth noting that there will invariably be some instances of separate judicial speech that also have no discernible impact. Separate written opinions are not always read, taken up by the legal community, or influence anyone’s thinking. Not all oral dissents receive media attention,²⁸³ limiting their

276. Richard A. Posner, *Judges’ Writing Styles (And Do They Matter?)*, 62 U. CHI. L. REV. 1421 (1995).

277. Guinier, *supra* note 11, at 12-14.

278. For considerations of the relationship between separate opinions and the legitimacy of international courts, see Dunoff & Pollack, *supra* note 140; Dunoff & Pollack, *supra* note 175.

279. Blake & Hacker, *supra* note 37, at 2.

280. Schmidt & Shapiro, *supra* note 33, at 78.

281. See Dunoff & Pollack, *supra* note 140, at 271 (making a sophisticated and persuasive case for the trade-off between the values that can be maximized at international courts); see also Azizi, *supra* note 164, at 55-56 (claiming that the restriction on transparency at the ECJ must be seen in light of the need to preserve the independence of CJEU judges).

282. See Gaille, *supra* note 78.

283. Schmidt & Shapiro, *supra* note 33.

ability to have ramifications beyond satisfying a judge's desire to be heard. Even if intended to signal alternative legal arguments, lines of questioning from the bench may be rejected by parties and one's colleagues. Similarly, judges' extrajudicial words may fall on deaf ears and leave no imprint on public discourse.

However, given the range of potentially significant consequences of the different ways in which judges make their individual voices heard, separate judicial speech implicates the role that individual judges can and should play in both the development of the rule of law and the shaping of political consciousness. Direct engagement with external stakeholders—whether judicial or extrajudicial—involves trade-offs.²⁸⁴ On the one hand, such external deliberation risks transforming legal questions into political struggles and raises further normative questions about expanding judges' power and influence within society. The highly visible and semi-formal interventions by ECtHR judges in debates over reform of the court illustrate this tension and raises normative separation-of-powers issues, given that reform is legally in the hands of member governments of the Council of Europe.

On the other hand, judges are public servants with the authority to influence the fates of individual citizens. As such, speaking in the public sphere and participating in broader discussions could be viewed as essential elements of democracy and accountability. Moreover, separate speech has potential ramifications for awareness of, knowledge about, identification with, and support for a court. This is one of the rationales for leading scholars, member states, and even judges, calling for the introduction of separate opinions at courts like the CJEU.²⁸⁵ The argument is that with the enlargement of the EU in 2004, there is even greater need for transparency and democratic accountability at the CJEU, and that separate opinions have a role to play in this endeavor.²⁸⁶

The type and form of separate speech also shapes the extent to which it personalizes individual judges. Oral questioning, for instance, might increase

284. John Ferejohn & Pasquale Pasquino, *Constitutional Adjudication: Lessons from Europe*, 82 TEX. L. REV. 1671 (2004); Perju, *supra* note 163.

285. Solanke, *supra* note 163, at 712 (noting that in the polling amongst member states prior to the EU's enlargement, nine out of fifteen voted in favour or separate opinions at the CJEU); Julia Laffranque, *Dissenting Opinion in the European Court of Justice — Estonia's Possible Contribution to the Democratisation of the European Union Judicial System*, 9 JURIDICA INT'L 14, 14-15 (2004) (Laffranque is a former judge of the ECtHR); James Lee, *A Defence of Concurring Speeches*, PUB. L. 305, 325-26 (2009) (referring to the remarks of Lord Mance, a former member of the House of Lords and subsequently judge of the U.K. Supreme Court); J.H.H. Weiler, *Epilogue: The Judicial Après Nice to THE EUROPEAN COURT OF JUSTICE* 215, 225 (Gráinne de Búrca & J.H.H. Weiler eds., 2001) (arguing that separate opinions "force the majority opinion to be reasoned in an altogether more profound and communicative fashion."); Perju, *supra* note 165, at 339 (arguing that the "adoption of separate opinions would bring the Court closer to the justification model of authority.")

286. *See* Perju, *supra* note 165 (arguing that the CJEU needs to "politicize" its judicial style to build legitimacy and influence).

familiarity with judges-as-persons for those in the courtroom and legal insiders, but does little to familiarize the broader public with an individual judge's demeanor. When judges individually engage in highly visible semi-formal or informal activities, however, they effectively strip away the 'cloak of the judiciary' or the 'mask of the law,' thereby humanizing themselves and, indirectly, the court. Doing so holds the potential to increase the degree to which a citizen or policymaker identifies with a judge, and to contribute to demystifying the court and the judicial process. In this way, visible semi-formal and informal separate speech could increase legal access, especially for those who typically lack legal and political capital. This in turn has implications for perceptions of and confidence in a court.

While separate extrajudicial speech can demonstrate that judges are members of a larger community, judges nonetheless continue to be seen as symbols and representatives of the law and justice. The potential impact of their separate speech goes beyond public perceptions of an individual judge, and has implications for the integrity of the court. When a judge is defending the integrity of the judicial institution or engaging in public outreach and education, this might strengthen the judiciary and safeguard the integrity of judicial decision-making process, rather than undermine it. As is the case in the United States, greater public awareness of a court's activities may in fact help build its institutional legitimacy.²⁸⁷ Particularly in an era of backlash against the judiciary—both domestically and internationally—external deliberation through separate judicial speech may be the last line of defense of the rule of law.

B. Research Agenda

This Article represents only the first step towards initiating a deeper and more fine-grained conversation between legal academics, political scientists, sociologists, and practitioners on the motives, frequency, and impact of different types of separate judicial speech. Much more work, both conceptual and empirical, needs to be done in order to address normative and policy-related issues that are specific to the design and function of particular judicial institutions and their political context. Some lines of inquiry are internal and relate to the composition and functioning of courts, whereas others are oriented towards their broader roles within society.

One interesting set of questions revolves around the forms of separate judicial speech for which data and studies are available in the domestic U.S. context, but that have been virtually ignored at the international level. In contrast to the domestic context, for instance, there have been no attempts

287. *See supra* note 82 and accompanying text.

to document at the international level oral dissents or questioning from the bench, much less analyze the reasons for these separate judicial practices and their impact.²⁸⁸ It would be instructive to map the incidence of these types of speech across international courts, and consider what accounts for their presence, absence, or fluctuation over time. Further research would then be warranted on how these forms of oral judicial speech interact with other institutional design features of international courts, and if they influence the fate of these courts or individual judges.

Similarly, further research needs to be carried out to determine the frequency and impact of ‘speaking separately together,’ both with fellow judges and with other members of the court, including clerks and staff of registries. What motivates judges to initiate or join coalitions, are certain factors such as national, political, or professional backgrounds predictive of their composition, and do they tend to be one-off or stable? Similar studies should be conducted to determine when and how clerk influence on international courts can be thought of as inappropriate. Should we adopt different ethical standards for judicial clerks than for, say, legislative staffers, executive aides, or other international civil servants?²⁸⁹ Is there evidence to suggest that the influence of judicial clerks on rulings supersedes that of the judges?²⁹⁰

Moving beyond the architecture and practice of each individual court, it would be important to identify and study the horizontal or lateral consequences—domestically and internationally—of different types of separate opinions in international courts. What kinds of separate opinions tend to be referenced or cited by either litigants or judges in domestic courts or other international courts? And what purpose does this citation serve? Do all forms of separate judicial speech—including off the bench commentary, publications, and judicial exchanges—have the same resonance in terms of transnational or global judicial dialogue? Does the existence of separate judicial speech impact the domestic enforcement of an international judgment or award, and if it does, is that due to its legal reception or its impact on domestic political debate?

Relatedly, at a time when international institutions of all stripes are derided for being elitist entities that are out of touch with the concerns of

288. Dunoff and Pollack refer to the incident of the United States blocking the re-appointment of WTO Appellate Body Member Seung Wha Chang as an example of how questioning from the bench relates to the judicial trilemma faced by international tribunals, but they do not systematically analyze the reasons why judges engage in these types of separate judicial practices or their impact. *See* Dunoff & Pollack, *supra* note 140, at 225-27.

289. Creamer & Godzimirska, *supra* note 240, at 673 (noting that the ECtHR Registry, including those lawyers who assist the judges, are subject to the same Code of Conduct as other Council of Europe staff members).

290. *See, e.g.*, Pauwelyn & Pelc, *supra* note 247.

ordinary people in member states,²⁹¹ studies are needed to assess whether taking a leaf out of the U.S. domestic judicial playbook might help shore up international judicial legitimacy. Would it be helpful to humanize the international judiciary? Should international judges be making more public appearances and facilitating greater public awareness of their courts' activities?

VI. CONCLUSION

Separate judicial speech has a long and controversial history in both domestic and international law, waxing and waning with the function, authority, and composition of courts as well as judges' role expectations. The different forms of separate judicial speech, the extent to which judges are permitted to and comfortable with exercising them, and the responses that they invoke amongst stakeholders reflect the constantly changing legal and political environments that both shape and are in turn shaped by domestic and international judges.

This Article has mapped and dissected the regulatory frameworks, practices, and values underlying separate speech by judges in domestic and international courts. It offered five dimensions of variance along which this speech might fall, on and off the bench. It argued that these variations in form carry a range of connotations and further different forms of separate speech convey very different messages for their recipients, with consequences that are both intended and unintended. These differences have real world implications for both courts as legal institutions that make and interpret law and for judges as individual legal actors who represent the law and shape its legitimacy.

Scholars have long recognized the unique status that judicial decisions and, by extension, judges occupy in domestic and international law due to their semantic and normative authority.²⁹² However, international lawyers have not been as attentive as their domestic counterparts to the political capital demonstrated by and exerted through the judicial office and to the myriad ways in which judges might use this capital to bolster both their own professional and personal image, as well as that of the institutions they are duty bound to serve and uphold. In the current political climate of backlash against international courts and tribunals, the very survival of these institutions may depend on judges embracing this role and its potential.

291. Jack Goldsmith & Shannon Togawa Mercer, *International Law and Institutions in the Trump Era*, 61 GERMAN Y.B. INT'L L. 11, 36 (discussing the "global populist revolt against international institutions as elite, out of touch, and unfair"); Eric A. Posner, *Liberal Internationalism and the Populist Backlash*, 49 ARIZ. ST. L.J. 795, 797 (2017) (arguing that a view held by international law elites, "that further international legal integration of the world is inevitable and beneficial, and that it enjoys the support of most ordinary people, has been refuted by events").

292. Ingo Venzke, *Semantic Authority, Legal Change and the Dynamics of International Law*, in LEGAL AUTHORITY BEYOND THE STATE 102 (Patrick Capps & Henrik P. Olsen eds., 2018).

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