

# Decision Rules in a Judicial Hierarchy

*Comment*

by

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## *1 Introduction*

(1) The paper by CAMERON AND KORNHAUSER [2005] is the second in a line that attempts to explain the function of tiers of judicial decisionmakers. The goal is to relate the rules that courts use to the litigants' decisions whether to appeal adverse verdicts or not. This is a challenging problem if the modeler makes the realistic assumptions that the litigants sometimes lack information about their adversary's type, and that the courts also often will lack this information.

(2) This is an important and original topic that is approached in a serious and systematic way. The current paper is, I think, an advance on the authors' earlier work because its information assumptions are more plausible. And as the end of the paper reveals, there is more interesting work to do.

(3) This Comment is in the spirit of helping the project along, so it may relate as much to future work as to the current paper. My remarks largely involve a request for further explanation. Given the novelty of the topic and my innocence of the law of Civil Procedure, there is a lot here that is not clear to me, and that may not be clear to other readers.

## *2 Modeling Choices and Domain*

(1) In their prior paper, the authors identify two approaches to the relation among courts in a judicial hierarchy. The principal/agent approach (PA) views courts as political actors who decide cases in order to implement their policy preferences. The team approach (TA) views courts as members of a team with a common goal, which is to reach correct decisions.

(2) Both approaches hold that, in a judge's view, a correct decision implements the judge's policy preferences. The PA approach thus permits a higher court to differ from a lower court or an administrative agency because the two sets of decisionmakers have different preferences. The higher court's task, in part, is to control deviations by the lower court or the agency from the higher court's policy preferences. In this model, the legislature attempts to control deviations by the courts from the current political consensus.

(3) In the TA, every judge has the same policy preferences. Hence, a higher court could differ from a lower court only if (a) the lower court mistakenly applied the law to the facts; or (b) judges observe party types imperfectly and the higher and lower courts received different signals of the appellant's type. An important preliminary question is which approach is best when studying the relation of courts *inter se*.

(4) This paper adopts the team approach but does not attempt to justify this modeling choice. The authors say, in their prior paper, that the TA is best for "normal" cases. This defines a normal case as one where higher and lower courts have the same policy preferences. The paper makes a general analysis, however, so there is a question how high in any system the ratio of this paper's "normal" cases is to total cases. This question is not addressed.

(5) Further along this line here is a large literature in political science studying courts and the relation among them. Just about every paper in this literature appears to adopt the PA. This choice is justified on two bases. First, is realism. Courts have policy preferences, appointing authorities such as chief executives and legislatures act as if those preferences matter, and judicial dissents and other informal evidence of judicial decisionmaking appears to show that policy preferences differ across judges. Second, empirical predictions of PA political science models have substantial empirical support.

(6) The authors make no effort in the instant paper, and very little effort in their prior paper, to justify their adoption of the team approach. My own view is that the team approach is implausible, at least as applied to US and common law countries. In these countries, courts appear not to act as if they wear the same uniforms and march to the same songs. The PA approach to questions of the type considered here is so well established and so seemingly plausible that (a) the paper's most basic modeling choice needs more justification; or (b) the paper should identify the court systems that are best modeled with the TA.

(7) My second concern is domain, and I have a similar question. Are there real world institutions that the analysis here can explain? In the model, the first tier court presides over a trial. The judge receives a public signal of the defendant's type. A "hard signal" consists of "public, legally admissible, and verifiable evidence" that reveals the type, but this signal is received with probability  $\pi' < 1$ . A "soft" public signal does not reveal a party's type.

(8) If there is an appeal, the higher tier court receives a second public signal, which also can be hard or soft. The paper recognizes that in the US and the UK, among other places, no new facts can be introduced at the appellate level. Put another way, the appellate courts in these countries cannot receive signals. Thus the domain of the model here appears to exclude US and common law judicial systems. Rather, the model applies to systems in which a later court provides *de novo* review of the initial factual determination. The later court, that is, also adjudicates the facts. The paper would be better motivated if one such system were described.

(9) There is a minor and perhaps a more serious concern regarding these systems. First, the paper uses terms such as "tier" and "hierarchy," but when there is later *de novo* review, it is more natural to say that courts function serially, not in a hierarchy.

Of greater concern, the model here supposes that the initial court, if it is uncertain of the defendant's type, always picks the type that is *most favorable* to the plaintiff (*i.e.*, the court holds the defendant liable). Every system that I know of, in the usual case, imposes the burden of proof on the plaintiff, so that if the court does not know the defendant's type, it picks the type that is *least favorable* to the plaintiff. In addition, in the model here the first appellate court *always* reverses the decision below, but in most systems appeals succeed with positive probability.

(10) In sum, the model in this paper permits the second and third tier courts to get new facts, it imposes the burden of proof on the defendant, and it has the appellate court always reversing. The paper does establish the equilibria that these assumptions imply, but the question remains just which real world judicial systems these equilibria could describe. This question should be addressed.

### 3 More Particular Questions

(1) Perhaps following from the above, the paper does not generate empirical predictions, and it is not obvious how the analysis could be tested. What evidence could be advanced that would make one more or less willing to accept the story here?

(2) The equilibria are importantly driven by the quality of the higher courts. In the prior paper, court quality was said to decline monotonically as a court's case load increases. There is a question whether judges that see more cases decide them worse. To the contrary, a view holds that cases educate courts so that, over a range, courts do better when their caseload increases. The paper could better motivate its assumption regarding the effect of caseload on court quality, or should say whether the results would change if quality had a global maximization point for caseload. Also, the number of judges is a political variable. Hence, if one is explaining real systems, a later paper in this line should determine quality endogenously.

(3) The context in the paper is a possible tort, that the defendant either committed or did not. In this context, it is plausible to suppose that the plaintiff could see more evidence than the trial court: some such evidence may be unverifiable. The contract theory literature shows, in contrast, that parties will contract only on the basis of verifiable information. If this is right, the distinction between public and private signals collapses for cases involving contract disputes. This is because all evidence relevant to, say, whether a party breached or not would be "hard" (*i.e.*, verifiable). The paper purports to explain the existence and function of judicial tiers that decide all categories of case. It may lack this much generality even in systems where later courts also make factual determinations.

(4) Finally, the paper could set out a little more intuition for its results. As an example, in the domain of Proposition 1, the team of trial and appellate judges eliminates all errors. This is because the appellate court is highly accurate in ascertaining the defendant's type. Recalling that  $\pi^t$  is the probability that a court will recognize

party types,  $c$  is the cost of an appeal and  $d$  is the damages a liable defendant must pay, the accurate equilibrium occurs when

$$\pi^2 > (d - c)/d.$$

The right hand side of this expression is increasing in  $d$  and decreasing in  $c$ . Thus, to eliminate all errors the appellate court must be very accurate when damages are high relative to appeal costs, but the appellate court can be less accurate when appeal costs are high relative to damages. It would be nice to have some intuition for this result.

#### 4 Summary

The authors have a great topic and they are approaching it in an admirably rigorous way. In this, or in later papers, they should better motivate their choice of the team approach, give examples of real institutions to which the analysis might apply, develop some testable predictions, better explain the factors that determine judicial accuracy and, for many readers, provide more intuition than they do.

#### References

CAMERON, C. M., AND L. A. KORNHAUSER [2005], "Decision Rules in a Judicial Hierarchy," [\*Journal of Institutional and Theoretical Economics\*, 161, 264–292.](#)

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