Justice As Celebrity

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Suzanna Sherry, *Our Kardashian Court (and How to Fix it)*, **106 Iowa L. Rev.** 181 (2020).

Following "the *Dobbs* leak," I re-read Suzanna Sherry's *Our Kardashian Court (and How to Fix it)*. The piece is, sadly, prescient in discussing our broken Supreme Court. Her diagnosis of the Court's dysfunction—cults of personality—rings truer following the leak than any Presidential Commission's report. Her prescription—statutorily mandating that rulings be communicated in per curiam opinions without concurrences, dissents, or vote counts—rings more achievable than court-packing or its derivations do. Further, her piece—more than any I have grappled with for some time—caused me to reflect more deeply upon what the rule of law means in a profession dominated by legal-realist jurisprudence. I urge you to give this piece a read soon.

It is no secret that the Court suffers from greater legitimacy concerns and internal dysfunction than in the past. Many have proffered structural causes and solutions for these concerns. Sherry argues that we should focus on the celebrity status of the Justices as an important causal factor in these breakdowns. The Court is now "Keeping Up with the ~~Kardashians~~ Justices." That is the problem, in her view.

And none can doubt the Justices' celebrity status. Indeed, just this morning I passed the t-shirt store in my Midwestern college town; amidst the snarky jokes, national basketball championship, and KU themed shirts were three different "Notorious RBG" offerings. Three! Sherry captures this growth of celebrity with the following. "Over the last decade, the number of Americans who can name at least one Supreme Court Justice as increased while the number who can name at least one Supreme Court case has decreased." It is the persona of the Justice, not the law itself, that captures attention.

This explosion of Justice-as-celebrity is not merely correlated with, but is a causal feature of, the Court's legitimacy concerns in Sherry's view. As the Justices have become more like "brands," polls show that 75% of Americans believe that they decide cases on their personal political preferences rather than the law. This phenomenon, Sherry argues, "undermines public confidence in the impartiality of the Court and its Justices."

The Justice-as-celebrity trend drives judicial dysfunction. Justices write individually to maintain their brand and fanbase. This process, in turn, fosters judicial polarization, because to "the extent that the Justices are engaged in public debates (whether through their separate opinions or otherwise), they may be reluctant to engage in internal deliberation." Moreover, it creates disincentives to compromise. "Compromise is off the table because while it enhances the institutional reputation of the Court, it weakens the individual reputations of the Justices. Celebrity status makes it in the best interests of all the Justices to act like independent contractors competing for business by advertising the purity of their brand. Dysfunctionality is inevitable."

Sherry's solution is bold in its modesty. Congress should take away the Justices' official publicity machines. "Congress should enact the following into law: For each case, the Court must issue one, and only one, per curiam opinion. No attribution, no concurrences or dissents permitted. No one outside the Supreme Court would know who wrote the opinion or whether the vote was unanimous, five to four, or anything in between."

Sherry identifies numerous benefits. It would enhance the public perception of the Court as an institutional actor, with citizens seeing it as responding to law and not personal political preferences. It would push the Justices to focus more on doctrinal coherence than maintenance of their personal jurisprudential brands. It would remove the official, government-funded forum for Justices to cultivate their fan bases via concurring and dissenting opinions. It would reduce the number of cases without a majority opinion. And it would foster more cooperation and collaboration among the Justices—even those nominated by presidents of differing parties.

As you might expect from a scholar of Sherry's skill, she considers and rebuts a host of possible objections—that her per curiam approach will produce minimalist opinions, that it suffers constitutional infirmities, and that it is impractical. Two concerns—leaks and the effects of legal realism on the Court's legitimacy—warrant special attention.

Sherry considers that the quest for celebrity status may push Justices to leak information, especially if they were forced to operate under her proposed per curiam regime. "My proposal may well give rise to a temptation for Justices to play to their fans and burnish their political credentials by announcing to the world both their own vote and, where the vote was close, the actual vote count." As we now know, we did not need her proposal to cause leaks. The incentives are already in the system. But why?

Of all the ruminations for what was to be gained, and by whom, from the *Dobbs* leak, Sherry's Justice-as-celebrity theory offers the best explanation. Here, states the leaker, is the uncompromised, unsullied Justice's product—check it out, it's fully on brand! No matter the final product, the leak-reader knows what the majority author truly thinks. And, as Sherry predicted, this quest for individual brand purity came at an extreme cost to the institution as a whole.

As for legal realism, we no longer conceive of judges discovering the law as if it were a brooding omnipresence in sky, as Holmes deridingly put it. We are all legal realists now, as it were, and we understand that (especially in hard cases) it matters who the judge is. As a civil-rights plaintiff, I want a judge who has a plaintiff's brand and vice versa. Justice-as-celebrity, with its concomitant concurrences and dissents, reflects that law (at least in hard cases) is indeterminate. This practice of branding one's opinions, from this perspective, has the virtue of transparency. The Justice-as-celebrity approach tells citizens that any ruling was not logically derived from immutable principles, but that different judges with different brands view cases differently. Hiding behind a patina of per curiam decisions is inauthentic at best, assuming the accuracy of legal realist jurisprudence.

Sherry's response to this concern invites deep reflection. "I can see the point," she replies. One can hardly claim "that forcing a pretense of unanimity where none exists is unproblematic." But the "pendulum of academic and public opinion has swung so far toward the realist view that there is scarcely any room for an argument that law, even as made by the Supreme Court, is about more than raw political or ideological preferences." Because the nation must believe that the Court's decisions are based, at least in part, on precedent, principle, and legal reasoning, "[s]uppressing dissents and concurrences is a necessary corrective." Our commitment to rule of law, as I read her argument, depends upon a broad-based belief that decisions depend on legal norms—even if that is not entirely accurate in the hard cases. "Perhaps when the pendulum swings back, we will need full transparency again." But until such time, Sherry recommends that authentic legal-realist discussions stay in law reviews—safe from public scrutiny.

Sherry's argument leaves me thinking—which is a good thing! On the one hand, her position reminds me of Plato's Noble Lie, which is supposed to establish for the hoi polloi the legitimacy of the guardian's political supremacy in Plato's ideal republic. Or, if you prefer, her position is akin to announcing that "you can't handle the truth." On the other hand, I think she is right. Radical judicial process

transparency, coupled with a celebrity culture and digital media, seems to degrade our commitment to rule of law. This is a hard truth for me to sit with. But what a gift to have Sherry push me to reckon with it.

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