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Dissent, “Dissentals,” and Decision Making

Marsha S. Berzon
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Building on Judge Wood’s Essay on the external consequences of separate writing by judges on multijudge appellate panels, this Essay looks internally to examine how separate writing affects judicial decision-making processes by appellate courts. Studies in psychology and behavioral economics have identified various cognitive biases that may impact judicial decision making and have demonstrated that these biases can be at least partially neutralized by structured “adversarial collaboration.” Drawing on these studies, I posit that the practice of separate writing on appellate panels often aids in facilitating such collaboration, but separate writing regarding denials of en banc review does not do so.

INTRODUCTION

Judge Wood’s article eloquently discusses many of the consequences of separate opinions and delineates the ways in which judges consider those effects when deciding whether to write separately. Judge Wood’s focus is

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* Judge, United States Court of Appeals for the Ninth Circuit. I profusely thank my law clerk, Jennifer Bennett, who, much to the benefit of this Essay, has a psychology background and was able to fill in my new fascination with the idea of “adversarial collaboration,” which I first encountered shortly before giving the oral response to Judge Wood’s Jorde Lecture, on October 25, 2011.
largely external, considering the ramifications of separate opinions once published. In this Essay, I focus inward, on the appellate decision-making process. I examine how the publication of separate opinions—or, more accurately, the possibility thereof—affects judicial decision making on an intermediate multijudge appellate court.

Appellate courts have several functions.¹ Most obviously, courts of appeals review trial court decisions to identify and correct error; they guard against final decisions that are arbitrary, lawless, or merely mistaken. Appellate courts also provide guidance for the future by interpreting, developing, and clarifying the law. In addition, appellate review contributes to law’s legitimacy; litigants are likely to view decisions as more legitimate when reviewed by a panel of neutral decision makers. And the effort of courts of appeals to promote uniformity in legal interpretation strengthens the rule of law. The quality of appellate decision making is thus tremendously important, not only to the resolution of particular disputes, but to the development of the law and its legitimacy.

Several features of appellate courts that we take for granted have a significant impact on decision making. First, appellate courts are multimember bodies comprised of individuals of equal stature, in which the majority rules. Decisions are made by three-judge panels and, subsequently, if called en banc, by the entire court, or in the Ninth Circuit, eleven judges thereof.² Next, while judges on appellate courts are equals,³ intermediate appellate courts as a whole are embedded in a hierarchical system. They review the rulings of trial courts and can be reviewed—and overturned—by the Supreme Court.⁴

This structure of appellate review, as Judge Wood details in her Essay, evolved over time.⁵ That evolution occurred, of course, without the benefit of modern behavioral economics and cognitive psychology. But it turns out, interestingly, that the decision-making processes of courts of appeals in many ways mimic the infrastructure that psychologists and behavioral economists have demonstrated best supports good decision making. By examining the

³ But see Wendy L. Martinek, Judges as Members of Small Groups, in THE PSYCHOLOGY OF JUDICIAL DECISION MAKING 73, 78–81 (David Klein & Gregory Mitchell eds., 2010) (describing factors, such as seniority and the appointment of a Chief Judge, that cause judges within appellate courts to be unequal in ways that may affect their decision making).
⁴ As Judge Wood notes, however, in most instances, appellate decisions are final. See 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, 1448 (2012).
⁵ Id. at 1448–50.
insights of these disciplines, we can see how our federal courts of appeals get it right—that is, the ways in which they facilitate unbiased decision making—and how they may fall short of the ideal.

Part I of this Essay briefly examines some of the academic research on decision making. Cognitive psychologists and behavioral economists have found that, although most traditional models of decision making view decision makers as rational actors, people in fact have cognitive biases that cause them to deviate from this model. These biases can lead to errors in decision making. In an attempt to ameliorate these errors, psychologist Daniel Kahneman has proposed a method that he calls “adversarial collaboration”—simply put, working with those with whom you disagree.

In Part II, I use Kahneman’s model to evaluate appellate judicial decision making. I examine the extent to which our decision-making process encourages adversarial collaboration and at what points such collaboration might be hindered. In particular, I focus on the development and publication of separate opinions. I conclude that the possibility of panel members’ publishing separate opinions often facilitates adversarial collaboration. However, the publication of separate opinions by nonpanel members, in the form of dissents from denial of rehearing en banc, does not advance—and in some way impedes—adversarial collaboration.

I.

ADVERSARIAL COLLABORATION: LESSONS FROM SOCIAL SCIENCE

Over the last several decades researchers, particularly psychologists and behavioral economists, have questioned the account of human behavior that underpins traditional economics as well as much of legal doctrine—that of the rational person. These researchers have convincingly demonstrated that in many instances people do not act as the robotic preference maximizers the law often assumes them to be. It is not that humans are entirely irrational, but rather that our rationality is bounded. Because our cognitive resources are limited,
we often use heuristics, or mental shortcuts, to solve complex problems. These shortcuts, while useful in allowing us efficiently to approximate solutions to difficult problems, sometimes result in errors. Importantly, these flaws are not random. Rather, humans err in consistent, predictable ways.

Although researchers have identified numerous cognitive biases, I will limit my discussion to just a few examples that seem particularly relevant to judicial decision making. One such example is framing: different ways of presenting, or framing, the same information changes our understanding of that information. For instance, we are likely to react differently if we are told that the survival rate of a surgery we are about to undergo is 90 percent than if we are informed that the mortality rate of the same surgery is 10 percent. Of course, the information is precisely the same, but the way in which it is framed changes its impact.

Another example of predictable deviations from rational decision making is confirmation bias: whereas a hypothesis is properly tested by searching for evidence that would refute it, people often adopt a “positive test strategy.” Rather than attempting to falsify our hypotheses, we tend to “seek data that are likely to be compatible with the beliefs [we] currently hold.” Confirmation bias is different than intentionally omitting evidence that contradicts one’s beliefs. Rather, it refers to “unwitting selectivity in the acquisition and use of evidence,” marshaling evidence in favor of our existing hypotheses and omitting or interpreting away contradictory evidence, without even knowing we are doing so. Relatedly, psychologists have found that we often evidence a bias toward coherence. Given several pieces of information, we attempt to fit the data into a coherent story, suppressing ambiguity or internal contradictions.

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8. See Langevoort, supra note 7, at 1501.
9. See, e.g., Richard H. Thaler, From Homo economicus to Homo sapiens, 14 J. ECON. PERSP. 133, 133–34 (2000) (listing several such biases); see also supra notes 7–8.
12. KAHNEMAN, supra note 7, at 88.
14. KAHNEMAN, supra note 7, at 81.
15. Id.
16. Nickerson, supra note 13, at 175 (emphasis added).
17. KAHNEMAN, supra note 7, at 82.
In addition to these cognitive biases—that is, biases in the way in which people process information—judges, like all people, are also subject to what some psychologists call trait biases. These biases are substantive, “attributable to some stable characteristic or disposition of the judge.” Trait biases are the kinds of biases we typically imagine when discussing biased decision making—biases toward more or less authoritarianism, perhaps, or a tendency to favor conservative or progressive positions, or a predisposition to trust or doubt the government.

It is easy to imagine how cognitive biases—that is, biases in information processing—could exacerbate the effect of substantive biases. Take, for example, a case in which the question is whether a search was supported by reasonable suspicion. Confirmation bias may lead a judge whose initial intuition—or substantive predisposition—is to believe the police to seek to confirm this intuition by focusing on those facts that would support reasonable suspicion. The tendency to seek coherence may then lead the judge to ignore evidence to the contrary or interpret ambiguous evidence as supportive of reasonable suspicion. Similarly, a judge initially predisposed toward skepticism of law enforcement may tend to seek evidence supporting that predisposition, and interpret away or ignore ambiguous or contrary evidence.

The cognitive psychology and behavioral economics literature demonstrates that we are often unaware of the ways in which our biases impact our decision making. Despite our best efforts, recognizing cognitive illusions can be incredibly—often inexorably—difficult for the person ensnared within them. Indeed, Dan Kahneman—one of the foremost researchers of cognitive bias—claims to be, for the most part, just as susceptible to these flaws as before he devoted his life to their study. How, then, are we to guard against flaws of which we are not aware?

One answer suggested by those who study decision making is that, at least in certain circumstances, group decision making may ameliorate the errors caused by trait and cognitive bias. While we have tremendous difficulty

19. Id.
20. See KAHNEMAN, supra note 7, at 417.
21. Id.
22. See Stephen M. Bainbridge, Why a Board? Group Decisionmaking in Corporate Governance, 55 VAND. L. REV. 1, 22 (2002); Frederick C. Miner, Jr., Group Versus Individual Decision Making: An Investigation of Performance Measures, Decision Strategies, and Process Losses/Gains, 33 ORGANIZATIONAL BEHAV. & HUM. PERFORMANCE 112 (1984); Marjorie E. Shaw, A Comparison of Individuals and Small Groups in the Rational Solution of Complex Problems, 44 AM. J. PSYCHOL. 491, 502 (1932); David A. Vollrath et al., Memory Performance by Decision-Making Groups and Individuals, 43 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 289, 299 (1989); Alan S. Blinder & John Morgan, Are Two Heads Better Than One?: An Experimental Analysis of Group vs. Individual Decisionmaking 46–47 (Nat’l Bureau of Econ. Research, Working Paper No. 7909, 2000). While there is substantial evidence that groups make better decisions than individuals, recent research has demonstrated that whether group decision making is superior to that of individuals
recognizing the cognitive illusions under which we ourselves labor, it is often easier to spot the flaws in the decision making of others. As Kahneman explains, “it is much easier to identify a minefield when you observe others wandering into it than when you are about to do so.”

Based on this observation, Kahneman advocates that social scientists employ a process that he calls “adversarial collaboration.” Ordinarily, research in the social sciences follows the model of publication-critique-reply-rejoinder. First, a scientist publishes an article advancing a particular hypothesis. Another scientist then publishes a critique. The first researcher publishes a reply to the critique. Finally, the critic publishes a rejoinder. This process is “absurdly competitive and adversarial.” “[H]ardly anyone ever admits an error or acknowledges learning anything from the other.” It does not lead to better science; it leads to “angry science.”

In contrast to this traditional method of debate in the social sciences, “[a]dversarial collaboration involves a good-faith effort to conduct debates by carrying out joint research.” Scientists with differing hypotheses together agree on a research protocol, carry out the experiments, and publish their findings. This “usually lead[s] to an unusual type of joint publication, in which disagreements are laid out as part of a jointly authored paper.”

Adversarial collaboration has several advantages over the conventional method of scientific discourse, particularly with respect to minimizing the impact of certain cognitive biases. First, there is of course the potential that collaboration—particularly that with an adversary—will cause researchers to more carefully review their own hypotheses, reasoning, and conclusions to ensure that they are sound against any criticism they may receive from their collaborators. Furthermore, it allows each author to monitor the work of the others, thereby increasing the chance that errors and biases will be identified before publication.

In addition to these general monitoring functions, the structure of adversarial collaboration itself may neutralize some cognitive biases to which individuals—or teams of like-minded researchers—often fall prey. For example, if researchers with conflicting hypotheses both suffer from confirmation bias, such biases should cancel each other out. The “tendency for researchers to look for ‘tests’ which seem likely to confirm their prior

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23. KAHNEMAN, supra note 7, at 417.
25. Id. at 729.
26. Id.
27. Id.
28. Id.
29. Id.
hypotheses” will ensure that in an adversarial collaboration, each party has to subject its hypothesis to a genuinely stringent test.\textsuperscript{30} “The guarantee of stringency is this: each party’s hypothesis is being subjected to a test that the other party expects it to fail. Thus, one of the mechanisms which tends to generate \textit{apparently} decisive experimental results in the existing literature, positive confirmation bias, is neutralised.”\textsuperscript{31} Similarly, if both collaborators tend to marshal evidence supportive of their own hypothesis, ignoring evidence to the contrary, the finished paper will contain the evidence most supportive of opposing hypotheses, thereby neutralizing any confirmation bias either individual collaborator might demonstrate.

Furthermore, while ordinarily researchers “report apparently clear-cut experimental results and . . . draw strong conclusions from them[,] . . . downplaying doubts and ambiguities,” adversarial collaboration is likely to limit the tendency to impose coherence on ambiguity and to mitigate the impulse to draw grand conclusions with “wide-ranging implications” from limited data.\textsuperscript{32} Indeed, one of the most important benefits of adversarial collaboration “is that both parties are likely to recognize limitations of their claims.”\textsuperscript{33} Adversarial collaboration does not always lead to agreement. It does, however, increase “the validity and power of the experimental design” and “the quality of the data . . . generated.”\textsuperscript{34} Adversarial collaboration generates better data, reaches sounder conclusions, and garners more legitimacy than conventional social scientific research.

\section*{II. Appellate Decision Making as Adversarial Collaboration}

Appellate decision making can be understood as a form of adversarial collaboration, both amongst the members of a particular panel and, through the en banc process, the court as a whole.

\textit{A. Three-Judge Panels}

Although the judges on an appellate panel may not initially agree about the proper disposition of a case—or the reasoning by which such a disposition ought to be reached—the goal is eventually to draft an opinion in which all

\textsuperscript{31} \textit{Id.} at 4.
\textsuperscript{32} \textit{Id.} at 3.
\textsuperscript{34} Bateman et al., \textit{supra} note 30, at 4.
three judges concur.\footnote{It is better for each member of a panel that a case be decided unanimously as long as the opinion is one in which the panel member is comfortable concurring. Judge Wood explains well the reasons underlying the preference for unanimity: for the potential majority, there is a smaller chance of being reversed en banc or by the Supreme Court; for judges who might otherwise write separately, joining the majority allows them to incorporate their views in a precedential opinion or, at the very least, to ensure that such an opinion remains within interpretive bounds with which they feel comfortable; and for all judges, fewer opinions means considerably less work. See Wood, supra note 4, at 1461–62.} Of course, while the vast majority of cases—over 95 percent—are decided unanimously,\footnote{See Admin. Office of the U.S. Courts, Judicial Business of the United States Courts: 2011 Annual Report of the Director 38 tblS-3 (2012), available at http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2011/JudicialBusiness2011.pdf; Dissents by Circuit and Year (2012) (Microsoft Excel spreadsheet) (on file with author).} unanimity is not always possible.

In what follows, I observe that the norm of unanimous dispositions results from a judicial decision-making process that is, in essence, a form of adversarial collaboration. Furthermore, I suggest that despite the prevalence of unanimity, the possibility of separate opinions is an integral part of this adversarial collaboration: that possibility improves the internal decision-making process and therefore the quality of our dispositions, regardless of whether the dispositions are ultimately rendered unanimously.

I. The Collaborative Process

For appellate panels, adversarial collaboration begins at oral argument,\footnote{Most Ninth Circuit judges have a practice of sharing bench memoranda—memoranda drafted by law clerks about each case—before oral argument and, in some cases, circulating comments on those memoranda. For judges who participate in this process, adversarial collaboration may begin with the exchange of these memoranda. Judges, of course, make no commitment to follow the recommendations presented in the bench and comment memoranda. In fact, the ultimate dispositions often bear little resemblance to these memoranda—an indication that the adversarial collaboration process does work, in the long run, to improve the final opinion.} where judges engage in a form of hypothesis testing, asking the lawyers questions designed to reveal the scope and limits of their argument. Following argument, the panel holds a conference, during which each judge expresses his or her tentative conclusion about the case, and one judge is assigned to draft an opinion. After the draft opinion is circulated, the other judges circulate memoranda, suggesting minor technical changes as well as, in some cases, expressing substantive concerns.

For example, after receiving a draft from another chambers, I might circulate a memorandum stating that I expect to concur in the disposition if it were amended to incorporate certain changes, which I give in detail.\footnote{Our rules require suggested language. See 9th Cir. Gen. Ords. 4.4.} This memo implies that I \textit{might} write separately if the writing judge does not alter the draft or provide a satisfactory explanation for why it should not be so changed. Or, if I find the draft’s result acceptable but for an entirely different reason, I might write a lengthy memorandum explaining my analysis, again
with the understanding—sometimes made express—that if we cannot reach agreement, I might write separately. Very occasionally, if I do not think there is any hope of agreement or if I think I am more likely to persuade through a finished separate opinion than a memorandum, I might draft and circulate a separate draft opinion, tentatively concurring in or dissenting from the draft majority opinion.

Typically, after an exchange of memoranda, the writing judge alters the draft opinion to accommodate the suggestions of the other judges on the panel. Sometimes, particularly where the disposition is unpublished and the suggestions are only technical, the accommodations are minor. But sometimes the draft opinion evolves significantly—occasionally even changing outcome—as a result of this process. In these cases, there are often many rounds of drafts, discussion, and memoranda honing the opinion, limiting its scope, and refining it such that it presents a result and reasoning in which all three judges can concur.

Of course, while the goal of this process is to produce an opinion in which the entire panel concurs, this goal is not always achieved. Sometimes we cannot reach consensus, and a separate concurrence or dissent is published. I do not regard such a result as a failure of the collaborative process but rather as integral to its functioning. The possibility of a published separate opinion is the leverage required to ensure that each judge takes seriously the critiques of the others.

To be sure, separate opinions also have the potential to undermine rather than promote adversarial collaboration. In my view, however, such a result stems not from the existence of separate opinions, but from the tone certain of these opinions take. When judges writing separately see themselves as withdrawing from the process of collaboration—when they write opinions that seek to antagonize and score points on the majority rather than improve its reasoning—then the opinions cease to be part of an adversarial collaboration; they become merely adversarial.

2. Factors Affecting Collaboration

There are several factors that might impact the extent to which panel decision making resembles adversarial collaboration rather than the more acrimonious and less effective process of critique-reply-rejoinder. First, as in any collaborative process, personalities matter. Some judges are more committed to collaboration than others. Some are better able to respond to constructive criticism. And some groups of these judges simply work better together than other groups of judges. Unlike scientists, judges do not get to choose their collaborators. Panels are randomly assigned. Therefore, the opportunity for adversarial collaboration in any particular case is limited by the panel’s ability and willingness to collaborate.
Second, workload likely has a significant impact on judges’ ability to collaborate effectively and on the outcome of that collaboration. How workload matters, however, is not so clear. On the one hand, judges in circuits with higher workloads may want to avoid, where possible, the additional work of writing a separate opinion. Therefore, a heavy workload may give judges an incentive to put more effort into working together to craft an opinion in which all judges are comfortable concurring. On the other hand, it is possible that an increased workload has the opposite effect: perhaps it is easier to decide immediately to write a concurrence or dissent rather than engage in possibly protracted negotiations toward consensus.

There is no correlation between a circuit’s workload and the frequency of dissent in that circuit. My speculation is that workload does indeed affect a judge’s decision about whether to write separately, but that such an effect depends on the nature of the disagreement amongst the panel. Increased workload may lead judges to compromise more often on minor disagreements, deciding such disagreements are not worth the trouble of negotiating a mutually acceptable compromise or of writing separately. But it may also lead judges to give up more quickly on attempts at compromise in the face of major disagreements.

Finally and perhaps most importantly, adversarial collaboration requires adversaries. Whereas collaborators who disagree may be able to identify and counteract each other’s biases, leading to better decision making, groups whose members hold the same predeliberation hypotheses tend to magnify, rather than ameliorate, bias. This tendency has been demonstrated not only in the cognitive psychology literature on group decision making, but also in studies of appellate judges in particular. For example, panels in which all three judges are nominees of presidents from the same political party demonstrate “far more ideological voting” than panels with both Democratic- and Republican-appointed judges. In a study of administrative law cases in the D.C. Circuit, two scholars found that panels on which all three judges were appointed by a president of the same party were “far more driven by partisanship than a 2–1 majority.”

40. See, e.g., CASS R. SUNSTEIN, WHY SOCIETIES NEED DISSENT 112 (2003).
42. SUNSTEIN, supra note 40, at 169–70.
43. Cross & Tiller, supra note 41, at 2173.
doctrine and therefore mend its ways.” 44 Although I have some concerns about the way in which academics typically study judicial ideology and decision making, 45 these studies do suggest that, like social scientists, judges make better decisions when they work with others with whom they are more likely to disagree.

B. The En Banc Process

In addition to the panel process, the en banc process provides a second opportunity for adversarial collaboration. 46 While an en banc panel’s process for deciding a case is similar to that of three-judge panels and so similar with regard to adversarial collaboration, 47 the decision whether to accept a case for en banc review presents unique challenges to the adversarial collaboration process.

In most circuits all active judges sit on the en banc court. The Ninth Circuit, however, has a unique system of partial en bancs. An en banc panel consists of eleven members of the court, ten of whom are chosen at random. This limited en banc system means that, unlike in the other circuits, in the Ninth Circuit it is impossible to know the composition of an en banc panel in advance of making an en banc call (or voting on whether to take a case en banc).

This aspect of Ninth Circuit en bancs promotes unbiased decision making about whether a case should be heard en banc: judges are less likely to call a case en banc simply because of a policy-based—as opposed to legal—disagreement with the outcome, for it is difficult to predict the policy predilections of a randomly drawn panel comprising fewer than half of the active judges. The unpredictability of the en banc panels leads to more thoughtful en banc calls as well as more thoughtful en banc voting. It may also lead to a slight increase in the number of cases that are reheard en banc.

44. Id. at 2174.

45. I am somewhat dubious about the ability of academics to categorize “ideological” voting patterns. Such categorization is often done through rough rules of thumb and may not take into account nonprecedential opinions. Also, on my Circuit, at least, the political party of the nominating president is in many instances not a very accurate predictor of judges’ voting patterns. Therefore, while studies of judicial ideology may be useful to demonstrate the general point that judges do better when sitting with others with whom they are likely to disagree, I harbor doubts about the methodology these studies employ and, in some cases, about the specific results they report.

46. In the Ninth Circuit, any judge may call a case en banc. Once a case is called en banc, there is an exchange of extensive memoranda in which the judge who called the case explains the reasons for the en banc call and the panel responds by explaining why the opinion is correct. Other judges may—and often do—circulate memoranda supporting or opposing the en banc call. After memoranda are exchanged, there is a vote. A case is reheard en banc if a majority of all active judges so vote. For the rules governing Ninth Circuit en banc procedures, see FED. R. APP. P. 35; 9TH CIR. R. 35-1 to 35-4 and accompanying note; 9TH CIR. GEN. ORDS., ch. V.

47. 9TH CIR. R. 35-3. The Chief Judge sits on every en banc panel. Id.
the national average is approximately 2 percent, about 3 percent of Ninth Circuit cases are reheard en banc.\textsuperscript{48}

The en banc process facilitates adversarial collaboration in several ways. First, the potential of an en banc call encourages rigorous consideration of the issues and openness to feedback from those who disagree. Panel members, particularly those in the majority in a particular case, typically wish to avoid en banc calls. In addition to the risk of being overturned, en banc calls significantly increase the panel’s workload, as they require the panel to submit substantial memoranda explaining its decision and responding to critiques of other judges. Furthermore, an en banc call—even a failed one—increases the likelihood that the Supreme Court will grant certiorari.

Because panel decisions that result in dissents are more likely to be called en banc, the possibility of an en banc call encourages judges in the majority to respond carefully to the critiques of a minority judge in an attempt to generate consensus. Additionally, the possibility of such a call gives off-panel judges the leverage to suggest revisions to an opinion. Not infrequently, an off-panel judge will circulate a memorandum to the panel identifying what that judge views as an error in the panel’s opinion and suggesting revisions.\textsuperscript{49} Such memoranda are implicitly—or sometimes expressly—backed by a threat that if the panel does not make the changes, or at least provide a reasoned consideration of the off-panel judge’s concerns, that judge will call the case en banc.

The mere availability of en banc review thus allows each panel to take advantage of the insights of the entire court. This observation is, of course, even more true for cases that are actually called en banc. Regardless of whether the call succeeds, an en banc call encourages the entire court to review the opinion, examine its reasoning, and exchange scholarly memoranda critiquing the decision. This exchange provides further input to the panel, which may then amend its opinion in response.

Traditionally, en banc review was either granted or denied in a summary order. There has, however, been a fairly recent proliferation in the Ninth Circuit of separate opinions dissenting from or concurring in such orders.\textsuperscript{50} When I joined the court in 2000, out of twenty-four orders denying rehearing en banc,


\textsuperscript{49} In some circuits, draft opinions are circulated to the entire court before they are published. See, e.g., 7TH CIR. R. 40(e). The Ninth Circuit does not adhere to this practice because of our size. We do, however, precirculate summaries of opinions, and we are quite receptive to altering opinions after publication based on feedback from our colleagues.

\textsuperscript{50} For a list of all dissents from orders denying rehearing en banc in the Ninth Circuit through December of 2011, see Alex Kozinski & James Burnham, I Say Dissental, You Say Concurral, 121 YALE L.J. 601, app. B (2012). As that list shows, before 1970, there had been only a handful of such dissents. In the 1970s, such dissents became increasingly common. And in the last decade, they have become the norm.
seven—or approximately 30 percent—resulted in dissents from the denial of rehearing.51 Last year, dissents from the denial of rehearing were published in two-thirds of the cases we declined to hear en banc.52 And last year was not unusual; whereas the publication of dissents from the denial of rehearing en banc used to be the exception, it has become the norm.53 Accompanying the rise of such dissents, there has begun a practice of publishing concurrences in the denial of rehearing en banc. The number of concurrences in the denial of en banc rehearing has significantly risen in the last five years: between 2000 and 2004, fewer than 10 percent of denials of rehearing en banc were accompanied by such concurrences.54 Now between 15 and 20 percent of denials of rehearing are published with concurrences therein.55

I find these trends distressing. Panel dissents and concurrences improve internal decision-making processes. In contrast, both my personal observations from my time on the court and the academic literature on decision making discussed in the previous Part lead me to conclude that dissents from and concurrences in denials from rehearing en banc do not typically have a similar effect.

The goal of such separate opinions is generally not to constructively criticize the panel opinion. The internal memoranda exchange following an en banc call accomplishes that purpose. And the prospect of an en banc call itself offers sufficient incentive for the panel to consider seriously whether the opinion ought to be revised in light of the exchange. Rather, dissents from the denial of en banc are often thinly (or not so thinly) veiled entreaties to the Supreme Court. They are, essentially, judicial petitions for certiorari.56

While presenting minimal benefits, these dissents have several important drawbacks. First, in contrast to panel dissents, dissents from the denial of rehearing en banc are written by judges who have not reviewed the case on the merits. They therefore often reflect incorrect or incomplete understandings of the record or the legal arguments at issue. Second, because these dissents often serve as pleas for Supreme Court review, their goal is not to facilitate decision making but to garner attention. The tone of dissents from the denial of rehearing is therefore frequently less productive and less respectful than that of panel dissents. The antagonistic rhetoric of some such dissents may erode the public legitimacy of the court. Moreover, the practice erodes the court’s own sense of its institutional role. Dissents from the denial of rehearing en banc indicate that we, as a court, do not view our decisions as final, as we are

52. See id.
53. See id.
54. See id.
55. See id.
56. Between 2000–2010, there were 125 dissents from denial of rehearing en banc. There were eighty-three petitions for certiorari in these cases, approximately half of which were granted. See id.
unwilling to stand behind the results of our decision-making processes. That unwillingness signals a breakdown in the process of adversarial collaboration, as well as an institutional lack of confidence in it.

There are thus significant institutional costs to the publication of separate opinions when en banc review is denied, with few, if any, benefits. While the en banc process itself likely improves judicial decision making, the publication of separate opinions when en banc review is denied impedes the adversarial collaboration essential to the functioning of appellate review.

CONCLUSION

There is no shortage of scholarship on judicial decision making. Scholars have attempted to explain what judges decide and why; they have analyzed the traditions of separate opinions and the impact of such opinions on the legitimacy of the courts and the rule of law. I hope this Essay begins a new discussion, encouraging judges and scholars to examine not only the external impact of separate opinions on intermediate appellate courts, but also the role of such opinions as a useful—or, in the case of dissents from and concurrences in orders denying en banc review, not-so-useful—aspect of the internal decision-making process.

57. There is one exception: dissents from the denial of rehearing en banc that make a useful point not made by the panel majority opinion, or any separate opinion, may aid other circuits considering the same or similar issues. But usually any colorable argument that could be presented in such a dissent may be found in one of the panel opinions, at least once such opinions are amended after en banc voting. For further discussion of my views on dissents from the denial of rehearing en banc and the Ninth Circuit’s en banc process more generally, see Marsha S. Berzon, Introduction, 41 GOLDEN GATE U. L. REV. 287 (2011).