

MATHILDE COHEN

“TRUTH IN ADJUDICATION—A CIVIL/COMMON LAW DIVIDE?”

Forthcoming in Spanish as La verdad en las decisiones judiciales—¿una división entre common law y derecho codificado? in 3 DERECHO Y VERDAD, CONCEPCIONES (German Sucar & Jorge Cerdio, eds.), Tirant Lo Blanch, Madrid, Spain (2014)

In both common-law and civil-law jurisdictions, judges have developed distinctive customs and techniques to explain and justify their decisions. They may proceed orally from the bench or through the writing and the publishing of judicial opinions or other accompanying documents, ranging from parties’ briefs, to amici curiae, to press releases, and so forth. The two judicial cultures have established their own restrictions on the range of reasons that are appropriate for judges to mention. The purpose of this paper is to ask whether judges aim at truth when they are engaged in these explanatory and justificatory activities. And if they do, what kind of truth are they looking for? One of my main goals is to spell out the conception of truth implicit in the way courts explain their decisions and write opinions.

To address this question, the paper looks at empirical and comparative law evidence of judges’ justificatory practices—especially judges sitting at high courts. The methodology consists in searching for empirical or comparative law answers to philosophical problems that are usually not treated as having such answers. Jurisprudential questions such as that of the nature of truth in the law have, I claim, practical counterparts which role agents such as judges have to solve for themselves in their institutional confines. In this study, I am interested in finding out how judges’ institutional settings influence the way in which they answer these questions for themselves. I explore judges’ conceptual understanding of the type of legal truth they are institutionally required to pursue in their decisions.

To this day, most comparative law scholars distinguish between two major legal systems: the common law and the civil law. Despite the limitations and reductive aspects of this way of dividing up the legal universe,1 I take these two categories as a given for the purpose of the present argument. In doing so, I will focus on French and American courts as illustrative of their respective legal traditions, namely the civil law and the common law. Based on these two examples, I argue that the assumption according to which civil-law and common-law adjudication operate on different theories of truth should be nuanced. I claim that in practice both systems are uncommitted to any one particular conception of truth.

The conventional presentation of the typical common-law as opposed to the typical civil-law model of judicial decision-making suggests that common-law judges rely on a coherence theory of truth, while civil-law judges adhere to a correspondence

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theory of truth. \(^2\) Truth in civil-law adjudication, especially in France, is about showing how a particular judicial disposition falls under the Constitution or the Code. This conception of truth is closely linked to the notion of a “hierarchy of norms” within the legal system. In civil-law jurisdictions, judicial decisions usually rank relatively low in this hierarchy, being surpassed by the Constitution, statutes and regulations respectively. Judges are not supposed to engage in lawmaking and are expected to demonstrate that their judgments correspond to—in the sense that they can be subsumed under—a “superior” norm, be it constitutional, legislative, or regulatory. This is the judicial version of the philosophical correspondence theory of truth. Much of judicial reasoning in the civil law is therefore about warrants for judges’ decisions rather than justifications. Most of the time, courts aim at showing that they are entitled to decide \(x\) or \(y\), not that they are justified in deciding in \(x\) or \(y\) in the sense that they have good reasons in favor of \(x\) or \(y\).

In common-law jurisdictions, the question of truth in adjudication is set against a different background, as judges are recognized as legitimate lawmakers. The truth of judicial pronouncements, therefore, cannot turn upon their conformity to the law enacted by other branches of government—or not exclusively, at least. A court is expected to give justificatory reasons for its judgment, that is, reasons that show that it was the correct and rational decision under the circumstances and given the precedents and the other relevant source of law. This is the judicial version of the philosophical coherence theory of truth. An explanation for a judgment is true or truthful if it forms part of, or is entailed by the most coherent account of other norms, including other judicial decisions or precedents, which are taken to be part of the applicable law.

In what follows, I argue that this contrast between a correspondence theory of truth in the civil law and a coherence theory of truth in the common law is overstated. Both judicial cultures are open to a much wider range of reasons to explain and justify judgments than this brief presentation suggests. More specifically, as soon as one studies adjudication as a collective, rather than a purely individual enterprise, a number of distinctions between common-law and civil-law adjudication seem to dissolve, or at least to fade, including their divergent approach to truth. When sitting in panels of three or more, judges must balance the need for collegiality and majority building with individual judges’ independence and idiosyncrasy. Both history and current practices indicate that each legal culture accommodates different conceptions of truth when it comes to reaching collective judgments. In other words, the group decision-making context highlights that civil-law adjudication too sometimes relies on a coherence theory of truth. Similarly, common-law adjudication incorporates aspects of the correspondence theory of truth.

The paper has three main parts. The first two parts explore the significance of the apparent conflict between the civil-law and the common-law conceptions of truth. It begins by providing background and context to the civil-law correspondence theory of truth. In the second part of the paper, I turn to the coherence theory of truth at work in the

common law. Finally, in the last part of the paper, I turn to adjudication by multi-judge panels and explore a number of ways in which both legal traditions rely on different conceptions of truth.

**PART I. CIVIL-LAW ADJUDICATION—A CORRESPONDENCE THEORY OF TRUTH?**

Let me begin with a linguistic remark. While common lawyers use the vocabulary of “reasons” to describe judges’ explanations for judgments, civil-law jurists of Romance languages employ the term “motivation”—or any close variation. Typically, it is said that English or American judges “give reasons” for their decisions, while French judges “motivate” them. Common lawyers use variations of the phrase “giving reasons requirement” or “duty to give reasons” to refer to a court’s obligation to explain and justify its decisions. In Romance languages, the term of art to designate the duty is *obligation de motiver* in French, *motivación* in Spanish, *motivazione* in Portuguese, and *motivazione* in Italian.³ Is this a mere nominal difference, a linguistic accident? Or does the discrepancy reveal some fundamental difference in the way in which civil-law and common-law judges conceptualize truth?

When we talk about people’s motives, we generally mean the psychological processes that cause them to act, that is, the considerations that, in fact, influence their behavior. These could be implicit or explicit motives. Implicit motives are those largely inaccessible to introspection, but nonetheless likely to influence behavior, such as self-deception. For an example, imagine sexist judges who are self deceived in believing that they systematically dismiss gender discrimination lawsuits solely because the claims objectively lack merit. Explicit motives reflect the conscious, verbally represented (or representable) self-images, values, and goals that people attribute to themselves, such as the desire to achieve a particular goal. Think of openly feminist judges who have on their agenda the goal of promoting gender equality whenever they can through their decision-making.⁴

When we talk about people’s reasons, as opposed to their motives, we usually mean the justifications they put forward or are likely to self-report when asked why they have engaged—or intend to engage—in a particular course of action. Taken in its justificatory sense, the word “reason” is not about individuals’ psychology, about what determine them in fact, but rather about their capacity to articulate considerations that are objectively sufficient to show that their actions are warranted, desirable, or rational in a certain context.

Motives are primarily about mental states, while reasons have a normative or justificatory sense. The use of the term “motivation” might suggest that civil lawyers are interested in ascertaining judges’ actual bases for deciding, rather than their justifications

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for resolving disputes in a certain way. If that were the case, though, judges would be required to give truthful reasons in the sense that they would need to disclose their motivating reasons. In his pioneering history of the French judicial duty to give reasons, legal historian Tony Sauvel endorsed this theory, which has enjoyed an enduring influence on French legal thinking since then.\(^5\) According to Sauvel, “well-written motives must faithfully disclose all the mental steps which led the judge to reach a judgment.”\(^6\) In this view, the goal of a reason-giving requirement is to compel judges to disclose their mental states rather than to articulate convincing arguments that justify their decisions. To substantiate his claim, Sauvel notes that the first statutory duty to give reasons, enacted by the French revolutionaries in 1790, was framed in terms of motive analysis, rather than reason talk.

Indeed, the 1790 statute declared: “the motives which determined the judge shall be expressed.”\(^7\) Sauvel observes that the French legislators debated the exact wording of the duty during the parliamentary debates which preceded the enactment of the statute. Jacques-Guillaume Thouret, who masterminded the effort to restructure the country’s judicial system in the aftermath of the Revolution, insisted that the new mandate should be phrased as follows: “the result of the facts found or recorded will be expressed, and the text of the statute which determined the judgment will be copied.”\(^8\) Thouret’s proposal left no room for judges’ motivations. Had this version of the requirement been enacted, it would have resulted in banning any form of judicial reasoning, as it demanded an exact correlation between the facts in dispute and the statutory provision to be mechanically applied. During the debates, however, another revolutionary legislator, Chabroux, objected to Thouret’s proposition: “We have no statutes precise enough to subject a judge in a judgment to copy the text of the statute; I demand that we simply say: ‘and the motives which determined the judgment shall be expressed’.”\(^9\) Chabroux’ pro-motivation view prevailed: his amendment was accepted and the motive terminology was adopted.

There is a wide discrepancy, however, between this linguistic and historical insistence on motives and French judges’ actual opinion-writing practices. A conscientious reader of French case law could spend days reading opinions issued by courts of all levels without finding the slightest trace of judges’ motivations or even of any indication at all that the opinions were drafted by real, incarnated individuals. French opinions are generally disembodied, formalistic and lacking in personalized expression or style. They are unanimous and unsigned, almost uniformly purporting to describe a deductive process of decision-making, regardless of the way in which the decision was actually reached behind closed doors. To this day, most opinions are structured in a single-sentence and

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\(^6\) *Id.* 48 (translation mine, emphasis added).

\(^7\) Title V, art. 15 of the August 16-24, 1790 statute mandates judges to write opinions containing four distinct sections: (1) name and position of litigants; (2) “the questions of fact and law which constitute the lawsuit”; (3) “the result of the facts found or recognized during the discovery process and the motives which determined the judge shall be expressed”; and (4) the disposition. (translation mine).

\(^8\) *Moniteur*. 1790. 895 (translation mine; emphasis added).

\(^9\) *Moniteur*. 1790. 895 (translation mine; emphasis added).
written in the third person. Each paragraph is introduced with a ritualistic signal word such as “vu,” “attendu que,” or “considérant.” The typical French opinion adheres to the following model:

“The COURT

[List of members comprising the judicial panel]

FRENCH REPUBLIC
IN THE NAME OF THE FRENCH PEOPLE

Given . . .

[numerical citations to parties’ briefs and other supporting documents, to the applicable law—usually the Constitution, the statutes and regulations, and very rarely to precedents];

Whereas . . .

[expounding on the applicable law and its relevance to the dispute];

Whereas . . .

[when a description of the facts is provided, it exposes only the bare essentials];

Decides . . .

[disposition].”

What is the conception of truth implicit in this syllogistic form, which has existed nearly unchanged since the French Revolution? One way to understand this deductive presentation is to recognize that civil-law adjudication relies on a correspondence theory of truth. The basic idea of the philosophical correspondence theory of truth is that what we believe or say is true if it corresponds to reality, to the way things actually are—whatever that is, depending on one’s ontology and metaphysics. There are, of course, different accounts of the correspondence theory, but according to the classic version, the claim is that a belief is true if and only if it corresponds to a fact.

What does the correspondence theory of truth mean applied to judicial decision-making? To what type of reality must a judicial judgment and its justification correspond to be “true”? Were we to take at face value the suggestion that judicial opinions are about disclosing judges’ motives, the basis for assessing judicial truthfulness would be whether the opinion accurately reports the deciding judge’s mental states at the time of adjudicating. A judgment would be true, as Tony Sauvel maintained, if and only if it fully recounted the mental steps which led the judge to arrive at the conclusion. The process of explaining a disposition, be it by writing an opinion or by oral verbalization, would


consist in the transcription of preexisting thought processes. This raises the question of how far back judges would be required to go in their introspective quest to retrieve their motives. Implicit motives, defined above as those involving an element of unconsciousness, are presumably unavailable for reporting because—by definition—judges are unaware of their existence. But then, how could the law draw a clear line between those implicit motives which need not become part of a truthful judicial explanation and explicit motives, which must be disclosed? The concern is that it would be arduous, if not impossible, to second-guess judges’ assessment of their own mental states prior to reaching a decision. How could one ever verify that a judge is faithfully reporting all the conscious motives that were relevant at the time of deciding?

Even if this authentication were possible thanks, for example, to a mind-reading machine, the problem with the motive-based interpretation of the correspondence theory is that it would lead to absurd results. A judicial explanation such as “I decided in favor of plaintiff because of what I ate for breakfast” could be “true,” yet completely useless in the sense that it would not show that the decision is justified. It would provide small levels of predictability, if any, as to how future cases will be decided. To be sure, if the “true” judicial explanations were correspondence to motives, there would probably be procedural rules specifying that certain judicial motivations should be off limits on the grounds that decisions reached for such reasons tend to result in greatly more harm than good. Certain mental states would likely be regarded constitutionally illegitimate, such as racial discriminatory intent.

A full discussion of the implications of a motive-based correspondence theory of truth, however, would take us too far afield. It would also be misguided. As the preceding description of the emblematic French opinion suggests, motive analysis can hardly be the basis for assessing the truth of adjudications in the civil law given that the expression of judges’ motives is nearly entirely absent from standard opinion-writing practices. The study of truth in adjudication thus reveals that what Romance language lawyers call “motivation” has little—or nothing—to do with motives in the psychological sense after all. Quite the reverse, the civil-law syllogistic theory of adjudication is really about reasons in the justificatory sense. It relies on a correspondence theory of truth, but not in a motivational sense.

A court’s judgment is true if it “corresponds to the law,” that is, if it applies the existing legal rules, following hierarchical principles, to a particular set of facts. In the civil law, judicial decisions are close to the bottom of the hierarchy of norms. Constitutional provisions prevail over ordinary statutes, which prevail over secondary legislation or administrative regulations, which in turn prevail over judicial judgments. Because civil-law judges are not supposed to make law, but only to apply the law, a judicial decision is deemed true or correct within the system if and only if it applies a legal rule to a set of facts. The court’s conclusion must be presented as deducted from major premises constituted by the rules of law governing the case and minor premises stating the key facts. In theory, the judgment should be dictated by prior rules applied in accordance with canons of formal logic. The judicial correspondence theory is realist—in the philosophical sense—in that it implies that judicial justifications are objectively true.
or false, depending on how the law they are about is. Good judicial reasons are objective, warrant-like, such that courts could find them by means of proper inquiry.

According to the philosophical version of the correspondence theory, what is key to truth is a relation between propositions and the world, which obtains when the world contains a fact or another type of reality that is relevantly similar to the proposition. The theory is at its core an ontological thesis: a belief is true if there exists an appropriate entity—a fact—to which it corresponds. If there is no such entity, the belief is false. Similarly, in the legal realm, what is key to the correspondence theory of truth is a relation between judicial propositions and other types of legal propositions, which obtains when the legal system contains a rule, preferably of constitutional or legislative stature, from which the judge’s conclusion can be deduced. Just as facts are entities in their own right for the classical philosophical correspondence theory, rules of law, especially constitutional principles and legislative statutes, are like independent entities for the syllogistic conception of adjudication. The adjudicative correspondence theory holds that truth in adjudication consists in a deductive correspondence between judicial judgments on the one hand, and legislative or constitutional norms, on the other hand, the latter being thought of as a reality that obtains independent of anything judges may think or believe about them.

Going back to the French example, the peculiar institution of the “référé législatif” indicates that revolutionaries understood the full implications of their reliance on the correspondence theory of truth. They were aware that allowing judges to interpret the law would grant them the power to make law, thus competing with legislators. To prevent that result, they introduced the so-called référé législatif or legislative referral in the same 1790 Judiciary Act which created the first reason-giving requirement. Courts were to refer to the National Assembly any statutory provision which judges considered impossible to apply as is, that is, without being interpreted, due to some ambiguity or unforeseen gap in the law. The goal of the two-pronged reform (i.e., the duty to give reasons conjoined with the legislative referral mandate) was to prevent judges from assuming a legislative role by way of interpretation. Legislators were to be the sole authorized interpreters of the law—they had an interpretive monopoly. Unsurprisingly, this division of labor soon proved impracticable to maintain because the National Assembly was flooded with referrals for clarification and interpretation of statutes. The caseload was so great that it compromised ordinary legislative activities. As a consequence, in 1800 the référé législatif was abolished, thus implicitly re-opening the door to judge-made law by way of interpretations.

To conclude the French story and its lesson for the civil-law tradition, it is the way the law provides judges with appropriately enacted and hierarchized legal rules that explains truth in civil-law adjudication. The correspondence theory explains the nature of truth by providing the entities needed to enter into correspondence relations—a strict hierarchy of legal norms. As the next part shows, the common law does not rest on such a legal ontology and, therefore, adheres to a different conception of truth in adjudication.

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12 Statutes of August 16, 1790 (Title 2, Article 12) and of November 27, 1790 (Article 21).
PART II. COMMON-LAW ADJUDICATION—A COHERENCE THEORY OF TRUTH?

In the Anglo-American tradition, judges are primarily expected to provide justificatory reasons for their decisions. They are to show not only that they had authority to resolve a given case, but also that their way of resolving the dispute was justified in the sense that it was true or correct under the circumstances. A foundational idea of the common law is that judge-made law is the expression of reason, and a reason that is public, not private, in the sense that it draws from a shared rationality. Exchanges in the courtroom should be an exercise in public justification, rather than discourse permeated by motive analysis. Common lawyers do not see themselves as involved in the business of discussing the psychological determinants that influenced their judgment. They focus on articulating persuasive arguments for their preferred legal solution. In a modern common-law system, courts, especially at the intermediate appellate and supreme court levels, not only resolve disputes, but also announce rules to govern in future cases. When judges are engaged in lawmaking, their reasons for judgment give indications as to how future cases will be decided and thus provide guidance to lawyers, litigants, and the general public more broadly.

What is the conception of truth implicit in this typical common-law form of adjudication? The correspondence theory of truth seems to have no place in the common law. Because of the forward-looking function of courts, the reasons judges provide do not merely aim at tracking the existing law, nor do they faithfully reflect their authors’ underlying motivations. Instead, in their opinions, judges frequently strive to modify, expand or clarify the law by providing interpretive and policy analysis of the rules they are developing. In doing so, they appear to endorse a coherence theory of truth.

There are different versions of the philosophical coherence theory of truth. According to Joachim’s influential version of coherentism, so-called “monistic idealism,” what is true is the whole complete truth. Individual judgments or beliefs are not the whole complete truth. Such judgments are, according to Joachim, only true to a degree. What is interesting about this doctrine for the present argument is that it holds that any individual belief or judgment gets its content only in virtue of being part of a system of judgments. Applied to adjudication, the coherence theory recognizes that individual judges’ reasoning is not the whole complete truth about the law. They are only true or correct to a degree and must be reconciled with other legal propositions which can be found in statutes, regulations, precedents and other sources of law.

In the philosophical coherence theory of truth, to be justified is to be part of a coherent system of beliefs because only another belief can stand in a justification relation to a belief, allowing nothing but properties of systems of belief, including coherence, to be conditions for justification. In the common law, judicial decisions are considered justified when they are part of a coherent system of legal justifications and arguments.

Any one judicial opinion will only be partially “true.” A judicial justification is true if and only if it is part of a coherent system of legal propositions. The very notion of precedent—the idea that present courts are bound by their prior decisions and therefore obligated to decide the cases before them in a manner that is consistent with those prior decisions—implies the need for judges to know what those prior decisions are and to take them into account when deciding new cases. The coherence theory of truth holds that legal statements, be they court judgments, constitutional pronouncements, legislative enactments or administrative decrees, are true because they cohere with other legal propositions.

The importance of coherence explains why judicial opinions call for the most cautious and attentive wording. This choice of words is meant to ensure that the rule announced is neither over nor under-inclusive, and that it does not conflict with other binding precedents that bear on the issue.\(^\text{15}\) To further the contrast with the correspondence theory, we may add that a judicial justification is true if it is the content of a defensible (in the sense of not being completely irrational) legal argument in the system, or entailed by a defensible legal argument in the system. Far from being a matter of whether the law provides a hierarchically superior legal norm from which to deduct a judicial outcome, truth is a matter of how judicial opinions, past and present, are related to each other.

This cohererist approach to truth accounts for the determination of the facts in dispute as well as the conclusions of law. This is apparent from the way in which common-law judges traditionally conduct litigation and relate to the evidence. In civil-law jurisdictions, the correspondence theory implies that there is one and only one truth, which manifests itself in a single version of the facts and one correct conclusion of law. Judges are not only expected to become familiar with the key facts before trial begins, but they are also in charge of investigating those facts.\(^\text{16}\) In the Anglo-American adversarial system, truth, including factual truth, is acknowledged to be multifaceted and susceptible to adversarial construction during the pre-trial phase. Ordinarily American trial judges have a passive role in conducting trials, acting more like umpires than managers. They leave most of the fact gathering and discovery functions up to the lawyers and their experts who, in principle, should cancel each other out and thereby produce a coherent and balanced picture of the facts. The common-law conception of truth in adjudication thus seems characterized by coherence throughout. Both in establishing the facts and in drawing conclusions of law, judges are called to ensure that relevant sets of propositions cohere with one another.

This comparative presentation, whereby the civil law follows the correspondence theory while the common law espouses the coherence theory, has the merit of clarity, but it might exaggerate the differences between the two systems. According to the correspondence theory, judicial truth is a sort of world-to-world relation. The theory captures this in the most straightforward way by asking for a judicial judgment in the

\(^{15}\) Bernstein, Fred A. “How to Write it Right.” California Lawyer. Jun. 2000: 42

world to pair up with an existing constitutional, statutory, or regulatory provision. The coherence theory, in contrast, insists that truth is not a world-to-world relation at all; rather, it is a content-to-content, or argument-to-argument, relation. Judicial opinions respond to other legal propositions to produce justifications for judicial outcomes. The dispute between the correspondence and the coherence theory of truth, therefore, is partly about whether there is a legal reality that is independent of judges. According to the coherence theory as illustrated by common-law adjudication, legislative and constitutional norms are not independent of judges. Through their interpretations and judicial pronouncements, judges contribute to the development of constitutional principles and legislative rules. In contrast, the internal culture of the civil law assumes that “the law” (which includes constitutional, statutory and regulatory law but excludes judge-made law) is settled and meaningfully constraints judges.

But what if there are no such things as legislative or constitutional norms independent of the way in which judges interpret them? There is a powerful opposition within the civil law that rejects the idea of legislative sovereignty and of circumscribing judges to a mechanical, purely law-applying function. This alternative view recognizes that an important body of rules and doctrines has developed through case law, which cannot be tied any constitutional, statutory, or regulatory text. The classic example is the French law of torts. The Code is so scarce on the topic that the case law under the statutory provision is basically common law, hardly attached to any text. When this lawmaking potential of civil law courts is recognized, the notion of truth-correspondence as discussed previously loses its ascendency. It can no longer be the case that the test for truth in adjudication exclusively depends on correspondence with hierarchically superior norms. Similarly, there is also a compelling counter-narrative within the common law, which rejects the idea of judicial supremacy and the thought that law is what the courts say it is. Proponents of this alternative view deny any creative role to judges and maintain that constitutional and statutory texts have meaning independently of judges’ interpretations, which should be given its effect. When law is conceived of as a pre-existing reality of sorts, which can be discovered and should be taken seriously as is, the coherence theory as previously discussed loses part of its preeminence for common-law adjudication.

Independently of these challenges by insiders, the sharp divide between a supposedly common-law and a supposedly civil-law conception of truth in adjudication should be nuanced. As I argue in the final part of the paper, while the two systems use collective decision-making to dispose of most of appellate courts and supreme courts’ caseloads, neither the correspondence theory nor the coherence theory can account, in and of itself, for adjudication as a small group phenomenon.

PART III. BLURRING THE BOUNDARIES—A SMALL GROUP PHENOMENON

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17 Originally, a mere five provisions of the Civil Code (Articles 1382–1386) set out the whole of fault-based and strict liability in very general terms.
We must take seriously the fact that both in common-law and civil-law jurisdictions judicial decisions on collegial courts are often the product of group choices. The small group context of court decision-making is common to the two legal traditions and has significant consequences on their internal conceptions of truth.\textsuperscript{18} Most appellate courts and virtually all supreme or constitutional courts use groups of judges to render decisions on the merits—sometimes the full court, sometimes a subset of judges. The logic underlying the use of collective decision-making is that deliberation among multiple judges enhances the likelihood of arriving at the true or correct decision.

As Lewis Kornhauser and Larry Sager have shown in their seminal work on collective adjudication, this mode of making decisions entails significant collegial features.\textsuperscript{19} Judges hear cases as a group and deliberate together about both the outcome and its justification. They are behaviorally interdependent in the sense that no single judge can individually determine the disposition of the case or the justification to be offered for the disposition in the court opinion. And what constitutes a true or correct outcome and a true or correct justification for the outcome according to one judge may not be so according to another judge. Research in political science and sociology has documented the fact that for judges to agree on a common justification for their decision under a norm of unanimous or even majority decision, they need to collectivize their reasons by making compromises and putting their views into perspective. They need to learn how to see their individual judgments as parts of the whole truth.

Be they French or American, when judges decide cases as members of judicial panels, the collective nature of the decision process imposes distinctive constraints on the truth that can be aimed at. Collegiality creates tensions for each system’s conception of truth. Should judges aim at collective truth by striving to reach agreement on outcomes as well as on the reasons justifying these outcomes? Or should they focus on individual truth and each promote their own vision of the case? In other words, should the product of the group decision-making aim at individual truth, that is, at reflecting each judge’s individual outlook on the case? Or should it aim at a collective form of truth, reflecting a compromise among judges on what the correct solution and ratio should be?

Analyzed in a group context, the correspondence and the coherence theory of truth have a different flavor. Each approach may still enjoy considerable traction, but based on wholly different criteria. Assuming that the expression of individual truth is to be favored over collective truth, the criterion for a true judicial judgment is whether it corresponds to each individual judge’s reasons (both motivating and justificatory) for deciding the case. Here, truth is assessed, not based on the correspondence between the judgment and the applicable law, but between the judgment and every participating judge’s set of reasons for decision. Each judge’s viewpoint must be taken into


consideration one by one. Assuming, however, that articulating a collective truth is the goal, then the criterion for a true judicial judgment is whether it presents a coherent picture of all the participating judges’ reasons (motivating and justificatory) for decision. To produce truth, all the reasons put forward by the judges taken together are pooled and aggregated. In the former case, a one-to-one correspondence is pursued between the judgment, on the one hand, and each judge’s set of reasons, on the other hand. In the latter case, truth is assessed based on the coherence of the court’s judgment in relation to the group’s aggregated sets of reasons.

The situation is now reversed. Based on this new understanding of the correspondence and the coherence theory of truth, civil-law adjudication seems to follow a coherence theory, while common-law adjudication appears to favor the correspondence theory. Indeed, the conventional comparative law story tells us that in common-law jurisdictions judges are allowed to write separate opinions including dissents and concurrences and that per curiam opinions are infrequent. With a few rare exceptions, however, civil-law opinions are per curiam and judges are prohibited from dissenting or concurring publically through the publication of separate opinion. The usual assumption, therefore, is that the civil-law tradition insists on the expression of collective truth at the expense of individual voices, while the common law asserts the basic right for each judge to have their personal say in every case.

In what follows, I argue that this presentation should be nuanced. Both judicial cultures have evolved—and are still evolving—in their judicial practices. Both attempt to reconcile two modes of judicial truth, the collective and the individual, rather than pursuing one exclusively at the expense of the other. To see more clearly why, I will first return to the civil law and then move to the common law.

Civil Law—Correspondence or Coherence?

In the small group context, the flip side of civil law’s dedication to the correspondence theory of truth and its accompanying syllogistic judicial style of opinion-writing, is a norm of truth-coherence for multimember judicial panels. When acting collectively, judges are usually required to produce a common, unanimous per curiam opinion. Public dissents and concurrences are prohibited so as to preserve the appearance of impersonal, deductive judicial decision-making. In theory, there is no avenue for judges to express their disagreement because their group decision-making must present a united front. In fact, as noted above, few civil-law courts allow judges to write separate opinions. The courts that allow it are usually not regular, generalist courts but specialized constitutional courts, created after the Second World War or even more recently, and

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21 In continental Europe, the Portuguese and the Spanish Constitutional Courts as well as the German Federal Constitutional Tribunal allow the publication of dissents and concurrences. See article 90(2) of the Spanish statute on the Constitutional Court allowing Justices to issue a “particular vote” (voto particular) on a point of disagreement (su opinion discrepante); art 42 of the Portuguese law on the Constitutional court state that justices “have the right to table their reasons for a dissenting vote.” Dissenting opinions are written and published in a number of civil law high courts outside of Europe, for example in Argentina, Brazil and Mexico.
somewhat independent for the court system. More interestingly, though, even when dissents and concurrences are allowed, prevailing norms of consensus are so strong that judges seldom use the possibility to write separately.  

To this day, the commitment to coherence for collective judging in the civil law is strong and real. While recognizing that fact, I show, based on the example of French courts—which are often depicted as the most ardent opponents of dissents and concurrences—, that civil legal cultures are increasingly accepting of judges’ individual expression of disagreement. At first glance, it might seem that civil law’s structure of authority requires decision by consensus or, absent consensus, by the issuance of a single, anonymous opinion that suppresses any opposition or divergent view. I argue, however, that internal institutional mechanisms exist that allow, if not further, the assertion of diverging views.

Common-law judges know that the internal circulation of a dissent within a court is not the same as making it public. At the internal stage, the dissenters have not given up hope of influencing their colleagues and the dissent is part of ongoing interactions between members of the court. In a number of civil-law high courts, where public dissents are neither published nor recorded, it is nonetheless not unusual for judges to write up their objections to the court’s proposed opinion, not only in an attempt to influence the majority, but also because the process may have an expressive, symbolic or cathartic value for the writer. Of course, it could be objected that in jurisdictions where the publication of separate opinions is not permitted, these internal dissents carry less weight, or are less likely to influence the court than in common-law courts. But another way to look at these in-house dissents is that they may actually have greater persuasive power precisely because unanimity is necessary to reach judgment and separate opinions are prohibited. Each vote counts and, therefore, each panel member must be acknowledged and won over.

In certain continental Europe courts, far from being discouraged, the expression of dissident views is highly institutionalized and even takes a public form. At the Conseil d’État, which is France’s court of last resort for most of public law, cases decided on the merits by judges sitting in panels of four or more give rise to two types of individualized expression of disagreement. One form of dissent remains internal to the judicial panel, while the other is public. In each multimember panel, three judges play particularly important roles in what I call this “internal organization of disagreement”: the “juge

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22 At the German Federal Constitutional Court, despite the fact that dissents are allowed, Justices very rarely use the option of writing a dissenting opinion and the norm is to reach agreement on a common opinion the wording of which will betray remaining disagreements in a subtle and nuanced fashion, accessible to the attentive legal scholar. Bryde, Brun-Otto. “The Role of Constitutional Jurisprudence in German Democracy.” Competition or Convergence. The Future of European Legal Culture. Ed. Günter Weick. Frankfurt: Peter Lang. 1999: 13.

23 This argument is based on ethnographic research I conducted at the Conseil d’État in 2010-2011, as part of a collective survey of French high courts’ judicial opinions, “La motivation des décisions de justice,” funded by the “Droit et Justice” Organization, an emanation of the French Ministry of Justice and the Centre National de la Recherche Scientifique. A forthcoming article will publish the full results of the research and provide details on the data-collection methods.
rapporteur” (or reporting judge), the “réviseur” (or reviewing judge), and the “rapporteur public” (or public reporter). The first, purely internal stage in this organization of disagreement mainly revolves around interactions between the reporting judge and the reviewing judge. Public reporters come in at a second stage, and their interventions involve a public assertion of dissenting or concurring opinion.

Traditionally, the presiding judge of the panel designates a reporting judge as soon as the case is ready for review. This occurs in advance of the first conference and of the hearing. Reporting judges are usually chosen among the most junior members of the panel. Their task is to prepare a “rapport” or memorandum, and one or several “projets de jugement,” that is, draft opinions for the Court. The memo is a comprehensive document, at minimum 5-10-page long, sometimes much longer, setting forth the facts in dispute and the procedural history of the case, framing the legal issues, analyzing the applicable law, and suggesting one or several solutions. It is an entirely personal document, which reporting judges are free to keep private or to share with their colleagues. The reporting judge is expected, however, to circulate the draft opinion for the Court in advance of the first conference meeting. Several drafts or several versions of the same draft are prepared when the reporting judge is undecided or when the case is expected to be divisive.

For each case, the presiding judge also assigns a reviewing judge—usually a senior judge with considerable experience on the court. The reviewing judge is entrusted with the task of going over the elements of the case one more time and critiquing the reporting judge’s draft opinion and proposed solution(s). The reviewing judge usually gives feedback, orally or in writing, to the reporting judge directly, before the first conference meeting and reiterates that feedback orally for the benefit of the full panel during the actual conference meeting. This back and forth can be repeated several times for hard cases requiring multiple drafts and meetings.

While the function and role of the reviewing judge is mostly informal and kept away from the public eye, the institution of the public reporter is official and highly codified. Public reporters are a mid-career judges appointed for a number of years to serve as independent panel members. The main task of public reporters is to deliver a speech, called “conclusions” during the public hearing, in which they develop their own analysis of the case. Depending on the nature of the dispute and on the personality of the public reporter, these conclusions may resemble a dissenting or a concurring opinion, or still, simply provide an elaboration and clarification of the court’s per curiam opinion. In their speech, public reporters usually discuss the case’s procedural history, they analyze the statutes and the precedents, and develop an interpretive and policy analysis of the rules being applied. These conclusions are not formally part of the court’s opinion and

24 Following its condemnation by the European Court of Human Rights in the two cases ECHR, June 7, 2001, Kress v. France n° 39594/98, and ECHR, April 14 2006, Martinie v. France, n° 58675/00, French legislators have redefined the institution, previously known as “commissaire du gouvernement” at article 7 of the Code de justice administrative.

25 For an example of such clarifying conclusions by a public reporter, see Conseil d’État, Sect., December 21, 2007, Centre Hospitalier de Vienne, Rec: 546, Conclusions by Thierry Olson; RFDA, 2008: 348.
have no binding effect on the judges or the parties. In principle, they only express the public reporter’s personal and independent viewpoint on the case. In practice, however, much like certain United States Supreme Court dissenting or concurring opinions, they can exert significant influence on the lower courts and on future decisions, operating as institutional counter-voices.26

The tripartite division of labor at the Conseil d’État illustrates civil law’s ambivalence toward truth in adjudication. If French judges remain in principle committed to a correspondence approach when it comes to justifying judgments by judges sitting alone and to a coherent approach for collective judging, in practice, the boundaries between the different conceptions of truth are blurry. There exist institutional mechanisms that allow judges to express their personal vision of the law in a way that contradicts the myth of deductive judicial decision-making and unanimous group decisions. Let me now return to the common law. Similarly to the civil law, I argue that common law’s internal conception of truth in adjudication cannot be reduced to a single theory of truth.

*Common Law—Coherence or Correspondence?*

The coherence theory as developed in the second part of this paper can hardly account for common-law judges’ tendency to treat opinion writing as a matter of individual expression, whereby a truthful opinion is one that corresponds to a judge’s sets of reasons for the outcome rather than one that coheres with other judges’ rationales. Historically, English judges have endorsed a version of the correspondence theory according to which a true judicial justification is one that corresponds to each individual judge’s understanding of the law. The thought is that judges have a duty to be sincere when handing down their decisions and should reveal the factors, which they considered in making their determinations. This culture of judicial sincerity goes hand in hand with judges’ basic right to write separately. Whenever judges decide a case as a group, they are allowed to provide different, individual explanations for their preferred outcome. The premise is that forcing them to sign off to a disposition or a reasoning they do not subscribe to would be incompatible with their professional independence.

The English practice of seriatim opinions illustrates the view that when it comes to group decision-making, the test for judicial truth and truthfulness should be the correspondence between each judge’s reasoning and the judgment delivered. However, in what follows, I argue, based on the American judicial practice, that the common-law conception of truth in multimember adjudication is not that simple. In practice, it alternates between ideals of coherence and ideals of correspondence, so much so that it seems uncommitted to any one particular theory of truth.

Early on, the United States Supreme Court initiated a culture of signed majority opinions whereby one Justice writes an opinion for the Court and other Justices convey

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their disagreements in concurring and dissenting opinions. Thus, American courts have moved from the seriatim regime in which the expression of individual views was sacred to a hybrid decision-making system in which a majority opinion is expected and dissents and concurrences are alternatively celebrated or castigated depending on the social and historical context.\(^{27}\) At times, judicial truth has been about presenting a united and coherent reasoning for the group as a whole; at other times judicial truth has been about correspondence with each individual mindset, meaning that Justices should announce their views separately if they so desire. For the purpose of the present argument, what is particularly interesting about the U.S. Supreme Court’s opinion delivery practices is that they have varied significantly over the past two hundred years—and they are still in flux. Depending on the period and the composition of the Court, truth-coherence in the form of unanimous or majority opinions has been alternatively promoted and discouraged.\(^{28}\)

Chief Justice John Marshall is known as the champion of unanimous decision-making. When he was appointed on the Court, he discontinued the practice of seriatim opinions and successfully imposed—for a time—a norm of unanimous decision-making much similar to the traditional civil-law opinion, but for the fact that the Court’s opinion was signed by an individual Justice and joined by the others.\(^{29}\) In such a majority opinion, the author of the opinion uses the third person “we,” rather than “I decide this case this way.” It follow that a majority opinion does not necessarily state its author’s personal views, which may differ to some extent from the arguments put forward in the opinion.

The Stone Court (1941-1946) is often described as having established a more individualistic approach to opinion writing, leading to the demise of the norm of truth coherence.\(^{30}\) The resulting increase in the frequency of separate opinions is a central event in the history of the Court’s decision-making practices. Before the shift, unanimous decisions were the norm; since then, fragmentation is expected. Judicial individualism and overt dissensus are now an accepted, and until recently perhaps even a preferred mode of adjudication. A number of legal scholars, however, have condemned the consequent rise in “the number of decisions in which there is no simple majority opinion.”\(^{31}\)

Fragmented decision-making reintroduces the truth correspondence approach, and with it, a form of motive analysis that might have seemed foreign to the American

\(^{27}\) In its first years of existence, the United States Supreme Court used seriatim opinions following the English model. Hall, Kermit L. et al. The Oxford Companion to the Supreme Court of the United States. New York: Oxford University Press. 1992: 779-80.

\(^{28}\) To some extent, a similar argument could be made based on the English case. Roderick Munday has shown that the English judiciary has been drifting away from its traditional, individualistic approach to reason-giving, and increasingly proceeding by delivering unified and collective opinions. Munday, Roderick. “Judicial Configurations: Permutations of the Court and Properties of Judgment.” Cambridge Law Journal 61.3 (2002): 612-656.


judicial tradition. Common-law judges are not under a requirement to report their motives for deciding cases. But the individualistic approach to adjudication encourages them to explain their vote in an idiosyncratic way that discloses the reasons that actually motivated them, following a motive-based correspondence conception of truth. The Rehnquist Court (1986-2005) espoused this personalized approach. For instance, during her tenure Justice Sandra O’Connor was renowned for frequently employing fact-specific concurring and dissenting opinions as a way of avoiding pre-committing herself to a particular rationale in future cases. Commentators have suggested that this might have been a method for signaling to the public that “the outcome of a case goes through her”—so much so that certain litigants admitted to “writing for an audience of one” when drafting Supreme Court briefs. For instance, in a prominent commerce clause case, *Gonzales v. Raich*, Justice O’Connor dissented in a very personal, yet fact-specific tone: “If I were a California citizen, I would not have voted for the medical marijuana ballot initiative; if I were a California legislator I would not have supported the Compassionate Use Act. . . For these reasons I dissent.” Justice O’Connor is not the only Justice noted for her distinctive separate opinions. To this day, Justices Clarence Thomas and Antonin Scalia are pointed out for writing dissents not in the hope of influencing their colleagues, but rather to shift the arena of combat toward the public and to communicate their characteristic views to their constituencies.

At the time of this writing, it seems that the balance between truth-coherence and truth-correspondence is shifting again at the Court. Current Chief Justice John Roberts, appointed in 2005, seems keen on restoring a culture of coherence and collegiality at the Court. He sees his role as one of a mediator who tries to reconcile differences in the Court and promote unity by persuading his colleagues to speak with one voice. The new Chief Justice appears to be successful in this endeavor. In the first year after he received his appointment, fifty-four percent of all decisions rendered were unanimous. Should this new orientation persist, the gap between the U.S. Supreme Court’s and civil-law high courts’ approaches to truth may narrow.

To conclude, this comparative law analysis of truth in common-law and civil-law adjudication appears to vindicate the deflationary theory of truth. According to deflationist philosophers the common mistake in the debate about the nature of truth is to assume that truth has a nature of the kind that philosophers can uncover and theorize. In the deflationary theory, truth has no nature. When we say that something “is true,” it does not express anything above and beyond the statement to which it is attributed. For instance, to say that “snow is white is true,” or that “it is true that snow is white,” is equivalent to saying simply that “snow is white.”

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34 Emphasis mine.
Returning to law, something similar could be said about truth in adjudication. Legal philosophers looking for the nature of truth are bound to be frustrated, the deflationist would say, because they are looking for something that is not there, or at least that seems to vary from time to place, as this paper has argued. For the deflationist, truth in the law has no nature beyond what is captured in ordinary judicial assertions such as that “plaintiff wins because defendant knew with a substantial certainty that the consequence would occur” is true just in case the court decides that the plaintiff wins because defendant knew with a substantial certainty that the consequence would occur. Everything else, that is, the form and style followed by judicial opinions, is contingent a matter of local judicial culture here and now.

It follows that truth in adjudication might be both a redundant concept and a very useful concept. It is redundant in the sense that it is a concept that we could do without ontologically and metaphysically—we do not it to understand and conceptualize what the law is. But as an expressive and cultural concept, I hope to have shown in this paper that it is an extremely helpful concept in the sense that it offers a window into different legal practices given lawyers’ pervasive truth talk.

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