The Academic Study of Decision Making on Multimember Courts

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The study of decision making on multimember courts has, in the past ten or so years, attracted increasing academic attention. In this Essay, I would like to briefly discuss this academic literature on multimember courts in an attempt to relate Judge Wood's personal experiences to this literature. My hope is that this exercise will both situate Judge Wood's personal experiences in more general scholarly accounts of judicial behavior and breathe life into the more abstract academic work.

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INTRODUCTION: THE STUDY OF MULTIMEMBER COURTS

In writing When to Hold, When to Fold, and When to Reshuffle: The Art of Decisionmaking on a Multi-Member Court, Judge Diane Wood has done a great service for those who study judicial decision making. By putting the details of her own particular experiences and decisions into a broader account of decision making on a multimember court, she has provided a wealth of useful data. In particular, her detailed accounts of both the general nature of serving on a multimember court and the specific decisions she made while doing so provide a richer, more nuanced picture of the act of judging than is commonly found in much of the academic literature on judicial decision making.

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In this Essay, I would like to briefly discuss the more general academic literature on multimember courts in an attempt to relate Judge Wood’s personal experiences to this literature. Whereas a sizable portion of the literature on multimember courts is relatively abstract and theoretical, the empirical immediacy of Judge Wood’s contribution provides a nice counterpoint. Further, much of the extant empirical work is largely designed to capture general patterns across a large number of cases without going into much detail regarding the experiences of particular judges. Indeed it is quite interesting to examine the extent to which the concerns and motivations discussed by Judge Wood show up in the more abstract academic work.

In what follows, I will attempt to provide a very brief, albeit incomplete, summary of some of the academic work on the collegial aspects of judicial decision making. First, I will discuss a growing body of theoretical work that seeks to shed light on the normative implications of collegial decision making for aspects of the legal system, such as the stability, consistency, and coherence of legal rules. After that I will shift attention to the expanding body of literature on so-called panel effects, whose empirical evidence demonstrates that judges decide some types of cases differently depending on the identities of their colleagues on a panel. Next, I will examine the question of when and why judges might choose to write dissenting or concurring opinions. In the conclusion, I will draw connections between Judge Wood’s account of judging and the academic literature I have reviewed.

I.

NORMAL IMPLICATIONS OF RULE AGGREGATION

Until relatively recently, studies of judicial decision making had a somewhat odd relationship with aspects of multimember courts. On the one hand, scholarly attention tended to focus on multimember courts, like the U.S. Supreme Court and the U.S. Courts of Appeals. On the other hand, most studies tended to view the group decision-making process on a multimember court as little more than a series of individual, independent decisions. Thus, while there were many studies of multimember courts, there were relatively few studies of decision making on multimember courts that dealt with either the more complicated interdependent decisions that the judges on these courts faced, or those that considered the normative implications of various methods of aggregating the views of multiple judges.

Professors Lewis Kornhauser and Lawrence Sager provided one of the earliest and clearest articulations of this point in 1986. They wrote:

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2. Due to the restricted length of this Essay it is not possible to provide a systematic and comprehensive review of all of the relevant work. While the work discussed is widely viewed as important, I am not able to discuss many other important works.
Traditional theories of adjudication are curiously incomplete. Their focus is on the process by which a single judge decides or ought to decide cases. . . . The real world of adjudication, though, differs dramatically. . . . Intermediate courts of appeal and courts of last resort are organized so that judges almost always sit and act together with colleagues on adjudicatory panels. . . . Appellate adjudication, the common, almost exclusive focus of theories of adjudication, is thus essentially a group process, yet extant theories neither explain the group nature of the process nor take it into account.3

Since the publication of this article in 1986, and particularly within the last ten years, there has been an explosion of work that takes the collegial aspect of decision making on appellate courts more seriously.

As noted above, Kornhauser and Sager’s piece4 is one of the first pieces of scholarship to seriously examine the normative implications of rule, or judgment, aggregation.5 Of interest to Kornhauser and Sager are the accuracy, consistency, and coherence of collegial decisions. By accuracy they mean the propensity of the court to reach decisions that are correct—either in reference to an objective standard or by satisfying some community-wide criteria of correctness.6 Next, by consistency, they mean the lack of contradictions among the rules.7 Put another way, two legal rules are inconsistent if they assume the same set of facts and circumstances as legally relevant but they yield different legal conclusions; a consistent set of rules treats like cases alike. Finally, Kornhauser and Sager refer to a coherent set of legal rules as one that is not only consistent, as defined above, but also derivable from a small set of noncontradictory first principles.8

How should we expect collegial courts to perform on these three criteria of accuracy, consistency, and coherence? In terms of collective accuracy, Kornhauser and Sager show that under some assumptions, majority-rule decision making among a collection of judges that are each individually

3. Lewis A. Kornhauser & Lawrence G. Sager, Unpacking the Court, 96 YALE L.J. 82, 82 (1986).
4. Id.
5. An earlier piece that is somewhat related to the study of rule or judgment aggregation by collegial courts is Frank H. Easterbrook, Ways of Criticizing the Court, 95 HARV. L. REV. 802 (1982). As noted by Professors Kornhauser and Sager, there are important differences between their work and Judge Easterbrook’s: while Judge Easterbrook is concerned with preference aggregation, Kornhauser and Sager are interested in judgment aggregation. See Kornhauser & Sager, supra note 3, at 102. For Kornhauser and Sager, a preference is a limited and sovereign claim, such as “I prefer to hire a gardener rather than do my gardening for myself.” The claim is limited in that it applies only to the person making the claim, and it is sovereign in the sense that the person making the claim has the final say over what his or her preferences are. A judgment is a claim such as “It is better to hire a gardener than to do one’s own gardening.” A judgment is not limited because it makes a general claim that should be accepted by all reasonable people, and it is not sovereign because the validity of the judgment requires more than just the statement of the judgment by a single person. See id. at 85–86.
6. See Kornhauser & Sager, supra note 3, at 91.
7. Id. at 103.
8. Id. at 105.
accurate (at least in a probabilistic sense) produces collective decisions that are also accurate.9 Indeed, increasing the size of the multimember court increases collective accuracy, all else being equal. This is not a new result—Condorcet first proved this in 1785.10

Kornhauser and Sager’s analysis of the consistency of collegial decisions is similarly positive; they show that even when judges individually prefer very different rules, the consistent application of these rules at the individual level produces an overall consistent collegial rule. Note that this conception of collective consistency is a very minimal condition. All that it means is that the same set of judges will decide identically situated cases in identical ways—consistency as defined by Kornhauser and Sager does not require that there be noncontradictory reasons providing conceptual unity to the court’s consistent, i.e., predictable, decisions.11

This kind of conceptual unity is what Kornhauser and Sager refer to as coherence. While accuracy and consistency are not diminished by collegial decision making, the same cannot be said for coherence. Indeed, the major takeaway from Kornhauser and Sager is that aggregating individually coherent sets of rules does not necessarily produce a set of coherent legal rules. The rules emanating from multimember courts may well be accurate and consistent, but they are not necessarily coherent.

The publication of Kornhauser and Sager’s Unpacking the Court has spawned a large amount of scholarship.12 A particularly noteworthy piece is Legal Doctrine on Collegial Courts by Professor Dimitri Landa and Professor Jeffrey R. Lax.13 They provide a formal analysis of the process of rule aggregation on multimember courts with an eye toward the implications for the coherence and complexity of the resulting collegial rules. Their findings, like those of Kornhauser and Sager, are not optimistic. They conclude:

Judges on a collegial court can create a collegial rule that will capture the effects of their individual votes—but this collegial rule may be quite different from any of their individual rules, may be more (or even less) complex than any of their individual rules, may include

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9. Id. at 98.
10. Id.
11. Id. at 108.
nonmajoritarian treatments of the factors that compose a legal rule, may be sensitive to how they come together to construct their collegial rule, and may not be a meaningful legal doctrine according to standard normative or philosophical criteria. Further, when we observe an explicit collegial rule handed down by a collegial court, depending on how that rule is chosen, there may be cases that would be decided differently by the collegial court itself (by majority vote) than under the announced rule.\textsuperscript{14}

They further note that “[g]iven the collegial nature of higher courts, the normative account of law as ‘integrity’ advanced by Dworkin (1986)\textsuperscript{15} may simply be outside of logical possibility.”\textsuperscript{16} These are strong conclusions. Whether or not one ultimately agrees with them, it is hard to deny that this recent work on legal doctrine as rule aggregation is relevant for normative accounts of law and adjudication. If nothing else, it highlights the potential tradeoffs between various institutional forms (e.g., individual vs. collegial decision making, small panels vs. large panels, etc.). More broadly, this work has implications for what we can realistically expect from our judicial system.

\section*{II. PANEL EFFECTS}

A topic that does not explicitly appear in Judge Wood’s Essay but that has garnered a lot of academic attention over the last fifteen years or so is research on so-called panel effects.\textsuperscript{17} This literature looks at the extent to which, and the possible reasons why, attributes of a federal appeals court judge’s colleagues on a particular three-judge panel might exert an influence on the judge’s decision.
in a particular case. Below I discuss some examples of the types of effects that have been found. I then discuss the mechanisms explaining these effects, such as the informational dimension of multimember courts and the role of whistleblowing in judicial dissents.

In an early study, Dean (then Professor) Richard Revesz found that in D.C. Circuit cases involving challenges to Environmental Protection Agency (EPA) rulings, “a Democrat sitting with two Republicans votes more conservatively than a Republican sitting with two Democrats.”18 He went on to conclude: “The results thus show that while individual ideology and panel composition both have important effects on a judge’s vote, the ideology of one’s colleagues is a better predictor of one’s vote than one’s own ideology.”19 Looking at D.C. Circuit cases involving the *Chevron* doctrine,20 Professors Cross and Tiller reach similar empirical conclusions about the joint effects of both individual partisanship and the partisan composition of a panel.21 Looking at a much wider range of cases across multiple circuits and issue areas, Sunstein et al. also find evidence that panel composition effects can swamp individual effects in some cases.22

These panel composition effects are not limited to partisanship. For instance, Boyd et al. find strong evidence of gender-based panel effects in Title VII cases as well as weaker evidence of panel effects in cases involving abortion. They see no significant evidence of gender-based panel effects in other issue areas.23 Peresie also finds evidence of gender-based panel effects across a slightly wider set of cases.24 In the area of race, Kastellec finds strong evidence in support of race-based panel effects within cases dealing with affirmative action programs.25

Many potential mechanisms have been put forth to explain these various types of panel effects. While the empirical support for the existence of these panel effects is strong, the available data provide mixed evidence for the various explanations of these effects.

One possible mechanism is rooted in the informational or deliberative consequences of panel diversity.26 The argument here is that a panel composed of judges with diverse backgrounds will consider a wider range of perspectives when deliberating over the outcome of a case than would a panel composed of

19. *Id.*
21. Cross & Tiller, *supra* note 17, at 2169–72. Note that Cross and Tiller, in contrast to Revesz, provide different reasons for these effects.
22. *SUNSTEIN ET AL.*, *supra* note 17, at 22.
23. Boyd et al., *supra* note 17, at 403.
26. *See, e.g.*, Boyd et al., *supra* note 17, at 391 (presenting evidence supporting such an account with respect to gender-based panel effects).
like-minded judges. The single judge with a different perspective can thus influence the outcome of the case, where the other two judges might have decided the case differently absent the information provided by the single judge. One would expect the largest panel effects to be evident in issue areas where the background and experiences of the minority judge are most relevant. The fact that most of the evidence for gender- and race-based panel effects is drawn from issue areas in which gender and race might be particularly salient is consistent with this account. In a recently published paper, Spitzer and Talley develop a theoretical model that explains how and why an informational account might also work more generally to give rise to ideological or partisan panel effects. 27 The key to their account is that ideologically extreme judges will often have a greater incentive to collect costly information than would their ideologically moderate colleagues. Their model thus suggests a way in which ideologically motivated behavior may actually give rise to greater information exchange and better deliberation.

Another account is based on the potential for the lone minority judge on a three-judge panel to act as a whistleblower. 28 The idea here is that in cases in which the majority would like to break with precedent or otherwise deviate from established judicial practice, a lone minority judge can threaten to write a dissent that would alert a superior appellate court to the majority’s break with established doctrine. This credible threat by the potential whistleblower induces the majority (which is assumed to not want to be reversed by the superior appellate court) to behave in a more moderate fashion. This whistleblower explanation has enjoyed a place of primacy within the positive political theory work on multimember courts. 29

III.
THE DECISION TO WRITE SEPARATELY

The primary focus of Judge Wood’s Essay is a judge’s choice between joining a less-than-perfect majority opinion or setting off on one’s own to write separately—either in a concurrence or a dissent. This decision obviously has implications for the reasons behind various types of panel effects as well as for the nature of rule or judgment aggregation on multimember courts. While there has been a sizable amount written on this topic by judges and law professors, 30 there has been much less written by social scientists.

28. Frank Cross and Emerson Tiller provide the seminal version of this account. Cross & Tiller, supra note 17, at 2159.
30. See, for example, the citations in note 9 of Judge Wood’s Essay.
One of the best recent articles on this topic from a (largely) social science perspective is Lee Epstein, William M. Landes, and Richard A. Posner’s *Why (and When) Judges Dissent: A Theoretical and Empirical Analysis.* The authors provide an account of the decision to dissent that is rooted in a rational-choice approach to judicial behavior.

For Epstein et al., the costs of dissenting include the time and effort spent writing the dissent as well as the possibility of strained relations with colleagues on the bench. They note that a dissent also imposes costs on the majority in that a forceful dissent requires the author of the majority opinion to revise the majority opinion to respond to the challenges raised in the dissent—this also requires time and effort. The authors also note that these costs are magnified by heavy caseloads. This provides another explanation for the phenomenon of panel effects—the threat to impose costs on colleagues by writing a dissent may be enough to cause at least one of the judges in the majority to moderate his or her views.

What about the other side of the ledger—the benefits of dissenting? For Epstein et al., the benefits of dissenting include the possibility that the dissent will influence the law—either in the medium term by increasing the probability of a rehearing or a Supreme Court review, or in the long term by “record[ing] prophecy and shap[ing] history”—as well as the possibility that it will bolster the reputation of the dissenter.

Generally speaking, the motivations and considerations underlying a written dissent that Judge Wood discusses are consistent with those discussed by Epstein et al. A real strength and difference, however, is that Judge Wood’s Essay fleshes these considerations out in much more detail and also suggests some other, related considerations, such as the extent to which dissenting opinions impose costs more generally by either lessening the legitimacy of the court or by injecting uncertainty into an area of law. What is simply the abstract potential to influence policy in other work becomes a detailed discussion of the myriad ways in which a dissent might actually accomplish this. For example, Judge Wood’s discussion of her dissent in *Napleton v. General Motors Corp.* clarifies how a dissent can be motivated by broad institutional concerns, here the desire for clear standards governing appeals of orders granting or denying motions to compel arbitration. Thus, while the

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32. *Id.* at 109.
34. See Epstein et al., supra note 31, at 104–05.
35. See Wood, supra note 1, at 1462–63.
36. See id. at 1454–57.
37. 138 F.3d 1209 (7th Cir. 1998).
38. See Wood, supra note 1, at 1471.
goals of Judge Wood’s Essay are distinct from the goals of much of the narrow academic work on multimember courts, the relevance of her Essay for scholars working in these other areas is significant.

CONCLUSION

The nature of the decisions that a judge on a multimember court faces is considerably different than that faced by a judge sitting alone. Not only are the types of cases quite different but the very nature of working closely with other judges creates both opportunities for, and constraints on, additional action. The academic literature on multimember courts highlights many of these complications: the potential for a judge in the minority to act as a whistleblower, the additional writing costs imposed on the writer of a majority opinion by a dissenter, and the need to compromise in some cases because of excess caseloads, among others. Judge Wood’s Essay takes these abstract possibilities and breathes life into them by providing concrete examples from her own experience on the bench.

Relatedly, the output produced by multimember courts is considerably different from that produced by single-judge courts. This is true even after one accounts for the different functions that multimember appellate courts and single-judge trial courts serve. From a normative perspective, an interesting aspect of the move from a single-judge court to a multimember court is that it occasions important tradeoffs. For instance, there is some reason to believe that the decisions reached by multimember courts may be more accurate (in the sense that it is more likely to be viewed as correct by the relevant community) than those reached by a single-judge court. However, this increase in accuracy may well come at a price—a potential lack of coherence among the various judgments formulated by the court. Indeed this lack of coherence is one of the institutional costs of writing separately, a point identified by Judge Wood.

One take on this state of affairs is that we should limit our expectations of our courts and judges. Another view, which is not inconsistent with the previously expressed view, is that we should continue to work to understand what our judges are actually doing so that we can better understand the concrete tradeoffs embodied in particular choices of judicial institutions. While it is important to know that there are theoretical reasons to believe that doctrine emerging from a multimember court may be incoherent, it is arguably more important to know what the nature of this incoherence looks like in practice. Judge Wood’s Essay, which looks at specific decisions from the judge’s perspective, is one way that we can gain a better understanding of the outputs produced by multimember courts. Such an approach nicely complements the more abstract, theoretical academic literature on multimember courts. That complementarity is but one of many reasons that Judge Wood’s Essay should be widely read by students of judicial behavior.