DECIDING TOGETHER

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ABSTRACT: What protocol should participants in a collective decision making institution follow? Analysts often implicitly assume that each participant should decide as if she were deciding alone. This essay argues that, in many institutional contexts, the normatively appropriate protocol for deciding together differs from the protocol of deciding alone. The argument is developed through the analysis of two prominent collective decision institutions: the jury and the appellate court.

KEYWORDS: Collective Action; Decision-Making; *Seriatim* Courts; *Per Curiam* Courts; Majoritarian Courts.

RESUMO: Qual protocolo devem seguir participantes de uma instituição de tomada de decisão coletiva? Analistas assumem, frequente e implicitamente, que cada participante deveria decidir como se estivesse decidindo sozinho. Esse ensaio sustenta que, em muitos contextos institucionais, o protocolo normativamente apropriado para decidir coletivamente difere do protocolo para decidir sozinho. O argumento é desenvolvido por meio da análise de duas instituições de proeminente decisão coletiva: o júri e as cortes de apelação.

PALAVRAS-CHAVE: Ação Coletiva; Tomada de Decisão; Cortes *Seriatim*; Cortes *Per Curiam*; Cortes Majoritárias.

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I. INTRODUCTION

Normative theories of adjudication typically consider a single judge, deciding alone. Appellate judges in every country, however, sit in panels. They decide together. These theories thus implicitly suggest that a judge, sitting on a collegial court, should decide as she would decide were she sitting alone.[1]

Many normative theories of collective decision share this implicit assumption. Discussions of the obligations of legislators, commissioners of administrative agencies, and jurors, for example, often ignore the collective setting in which these agents decide. These individuals are directed to exercise independent judgment, a direction that is easily understood to direct them to decide as they would decide were they deciding alone.

This essay argues that, in many contexts, this tacit assumption is incorrect. In many, but not all, contexts an individual member should follow a decision protocol different from the one she would follow were she deciding alone.

This conclusion is, from a certain perspective, obvious. After all, collective decisions are typically institutional decisions. They are made within formal organizations, according to the rules and procedures that govern the institution. Individual decision makers should follow the rules and these rules may well differ from those rules the individual would follow were she deciding alone, *i.e.*, outside the institutional context.

On the other hand, conventional wisdom apparently holds that, in our central legal and political institutions – legislatures, courts, administrative agencies, and juries –, each decision maker should, in exercising her institutional function, decide as if she were deciding alone.

I shall argue that this conventional wisdom misunderstands the relation both between the aims of an institution, or the institutional aims, and the aims of agents within the institution, *i.e.* the agent's aims and between the evaluation of the institution and the evaluation of a decision.

The designer must structure the institution in a way that maximizes

[1] Ronald Dworkin, at a Colloquium on Law and Philosophy discussing a related paper Lewis A. Kornhauser, *Designing Collegial Courts* (mimeo, 2011), made a somewhat weaker claim: the primary elements of a substantive theory of appellate adjudication on a collegial court stemmed from the normative theory of adjudication by a single judge.

its performance relative to the institutional aims. This task requires the designer to assign aims to each agent in the institution and to provide the appropriate institutional structures to insure that each agent promotes her assigned aim.[2]

Maximizing institutional performance, however, does not necessarily require either transparency or homogeneity. In a transparent institution, the agent's aims correspond to the institutional aims. In a homogeneous institution, all institutional agents have the same aim. Many collegial decision-making bodies are homogeneous, but, I shall argue, they are not transparent. The design of well-functioning institutions sometimes requires that the institutional agents pursue aims distinct from the designer's aims.

This diversion between institutional aims and agent's aims also explains the divergent evaluative perspective. We assess, at least in part, individual decisions in terms of their (instrumental) rationality, the extent to which the individual successfully pursues her aim. We adopt a similar instrumental perspective in our assessment of institutions. This instrumental perspective on the evaluation of institutions does not necessarily imply that we require that the institution's agents be rational.

Two related reasons underlie this discrepancy between individual and institutional assessment. Our assessment of an institution rests on a pattern of decisions, not on each decision in isolation. An institution that strives for decision-by-decision rationality might succeed less well than one that acted in a more routinized less reflective manner. The institutional designer does better to require agents to act in a way that, on a decision-by-decision basis, is not rational.

The political institutions that motivate this essay, however, have a special character. Economists and many others typically understand these institutions as mechanisms of aggregation; they integrate the attitudes – preferences, beliefs, judgments – of individuals into a collective attitude. From this perspective, it appears that each agent should, in the collective decision process, decide as she would were she deciding alone.

I shall argue that the design of many "aggregating" institutions suggests differently. For the institution to perform well, agents must, when deciding together, follow a different protocol than they would were

[2] Typically, the designer has several mechanisms for assuring that the agent performs according to the design. Recruitment and retention policies may select agents who have the requisite aims or preferences. Promotion and pay policies may provide an agent with incentives to act appropriately.

they deciding alone.[3] More strongly, I shall suggest that, in some contexts, optimal institutional design requires that the protocol when deciding together differ from the protocol when deciding alone.

The next section rehearses the argument in the simple setting of jury decision making. The setting is simple because the institutional aim is uncontested. The third section considers the more complex setting of appellate adjudication in which the decision making demands are greater and the institutional aim is contested. Section IV concludes.

II. A SIMPLE EXAMPLE: JURY AND JUROR DECISION-MAKING

Consider a stylized version of "jury decision making." A jury of n members must decide the responsibility of a defendant in a civil case. Defendant's responsibility depends on whether he adopted act *a*. If defendant did *a* then he is responsible and the jury should reach verdict *A*. If defendant did not do *a* in which case I shall sometimes say that defendant did act *-a* then defendant is not responsible and the jury should reach verdict *-A*.

Each jury member receives a *private* signal about the action that the defendant actually took. Assume that each signal is drawn from the same distribution and is independent of the *n-1* signals received by the other jury members. In addition, each jury member has the same prior beliefs about the likelihood that the defendant in fact did *a* or *-a*. Finally, to make things concrete, assume that the jury decides on the defendant's responsibility by majority vote.[4]

[3] Thus, the argument in this essay is not directly an argument about what it is rational for an agent to do. The situations considered here are institutional ones rather than ones in which multiple individuals face strategic choices.

[4] The "jury" in the text differs from an actual jury in several respects. Most obviously, all actual jurors receive a public signal – the evidence presented by the parties – but no private signal. In addition, jurors are apt to differ in their priors. Finally, civil juries in the United States do not operate by majority rule. Every state (and the federal government) has adopted supramajority rule with the required majority running from 2/3 to unanimity (and the size of the jury running from 6 to 12). The argument below does not depend on the absence of a public signal (though each juror must receive a private one), the common priors, the size of the jury, or the size of the required majority. *See* David Austen-Smith & Jeffrey Banks, *Information Aggregation, Rationality and the Condorcet Jury Theorem*, 90 AMERICAN POLITICAL SCIENCE REVIEW 1 (1996). The

In this decision problem, jury members have identical preferences; each seeks to get the correct answer. So individual interest is identical to the institutional interest. In this instance, each juror seeks correctly to identify the prevailing state of the world. Each juror, and the jury as whole, seeks to maximize the probability of a correct answer. Each wants to endorse the more probable decision in light of the signal that each has received. Of course, different jurors may receive different signals which might lead them to have different beliefs about the correct action to take. What is best for the jury as a whole, of course, is to act on the basis of all *n* signals received. Thus, in addition to the protocols identified in Figure 1, an institutional designer might want to consider an *informative* protocol[5] according to which each juror truthfully reveals her signal and then each juror votes on the basis of all *n* signals rather than solely on the basis of her own signal.

Notice first that "deciding as one would decide were one deciding alone" has two different interpretations. One interpretation takes the characterization "deciding alone" literally; she decides as if she were the sole person making the decision. I shall say that a juror who follows this protocol votes *sincerely*.

The second interpretation understands "deciding alone" as acting in an individually rational fashion, given the collective nature of the decisions. I shall say that a juror that follows this protocol votes *strategically*. Each of these protocols may differ from the optimal protocol when deciding together. I discuss these in turn.

Consider first a jury, each of whose members votes sincerely. The juror's action will depend on her prior and on her signal. For sufficiently strong priors (or low quality signals), the juror will vote according to her prior regardless of the signal she receives. Thus, for a sufficiently strong prior, each juror voting in accordance with how she would act were she deciding alone would endorse the action dictated by the common prior. If, according to the prior it was more likely than not that the defendant had done *a*, each juror would vote for *A*; but if, according to the prior, it was more likely than not that the defendant had done *-a*, then each juror

discussion of optimal decision making in the context described here follows directly from the work of Austen-Smith and Banks.

[5] I have adopted the term used by David Austen-Smith & Jeffrey Banks, *Information Aggregation, Rationality and the Condorcet Jury Theorem*, 90 AMERICAN POLITICAL SCIENCE REVIEW 1 (1996) to describe a vote that accords with the juror's signal rather than a vote that accords with her posterior belief.

would vote for *-A*.[6] Without loss of generality assume that, according to the prior and in the absence of any signal at all, the correct decision is *A*.

But this behavior, however, is *not* (necessarily) ideal for the jury as a whole. Even when the common prior is sufficiently strong to override a single contrary signal, it may not be so strong as to override several contrary signals. For any given prior, there is some number *k* of contrary signals that would lead to a posterior belief that favored the action indicated by those contrary signals. The jury as a whole should thus act on the net number of contrary signals it receives. Let *n(a)* be the number of signals the jury receives that support the belief endorsed by the prior; let *n(-a)* be the number of contrary signals the jury receives. The jury should revise its initial belief if and only if $n(-a) - n(a) > k$. Thus given any prior belief, we can devise a *j-majority* rule that leads the jury always to maximize the probability of reaching the correct decision *when* each juror votes *informatively*.

The outcome need not improve if each juror votes strategically. A strategic voter considers not only the signal she received, but also the distribution of signals that others might have received and for which she would be the pivotal voter. Under a majority rule procedure, each juror is pivotal only when $n(-a) - n(a) = 0$. In this case, the juror knows that the common posterior based on the signals of all of the other jurors is identical to the common prior. Consequently, the juror ought to decide *A*, regardless of her signal (and regardless of the distribution of signals received by the other jurors as the given juror does not know this distribution). This decision, of course, is not always collectively optimal.

We have thus identified the protocol that is best for the jury as a whole. We have seen that, at least in some instances, the individual choice and strategic choice protocols diverges from the protocol that best furthers the institutional aim; a group agent, at least in some contexts, should not act as she would act if she were deciding unilaterally. Deciding together differs from deciding alone.

[6] For a formal treatment of this result and the others outline in this section, *see* David Austen-Smith & Jeffrey Banks, *Information Aggregation, Rationality and the Condorcet Jury Theorem*, 90 AMERICAN POLITICAL SCIENCE REVIEW 1 (1996).

III. COURTS

1. Introduction

In this section, I hope to illustrate how theories of adjudication vary across institutional settings. I shall argue that only in some of these institutions will a normative theory of adjudication require a judge to act "unilaterally," as if she were deciding the case alone.

I focus on three, very stylized *internal* accounts of adjudicatory institutions. Adjudication in these adjudicatory institutions vary both in the decision procedures followed and in the manner in which the decision is expressed. Clearly, the internal procedures structure the actual behavior of judges. These same structures and the nature of the artifacts or opinions each court produces, however, also permit us to construct a normative theory of adjudication that makes sense of these structures and artifacts. Though my account of the external relations of the court to other political institutions will be even barer; I will suggest how the function of the courts may vary across political regimes. Any complete theory of adjudication, of course, would require more detailed accounts of both the position of courts within a political system and of the internal procedures.

Before addressing specific institutional structures, two tasks await. First, I must specify more clearly what courts do. Second, I must say something about what judges want.

1.1. What Courts Do

According to conventional accounts, dispute resolution constitutes the core judicial activity and function. Not all dispute resolution institutions, however, are courts. Courts differ from other dispute resolution institutions largely because courts give reasons for the resolution that they reach. Giving reasons has two consequences: it makes courts accountable and it produces law.

Parties may resolve disputes without recourse to courts, indeed even if courts do not exist. Disputing parties may settle their differences without reference to a third party. Or they may consult a third party to mediate the dispute. Or they may use a third-party arbitrator. In each of these cases, the dispute is resolved without any reasons given for the particular resolution of the dispute. Indeed, in some instances, U.S. courts

refrain from giving reasons.[7] When the parties request a jury trial, they to some extent waive their rights to have reasons given for a decision. In a negligence case, for example, the jury essentially determines whether the defendant exercised reasonable care; the jury provides no justification for its conclusion, which is a mixed question of law and fact. As a consequence, the decision of the jury has no effect on subsequent cases.

The absence of reasons does not undermine the legitimacy of jury decision-making because juries are accountable through other mechanisms. Most immediately, the court itself may overrule a (civil) jury verdict if it finds that, on the evidence presented, no reasonable person could have reached the jury's conclusion. More significantly, the jury's legitimacy rests on the impartial procedures used to select it[8] and the narrow reach of its decision.

Reason-giving, by contrast, makes a court accountable both to the parties and to any reviewing court or other agency.[9] Moreover, if the reasons given are publicly available (and easily retrievable), they can affect future decisions and hence play a role in the development of the law.[10]

The nature and extent of reason-giving, of course, will affect both accountability and law creation. A court, after all, may provide more or less "narrow" reasons. The narrower the set of reasons offered, the more

[7] Courts in the United States sometimes issue decisions that are designated "unpublished." This designation means that the subsequent parties cannot rely on the decision in future cases before the court. In that sense, the case provides no "reason". More strongly, an unpublished opinion may be very spare and, in fact, offer no reason for the decision rendered.

[8] *I.e.*, a mixture of a random sample of the community subject to challenges by the parties for bias.

[9] Review is possible in the absence of reasons as the reviewer could hear the case *de novo* (as intermediate appellate courts in France are empowered to do). *De novo* review, however, is costly so any system of review would try to insure that only meritorious cases – *i.e.*, wrongly decided ones – were appealed. The parties, however, would have difficulty determining the merit of a decision and the appropriateness of an appeal if the initial court provided no reasons for its decision.

[10] Precedent, the body of previously decided case-law, can play only a limited role in the development of the law if it is not available to future lawyers, judges, and citizens. Availability may vary across these audiences; consequently the process by which and the content of the "law" that judicial decisions make will vary with extent and nature of case reporting.

constrained the law creation. Most narrowly, a court may simply identify the rule it applies to the facts. Even here, a court may announce a more or less expansive rule: it might condition liability on very case-specific "facts" or it might invoke a standard that leaves discretion to the fact-finder.[11] More broadly, a court might offer reasons why it chose the specific rule it applies to the facts. More broadly still, it might articulate reasons why the rule it chose to apply was a good rule (or the correct rule).

Each of the three appellate institutions discussed below both resolves disputes and gives reasons. Each, however, does so differently. These differences suggest that we should understand the normative theory of adjudication corresponding to each institution differently. The precise differences will emerge in the subsequent discussion.

1.2. What Courts and Judges Want

Jury decision-making presents a simple case because the institutional aim of a jury is relatively straightforward and uncontroversial. In civil cases, at least, the designer wants the jury correctly to determine the facts.[12]

Appellate decision-making may superficially exhibit an analogous simplicity: the court wants to reach the legally correct disposition for the legally correct reasons. In the appellate case, however, the nature of the disagreement among the individuals may be deeper and more profound than the disagreements among jurors. Though each judge may view her task as finding and applying the law and though each judge may believe that, in all or most cases, there is a correct identification and application of the law, in a particular case, each judge may disagree with her colleagues about what legal rule applies and how to apply it. This difference will not always be well-explained (or well-modeled), as in the jury example, by each judge having different information or differing

[11] "Facts" here means legally relevant facts which of course differ from the evidence offered at trial. The legally relevant facts may have to be inferred from that evidence. Additionally, application of law to legally relevant facts is rarely mechanical; it requires interpretation of the rule.

[12] In criminal trials, the designer's aim may differ but it is nonetheless straightforward and relatively clear. Rather than maximize the probability of a correct decision, the designer, at least in the US, may want to minimize the probability of a wrongful conviction.

priors about the correct answer to the legal questions. Rather, the judges disagree fundamentally about the nature and content of the law.

Of course, when a judge decides alone, she may well consider herself to be acting on a shared conception of the aims of adjudication. In circumstances when the content of adjudicatory aims is contested, however, we must revise and deepen our understanding of what this shared conception entails for individual action. One elaboration of this idea of a shared conception interprets this effort as an attempt to achieve or create consensus. The meaning of consensus, however, is itself unclear.

Consensus, from a decision-theoretic perspective, can be understood as a standard aggregation problem similar to the one confronted by the jury. Each individual has some beliefs or interests; the consensus beliefs or interests then just correspond to an integration of these individual attitudes according to a specified aggregation function. The analyst typically imposes some normative constraints on the aggregation function as Arrow does on the "social welfare function" or as Genest does on a group subjective probability function or as List and Pettit do on judgments.[13] A group preference, a group belief, or a set of group judgments then follows.

In the context of adjudication, this aggregate view of the court gives rise to at least two conceptions of the appropriate attitudes to aggregate. On one conception, each judge resolves the case on her own understanding of the common objective function; the court then aggregates case resolutions – dispositions and reasons given -- of each individual judge. On the second conception, the court aggregates the views of each judge on the court's objective function (or what the point of adjudication is) to select the common objective function on the basis of which each judge would then resolve the case.

A more ambitious, but less precise, conception of consensus would understand the Court's task as constructing an objective function for the Court as a whole. A judge should thus seek to build consensus: to find reasons that were mutually acceptable to each member of the court.

A court might achieve consensus in a number of ways. It might, for example, seek agreement on intermediate principles or at a doctrinal level

[13] *See* KENNETH ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (2nd ed., 1963); Christian Genest, *A Characterization Theorem for Externally Bayesian Groups*, 12 THE ANNALS OF STATISTICS 3 (1984); CHRISTIAN LIST & PHILIP PETTIT, GROUP AGENCY: THE POSSIBILITY, DESIGN AND STATUS OF CORPORATE AGENTS (2011). In both instances, of course, the analytic exercise is quite discouraging as only dictatorial "aggregation" functions satisfy the relevant axioms.

rather than at a foundational level. This method corresponds broadly to Rawls' idea of an overlapping consensus. Alternatively, the court might shift the grounds of its decision to a less controversial or less generative one. We might understand the majority decision that upheld the individual mandate to buy insurance in Patient Protection and Affordable Care Act as a tax rather than on Commerce Clause grounds as an instance of this ground shifting.[14] This mechanism for achieving consensus corresponds broadly to Sunstein's idea of incompletely theorized agreements. Similarly, the Court might offer "narrow" rather than "broad" reasons for its decision, limiting the future implications of its decisions. More generally, in legal terms, a judge might seek grounds of decision that are acceptable to each member of the court rather than the grounds that she, were she deciding alone, would think "best" or "correct" or even "best supported by the 'evidence'."

One might argue[15] that creating consensus requires first that the judge decide alone and second that she "compromise" with other judges who have reached their own unilateral, solitary conclusions. "Consensus" is thus synonymous with "compromise" and deciding together amounts to no more than striking the best bargain that one can.

This view may accurately describe legislative bargaining over competing interests but it does not obviously capture the process of consensus building about facts or values. A process of compromise differs from one in which the parties begin by identifying the principles on which they agree and then continue by extending this common core of reasons to ones that adequately address the problems before them.

In what follows, I shall assume that acting on the institution's aims means striving for consensus in this broader, though somewhat ill-defined sense.

Second, the prior discussion has conflated three distinct types of decision an individual or a group might make. An individual might express (or act on) an *interest*; she might make a *factual judgment* (as in the jury case); or she might make a *value judgment*. One might characterized the decisions of collegial, appellate courts in any of these three ways, though the characterization of these decisions as value judgments seems most appropriate.

The taxonomy above equivocated among these three types of decisions. The general taxonomy says nothing about the distinction while

[14] *National Federation of Independent Business v. Sebelius*, 567 U.S. ___ (2012). In fact, the characterization in the text is, as suggested below, not very compelling in the context of the actual majoritarian practice of the U.S. Supreme Court.

[15] As Ronald Dworkin did argue in a colloquium discussing Lewis A. Kornhauser, *Designing Collegial Courts* (mimeo, 2011).

the examples include both the prisoner's dilemma game the standard interpretation of which rests on a conflict of interest between the players and the jury decision problem the standard interpretation of which is as a question of factual judgment. The formulation of the objective function is neutral among these interpretations as it requires only a "preference" in the technical sense, that is, a ranking that satisfies the requirements of a linear order.[16]

In the context of judicial decision, the ambiguity remains in part because of the contested nature of law and in part because of the contested nature of adjudication itself. On Dworkin's account, for instance, every question of law has a right answer; thus each judge, indeed each citizen, renders judgment about that right answer. On many positivist accounts of adjudication in hard cases, by contrast, the judge acts as a legislator, a description that suggests that she acts on interest not on judgment. In what follows, I shall generally speak of courts and judges as rendering judgment rather than expressing a preference or stating a belief. This manner of speaking corresponds with the way in which lawyers and judges naively think of adjudication; but this formulation does not affect the argument concerning the relation between a judge acting as if she were deciding alone and deciding together.

2. *Seriatim* Courts

English courts follow a *seriatim* practice in which one judge on the court announces the disposition of the case and then each judge provides reasons for her dispositional vote. The institution of *seriatim* opinions might appear to require each judge to decide as if she were deciding alone; further analysis, however, will suggest that this conclusion is not necessary.

To understand the normative theory of adjudication implicit in *seriatim* practice, we need a clear understanding of what each judge does alone and what the court does together. A judge on the panel will announce the disposition that a majority of the panel endorsed. The court thus endorses a disposition as a *court*. Notably, the court does not endorse any reasons as a court though each individual judge does articulate *her* reasons for endorsing the disposition that she espoused. In a sense, then,

[16] *I.e.*, completeness, antisymmetry, and transitivity. The interpretation of the collective choice problem as one of judgment aggregation may seem problematic but we can generally reformulate the agenda to fit this structure.

the judges decide the disposition together but each judge gives reasons alone as the deciding court endorses, as a *court*, no set of reasons for its decision on the disposition.

Does a judge, participating in the decision on the disposition, decide as she would decide were she sitting alone? The discussion of jury decision-making in the prior section suggests that, with respect to dispute resolution, a normative theory of adjudication would direct each judge to vote "informatively" on the disposition. She should vote for the disposition that reveals whatever "signal" her meditation of the case revealed. This practice only corresponds to deciding as if one were deciding alone when the decision-maker's prior beliefs are evenly balanced. Otherwise, this protocol for deciding together differs from the deciding alone protocol.

Consider briefly the protocol each judge should follow for giving reasons. Does a *seriatim* court adopt the identical decision protocol for announcing a rule? That is, does each judge, in rendering an opinion, give her *own* reasons for the disposition she endorses, the reasons she would offer if she were sitting alone?[17] Accounts of adjudication, I think, commonly make this assumption. Indeed, this view seems entailed by the explicit refusal of the court in *seriatim* practice to endorse any reasons. On the other hand, though the court does not endorse any set of reasons, *subsequent* judges, courts, and lawyers do ascribe (or try to ascribe) both a rule and a rationale to the set of individual opinions announced by the court. Thus, though, on one hand, each judge apparently decides alone, subsequent judges regard the court as having decided together. The practice of future lawyers and judges might influence the protocol the judge on the deciding court implements.

When each judge pursues an individual decision-making protocol, individual protocol, each expresses the reasons for her disposition that she would give if she were sitting alone.[18] Under this practice, however, the reasons of the *court* remain unclear; consequently, the law created by the decision also remains unclear.

The obscurity derives from the multiplicity of rules (and reasons for rules) that the panel of judges may announce. Though the choice of

[17] It would be odd for the judge to render her sincere disposition, the one she would render if she were sitting alone but to give reasons for that decision that differed from her own reasons.

[18] In terms of the informative protocol introduced in the discussion of jury decision-making, one might understand that the judge, in giving of her reasons, reveals the content of her signal more fully. Strictly speaking, then, the protocol proposed here is an informative one, not the solitary decision protocol unless the judge's prior is suitably flat.

disposition is dichotomous, the choice among rules is not. In general, one can support a given disposition with many different rules. As a simple example, suppose the court, in deciding a case involving an automobile accident, must determine the standard of care that governs the driver. Suppose, for simplicity, that the driver's care level consists only of the speed at which he was driving; to be precise, imagine that the driver was going 65 miles per hour. Judge A thinks the driver was negligent; she can justify this conclusion on the basis of any rule that identifies safe driving as driving at a speed less than 65 miles per hour. Conversely, if Judge B thinks the driver was non-negligent, she can justify her conclusion on the basis of any rule that identifies safe driving as driving at a speed greater than 65 miles per hour. Each judge thus must choose among a continuum of rules; we have no reason to think that, if each judge were sitting alone, each will in fact choose the same rule or indeed that the judges in the dispositional majority will choose the same rule.

Note that the problem does not arise because no judge provides a canonical statement of the rule. The problem arises even when each judge provides a canonical statement of the rule *she* endorses. The problem arises because the judges disagree about which rule to adopt and which reasons to give for the disposition.[19]

Thus, the practice of *seriatim* opinions with this decision protocol, hinders law creation. Of course, the constitutional designer might *aim* at limiting judicial law creation and this would be one method for so doing. Typically, however, common law jurisprudes laud this process for its success in developing the law.[20]

Even in this world, moreover, pressures exist to produce a more certain, clearer set of legal rules. These pressures are greatest in criminal cases when concerns for fair notice argue for clearly articulated rules and individual judges have reasons to identify one rather than several reasons for a particular disposition.

Nonetheless, a normative theory of adjudication on *seriatim* courts

[19] Suppose we interpret the choice of legal rule as an epistemic problem; there is a right answer. Then, there is a sense in which, under appropriate assumptions, plurality rule, with informative voting by each judge, maximizes the probability that group will arrive at the right answer. *See* Christian List & Robert E. Goodin, *Epistemic Democracy: Generalizing the Condorcet Jury Theorem*, 9 J. POLITICAL PHILOSOPHY 3 (2001). This result is not very reassuring, however, as (1) a small panel of n judges may often produce n opinions and (2) the strategic concerns that infect the jury decision making problem discussed in section III are apt to plague the non-dichotomous choice problem as well.

[20] *See* RONALD DWORKIN, LAW'S EMPIRE (1988).

might conclude that judging together makes no different normative demands on the judge than judging alone.

3. *Per Curiam* Courts

The French *Cour de Cassation*, the highest private law court in France, well illustrates *per curiam* practice in which the Court issues a single, unsigned, ostensibly unanimous opinion. Obviously, achieving unanimity on either the disposition or any reasons given imposes a much greater burden on group processes than the *seriatim* practice.

French legal theory shifts the unit of agency from the individual judge to the court as a whole. The court, not a judge, announces the decision and the reasons for it; these reasons are not those of each individual judge on the court but of the judges deciding together. *Per curiam* practice apparently requires that each judge seek consensus with her colleagues; obviously a judge who seeks consensus decides differently when deciding together than she would decide were she deciding alone.

To understand how *per curiam* practice suggests a normative theory of adjudication that promotes consensus, suppose to the contrary, that each judge, when deciding together, acted as she would if she were deciding alone. She must both reach a disposition and provide reasons for that disposition.

The discussion of *seriatim* courts gave primacy to the dispositional decision; in a *per curiam* court such primacy is not obvious.[21] Assume,

[21] Some may argue that Cour de Cassation, unlike common law courts, only renders decisions on the law; it does not dispose of the case. This argument misunderstands both the powers of common law courts and the nature of the disposition. Common law appellate courts typically only have the power to render decisions on the law; they have no power to find facts or to reject the factual findings of the trial court (except when they are willing to say that no rational person could have reached, on the evidence presented, the factual conclusions stated in the opinion). The disposition of the case nevertheless depends both on the facts found and the proper application of the appropriate legal rule to those facts. Appellate courts that uphold a lower court understanding of the applicable rule affirm the disposition of the case rendered by the court below. When an appellate court rejects the view of law on which the lower court acted, it may require reconsideration of the case below thus affecting if not strictly determining the disposition. In common law courts, then, rejecting the lower court's view may result in a reversal or a reversal accompanied by a remand. The French Cour de Cassation, when it reverses, always remands, because it has no jurisdiction to apply the law to facts.

nonetheless, that the Court first reaches a decision on the disposition. Clearly, each judge cannot proceed as if she were sitting alone as the Court is apt to be non-unanimous on a first ballot. Of course, the Court could agree that they should proceed, internally, by majority rule so that, after a first ballot, all judges would endorse the majority disposition, thus implementing an aggregate view of consensus.

On the other hand, there is no particularly appealing implementation of the aggregate view of consensus over the reasons the court gives for its disposition. It is not clear what protocol each judge should follow in the provision of reasons. As noted above, many very different reasons might be given for a disposition, even if one accepts the narrow set of reasons that the Cour de Cassation in fact offers.[22] Judges may differ over the applicable legal rule and on how that legal rule applies to the case before them. Consequently, if the Court proceeds with a "straw vote" (in which each judge reports a choice of what she unilaterally thinks best) on the ground of decision; no rule is apt to gain a majority, let alone unanimous consent.

If, on the other hand, the Court wants to implement the broader senses of consensus, then it makes sense for the Court to address its reasons first. Once it identifies the governing legal rule, the disposition follows immediately. Consensus on the rule, then, implies consensus on the disposition.

We might understand actual French procedure in this way. The French process identifies a *juge rapporteur*, a reporting judge who prepares a report on the case that includes several different suggested opinions. The rapporteur thus structures the agenda for the court. How should we understand the task of the rapporteur and the corresponding obligations of the other judges on the panel?

It seems implausible to think that the rapporteur should first determine how she would decide the case were she sitting alone and then structure her report and the set of opinions so as to maximize the likelihood that the panel as a whole endorses that outcome. This understanding of her obligation, after all, renders it somewhat mysterious why *panels* of judges, rather than a single judge, decides each case. Rather, the rapporteur should do what is best for the panel. She

[22] An opinion of the Cour de Cassation consists of a single sentence that begins by identifying the applicable legal rule – *i.e.*, the section of the relevant code that the Court has determined the outcome of the dispute. A series of subordinate "whereas" clauses follow; each of which characterizes some legally relevant fact. The sentence concludes with an affirmance or a reversal.

must set out the case and the issues it presents in a complete, impartial way and then present alternative dispositions and rationales that will elicit consensus among the judges on the panel.[23]

Similarly, the other judges on the panel cannot act as they would act if they were deciding alone. Each of them must also acknowledge the collective nature of their decision. Consensus will typically require that at least some members, and possibly all members, endorse reasons or a rule, or even a disposition, that differs from the reasons, rules or disposition that would govern her decision were she deciding alone.[24] More importantly, the protocol that is best for the court is apt to be one that directs the judge to be appropriately responsive to the needs of the court as a whole.

A normative theory of adjudication on a *per curiam* court thus offers a theory of deciding together as a distinct enterprise from deciding alone.

4. Majoritarian Courts

Appellate courts in the United States follow a majoritarian practice. In this practice, the court strives to produce an opinion that attracts a majority of the panel deciding the case. A majority of judges thus agree on the disposition of the case and a majority, but not necessarily everyone in the dispositional majority, agree on the reasons for the disposition. Opinions are typically signed and often more than one judge provides reasons for her decision. The presence of a majority opinion, however, insures that the court creates law in a relatively unambiguous way.[25]

[23] Typically, the juge rapporteur offers at least two opinions, one for each disposition; on some occasions, she offers more than two, indeed as many as six. *See* MITCHEL LASSER, JUDICIAL DELIBERATIONS (2009). These draft opinions may differ not only on the disposition but also on the legal grounds for the disposition.

[24] In the right environment and following the appropriate procedures, some judge may not have to compromise. Suppose judges must choose a rule in a one-dimensional space of rules and each judge has spatial preferences over these rules – *i.e.*, she has an ideal rule and she prefers rules closer to her ideal point than rules farther away. Then, if the court uses a condorcet consistent procedure, such as following Robert's Rules of Order, it will adopt the rule favored by the "median" judge. But in this event, no judge but the median judge endorses her most preferred rule.

[25] This clarity is generally true even when other judge dissent or write concurring opinions. Both dissents and concurrences typically sharpen the meaning of the rule announced by the majority. Moreover, to the extent that the majority rule is partial or

Moreover, abandonment of the unanimity criterion permits the court to provide a broader set of reasons than on a *per curiam* court.

The prior discussion suggested that a *seriatim* court exhibits a predominantly aggregate notion of the court according to which each judge should decide as if she were deciding the case on her own, or, at least, voting informatively on the disposition and providing her own reasons for that vote. The court then has a well-specified procedure for aggregating the dispositional votes; law, by contrast, develops through a complex procedure of interpretation and reinterpretation of the multiples opinions of a given court by future lawyers and judges arguing and deciding future cases. A *per curiam* court, by contrast, is best understood as a consensus court that strives to find grounds of decision that are mutually acceptable to all judges on this case. The disposition then follows from the agreed-upon reasons. This decision procedure places reasons before dispositions.

A majoritarian court represents an uneasy compromise between these two extremes. As on a *seriatim* court, the disposition of the court aggregates each judge's informative vote on the disposition; it aggregates the individual views of each judge. On the other hand, as on a *per curiam* court, the giving of reasons by the majority has elements of a consensus procedure.

Procedures on the U.S. Supreme Court give priority to the disposition. After oral argument is heard, the Court meets in conference at which each justice makes a non-binding announcement of her dispositional vote. The senior justice in the dispositional majority then designates a member of that majority to draft a majority opinion. The designated author circulates an opinion that may prompt suggestions from other judges or competing opinions. Justices then decide which opinions to endorse.

The primacy or at least priority of the dispositional vote is in tension with the consensus approach to reasons. Normatively, the majoritarian practice for the vote on the disposition follows the *seriatim* practice that requires the judge to vote as she would if she were sitting alone;[26] but an endorsement of the disposition that receives a minority of votes excludes the judge from the process of consensus that produces the court's reasons for the judgment. This exclusion generates an incentive for any judge who wants influence over the law to misrepresent her view of the disposition. This incentive is particularly strong for the Chief Justice who, should she

incomplete, dissents and concurrences suggest how the majority rule should (or will) be extended.

[26] And had a prior that placed equal weights on each disposition.

vote in the dispositional majority, would, as the *ex officio* most senior justice in that majority, designate the writer of the majority opinion and thus have great influence over the content of the majority opinion.

The provision of reasons by judges on a majoritarian court, however, differs in many respects from the provision of reasons on a *seriatim* court; in some respects, it more closely approximates the approach of the *per curiam* court in which the judge seeks consensus but important differences exist.

Consider first those judges in the dispositional minority. Each of these judges acts as she would in a *seriatim* practice; she proffers her own reasons for the dispositional vote she made. In this, she differs radically from the author of the majority opinion that gives reasons for the court's disposition. The author of the majority opinion provides not her own reasons for the majority disposition but the reasons of the "court."

The author of the majority opinion must provide reasons acceptable to a majority of the court. When the dispositional majority exceeds half the court, the author needs "consensus" from only a subset of the members of the dispositional majority. Consider, for example, the U.S. Supreme Court which has nine members. The author of the majority opinion needs at least four other justices to endorse her opinion. When the dispositional majority is five, she requires consensus within the entire dispositional majority; but when the dispositional majority is more than five, the opinion does not require the endorsement of all other judges in the dispositional majority.

This feature of majoritarian practice arguably transforms the nature of the opinion of the court. On a *per curiam* court, a normative theory of adjudication would suggest that this opinion represents a true consensus rather than a compromise of individual views. It is less clear, however, what normative theory of adjudication is implicit in a majoritarian practice.

On the one hand, the institutional aims of the court support a normative theory akin to the one underlying *per curiam* practice. We want the court as a whole to develop a coherent body of legal rules and principles. Establishing consensus among the judges rather than aggregating their views may better promote this aim. On this account, the majoritarian court which restricts the set of judges among whom consensus must be reached has a significant benefit: it may permit consensus around a deeper set of reasons. This deeper or wider set of reasons facilitates both the development of the law and compliance with it as other judges, lawyers and citizens have a clearer grasp of the reasons underlying the disposition of the case.

The narrower range of the consensus might thus explain why majority opinions of the U.S. Supreme Court in fact offer a much wider set of

reasons than opinions of the French Cour de Cassation do. An opinion of the Cour de Cassation identifies only the rule chosen to decide the case;[27] an opinion of the U.S. Supreme Court typically identifies not only the relevant rule but also reasons that the Court had for adopting that rule.

On the other hand, the need to produce a limited consensus introduces a set of complex choices for the opinion author who must identify the set of members of the dispositional majority with whom she will achieve consensus. This process seems to invite strategic bargaining among the judges in the dispositional majority. This invitation is arguably exacerbated by the practice of identifying the author of the opinion as this publicity identifies the author with a specific set of reasons and rules.[28] Demands for consistency across the individual judge's opinions may hobble the court's ability to achieve consensus; after all, the justice will have written not only majority opinions but also concurrences and dissents. On some accounts, these dissents and concurrences should reflect the reasons she would express were she deciding alone; these reasons might easily conflict with the consensus views expressed in majority opinions.

The normative theory of adjudication implicit in majoritarian practice, then, will clearly be both subtle and complex. The normative theory must integrate the elements of practice that suggest a consensus protocol of decision-making with those elements that comfortably fit with an aggregate account of the court as a sum of the individual views of each judge. The complexity of the required theory flows from the need to articulate distinct decision protocols for the judge at the dispositional vote and at the stage of reason-giving. Moreover, the normative theory of reason-giving may depend on whether the judge provides reasons for a vote in the dispositional minority or in the dispositional majority. When in the dispositional majority, the theory must guide not only the conduct of the author of the writer of the majority opinion but also guide the other judges' decisions to join the majority opinion and to write concurring opinions. Finally, a normative theory of a majoritarian court must determine the force of the majority opinion; that is, it must articulate the role of the majority opinion in the decision-making of future judges.

[27] Supplementary materials are sometimes published that suggest reasons for the choice of that rule but these materials are not technically part of the opinion. *See* MITCHEL LASSER, JUDICIAL DELIBERATIONS (2009) for a discussion.

[28] John Ferejohn & Pasquale Pasquino *Constitutional Adjudication: Lessons from Europe*, 82 TEXAS LAW REVIEW 7 (2004) make this point.

IV. CONCLUSION

This essay argues for two claims: one general and one specific to courts. The general claim addresses an aspect of the optimal design of collective decision-making institutions. In a well-designed, well-functioning institution, the decision-making body will optimally advance the institution's interest. This banal observation does not determine the optimal behavior of each individual member of the decision making body. The optimal individual decision protocol depends on the aims of the institution. Significantly, in some institutional settings, the individual decision-maker should *not* do what she would do if she were deciding alone.

This conclusion runs counter to an implicit, common understanding of collegial decision-making that valorizes the "sincere" decision-maker who decides as she would decide were she deciding alone. This decision-making protocol undermines any institution that seeks to develop consistent and coherent decisions across time.

The disparity between the optimal individual decision protocol and the aim of the institution is also in tension with views that see these institutions as aggregating the relevant attitudes of the agents that comprise them. These aggregate views typically endorse a view of group rationality that bases group attitudes on the attitudes of the individuals that make up the group; group attitudes depend on the attitudes each individual would have were she deciding alone. In a static environment in which individual and group attitudes are fixed once and for all time, this program is – putting to one side the difficulties limned by various impossibility theorems – straightforward. In a dynamic setting however, when the group makes decisions sequentially, the pressures optimally to promote the group interest argues for each agent adopting a different decision protocol, at least in some institutional structures.

The discussion concerning courts relies on the general claim but adopts a slightly different perspective that infers the normative theory of adjudication implicit in particular practices. This perspective indicates the significant implications of the general claim that deciding together may differ from deciding alone has for normative theories of adjudication. Most importantly, normative theories of adjudication will vary dramatically across institutional structures.

Normative theories of adjudication typically ignore both the collegial nature of most appellate decision making and the details of specific practices. Implicitly, that is, they assume first that normative theories of adjudication are invariant across institutional structures and second, that

each judge on a panel decides as she would decide were she deciding alone. Neither assumption withstands scrutiny.

Attention to the detail of actual adjudicatory institutions reveals significant variation in the structures of decision among collegial courts. Each of these various structures suggests a different, implicit normative theory of adjudication.

The second assumption underlying most normative theories of adjudication that deciding together does not differ from deciding alone also requires revision. Though this assumption may hold when considering classical English practice on a *seriatim* court, it fails dramatically to make normative or explanatory sense of practice on a *per curiam* or majoritarian court. On these courts, the normative theory of adjudication must acknowledge that judges deciding together must follow a different protocol than each would follow were she deciding alone.

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