Secret Votes and Secret Talk: Some Puzzles

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Introduction: Minimal Democracy

I think of deliberation and voting as core democratic practices. In my view, the notion of democratic rule is incomprehensible unless there is some sense, however fragile, in which people rule themselves. That sense can be weak in the sense of having elected representatives play the central role in legislating and governing, but there needs to be some kind of chain of responsibility connecting the people to laws and policies B or else we are not really talking about democracy but about some other form of government. The chain of responsibility requires two things B first that people can speak to the government to petition and state grievances; and second that their assent is required for rule to be legitimate. So the chain has two strands B one reaching from the citizens to the government involving speaking directly or through representatives (upwards if you like); the second (downwards) involves the government giving acceptable rules to the people. Both strands must be robust and secure against possible breaks.

Assent involves two things: that the representatives are selected in a way that makes plausible their ability and willingness to represent the people. Perhaps this involves election; perhaps as in Athens lottery is admissable; perhaps other modes are possible as well (see

Kishlansky for one possibility). Second, certain kinds of rules (laws of a certain significance) may require more specific forms of assent. It is impossible to say precisely which ones or what forms of assent are required a priori; it is a matter of convention that each polity settles for itself. But the two forms observable in modern democratic states are: first, approval by the legislature as a law (with public evidence of deliberation) rather than an administrative edict; and second some evidence of the willingness of the public to accept the law in everyday life (I know this is nebulous but...there it is). So, in my view, democracy involves minimally two things: that people be relatively free to criticize and petition their government in any way that they want. And that they, or their representatives, have to assent to laws for them to become legally binding.

These are weak requirements. Assent might be satisfied by the people accepting a proposal as law that they had no role B even indirectly B in formulating. As Romer and Rosenthal showed decades ago, the right to refuse a take it or leave it offer can be a very weak power. And it is even weaker if that right is restricted to representatives. So in a well functioning democracy (one that is a bit more than minimalist in my sense) there should be assurance that proposed laws are formulated in a more or less deliberative manner: aimed to address important public problems and grievances and tailored so as to avoid punishing minorities. How those deliberations should be organized is a question of political science in the old sense: they need to be effective in choosing policies that solve important problems (consult with relevant experts on technical matters, etc), and at the same time, listen to complaints about whose rights and privileges are at risk. These requirements can be in conflict. Sometimes, to be effective, policies need to be formulated in closed sessions among experts; but closed processes can be abusive to the interests of those outside the chamber.

So, in a minimal democracy the core practices B choosing representatives and

deliberating about policies B can be done in some sense secretly or in the open. And there arguments recommending secrecy for both practices, though the sense of Asecrecy@ is somewhat different in the two cases. A body can deliberate in secret from outsiders B in the sense of closing the doors to its proceedings to make them hard to observe by nonparticipants. The Constitutional Convention at Philadelphia deliberated in secret in this sense. Other examples are ordinary juries, and most high level courts: even the relatively Aopen@ Supreme Court has its conferences in secret (though the justices take notes at those conferences and sometimes they are published later). And within organizations or faculties most decision making bodies that I know of typically have at least the possibility of having some meetings in secret: in executive session. When a body deliberates in secret the arguments made and the identities of those who make them are not known to outsiders (unless there is a leak) but they are known to those inside the group.

I. Democratic Secrecy

ADemocratic@ secrecy insofar as it embraces both of these ideas, is of two kinds: one is directed mostly toward those outside the group; the other against those inside it (as well as those outside it). If this is right I would expect that each kind has a distinct motivation. This is because the upward and downward chains have different normative requirements. In any regime, the sovereign or lawmaker needs to hear about problems in society before they become emergencies. Rulers can use spies or listen to rumors or try any number of mediating organizations. But consulting with the people through delegates and representatives is a common mode of information gathering and it is obviously at the core or the modern democratic state. To effectively gather information it is important to allow a good deal of unthreatened speech. The

English adopted parliamentary free speech norms very early, presumably because the king thought such rules were useful (protecting members from arrest when in parliament). In medieval England the relation between the king and the parliament was exemplified in the slogan Agrievances before supply@ symbolizing the demand that the king hear and address grievances (in legislation) before parliament would grant new revenues. But king would have wanted to hear grievances anyway even without the bargain that the slogan is said to represent.[1]

While the king needed to receive grievances it was up to him to decide how to address them. Often it was done by granting new legislation B perhaps restricting some abusive monopoly as was common under the Tudors and Stuarts. But the legislation expressed the will of the king and needed to be put in a way the emphasized that it had binding effect because it was Ahis@ law. Pasquale has told me that the early French courts had the task of interpreting the king=s will Bstating the law B on the presumption that it was necessarily unified and coherent (as it was the expression of one man=s will). He said that this presumption supported the idea that the courts should rule as collegial bodies. I am not so sure that kings can=t be of several minds or, at least, somewhat vague or confused about what they want or will permit. Certainly English courts never took it as obvious that judges should subordinate their views to the need for a unified sovereign command. But I do agree with Pasquale that giving a law (the downward strand of the chain) involves achieving coordination on the norm B that those subject to the law see that Athis@ norm and not some other one is what they are required to learn and follow. What is needed here is clarity and focus. So there is certainly pressure in direction of unity of

[1]Steve Holmes has emphasized how difficult it is for a sovereign to make himself hear bad news even if knowledge of that news is necessary to formulate laws useful to his regime and argued that an irrevokable devolution of powers can help secure effective information transmission from the periphery to the Center.

expression.

I believe that the main motivation for secret voting is preventing corruption B to prevent individual voters from being bribed or intimidated in some way.[2] That surely was the motivation for the introduction of the Australian ballot in the late 19th C. B it was adopted in a context where it was widely thought that political parties and others were paying for votes which is really only economically feasible if votes can be observed. And it seems to have been the motive of the Romans when they adopted the law mandating the secret ballot for elections (the Lex Gabinia in 139 BC) as well as when the device by which ballots were cast (the bridge or pontus) was narrowed to permit only a single file to the urn where ballots were deposited (in a law passed by Marius as a tribune in 119). Cicero=s doubts about the wisdom of secrecy are well known: In De Legibus he has Quintus complain that the secret ballot has diminished the influence of the *boni* over the electorate in a way that has allowed the election of bad candidates and bad legislation. Rousseau and other modern republicans have largely accepted Cicero=s diagnosis: like Cicero he said that it was regrettable that open voting was not possible by that time in Rome (presumably the people were already too corrupt for that), and so explained the secret ballot as the best that could be done at that late date.[3]

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[2] Acorruption@ is a broad concept and, as is apparent from the discussion, what some called corruption was plausibly an appropriate form or persuasion. I suppose that the Athenians probably saw as corrupt anything that interfered with their equality norms. For example, if some are more expert than others and can give better reasons to vote for some candidate or policy it may seem reasonable for the Assembly to listen more to their opinion than to those of others. But this kind of unequal influence might be seen as corrupt by some since it might undermine political equality.

[3] Cicero himself (speaking as Marcus in *De Legibus*) proposed another solution: let votes be cast in secret and then made available to the optimates, at the voter's option, as a way of winning favor. In effect making votes secret but verifiable ex post. One can imagine how this might be modeled as a kind of signaling game, where the refusal to show a ballot would be

informative. Cicero, as game theorist, would probably have thought that the likely result would be that votes are effectively controlled by the desire to please the optimates rather than by any explicit intervention. This needs proving of course.

I suppose the Athenian practice of secret voting in the peoples' courts had a similar genesis. And certainly the elaborate practices of maintaining secrecy about who would be a juror until just prior to trial, the prohibition (effective I suppose) on deliberations within the jury, and the use of pebbles as ballots all seemed aimed at preventing the corruption of jurors. And the early Athenian practice of Ostracism which was, as far as I know, characterized by the secret deposition of pottery shards in some place B presumably anonymously. But I am not sure of that. The one famous story I know of that practice B the vote by a peasant for ostracizing Aristedes the Just B did not evince any concern with undo influence on the peasant=s vote.

If the prevention of corruption was the common purpose of making voting secret, there was also, at times, an awareness of the costs of doing so. Cicero=s dialogue in De Legibus articulates one cost - that the better elements in society (aristocrats) will lose influence and society will be run by the mob. Rousseau, more sympathetic to popular role in election, saw a some different cost: that open and free deliberation, which would normally be the best way of finding the general will, is not possible because people are too weak to avoid corruption. It must therefore be replaced by a more rigid and formal system in which magistrates propose laws (and possibly debate about them in front of the assembly), and the people vote on them without deliberating among themselves. Rather like the Athenian Courts B and even it lawmaking body (the nomothetai, which was a part of the courts since its members were drawn from the annual jury pool).

While Rousseau and Cicero are ideologically at odds, it seems that their regrets over secret ballot are, at base, closely related. When the ballot is secret it becomes less likely that reason governs B the tumultuous mob is more likely to rule instead, as Cicero feared; or, as Rousseau worried, that the will of all (the sum of private wills) is likely to prevail in place of the

general will. In effect both seemed to think that what is lost with the secret ballot is the introduction of important and appropriate reasons B reasons that would be persuasive if listened to B as to what policies should be adopted. But both thought that Rome in the 2nd C no longer had the option of open voting and that it was worth trying to build on the imperfect voting institutions.

A related concern is this: when a secret ballot is introduced a sharp disjunction is imposed between discussion and decision. Imagine a faculty meeting at which a job candidate is discussed and people give arguments for and against the candidate. On balance, from what is hear at the meeting, it seems that there is a recognition that the candidate is a leader in her field and very well qualified for the position and that few important objections of any kind have been raised. Then, according the departmental rules votes are taken by secret ballot and she fails to get more than a few votes. I have been in that meeting B more than once B and each time it struck me that secret balloting meant that no-one had to explain their vote in public. Indeed, no one would believe a proffered explanation since it is impossible to verify how anyone voted. In effect, people were prohibited from giving reasons for their decision. And since such reasons could not credibly be offered, they could not effectively be addressed either. And all that remained to tell the candidate was that Awell, you didn=t get the job.... and I really don=t know why@. This is another reason to think that a cost of secret ballots is to make the result of the process less reasonable in the sense that it is less explicable and less justifiable to the wounded party.

The purposes of having secret deliberation seem more diverse. One concern is to assure that members of the body approach their task without worrying what others, on the outside, may think about them. In particular, they should avoid the temptation to build an external reputation

or to take firm and incorrigible positions that would make it hard for them to adjust their views in discussion with others. Plainly if the members could adopt rigid public postures it could advantage them in internal bargaining with their colleagues during deliberations and the net effect might well be worse for all the members. Let=s call this the collegial motivation: which I argued is rooted in the need to achieve a unified expression of a norm to facilitate social coordination.

A second reason for secret meetings is to avoid pressure from the outside. The events in the French revolution illustrate this: where those in favor of a constitutional monarchy B as were the Girondin B were intimidated by the AMountain,@ and were forced to abandon the their moderate constitutional project as well as the King himself. I suppose there would a similar concern with bribery. Closed meetings might be thought to discourage outright bribes, presumably because the bribers could not easily monitor the behavior of those who they had Abought.@ Call this the anti-corruption motivation.

A third reason for closed discussions might be that ordinary people are simply incapable of understanding the issues and would be led to evaluate their representatives on irrelevant criteria. This could be so because the issues are technical or because widespread knowledge about the issue would be dangerous (as might be the case in making monetary policy, or national security decisions, in public for example). Call this the Adon=t try this at home!@ movtivation.

But while these concerns may be apt for certain kinds of bodies B courts for example, since they are mostly concerned with interpreting and applying laws B they seem harder to apply to the elected legislature.[4] The legislature is, on my account, a dual purpose organization

[4] Actually modern courts B especially constitutional and other high level courts B are in a more complex social situation. They are concerned not only apply the law to cases, which

concerned both with the upwards flow of information and the generation of assent; and it is also concerned with the downwards creation and application of regulatory norms. Constituents may demand, and possibly deserve, that their hear their complaints and show public and repeated evidence that they have really listened. And they may expect that their representative transparently indicates what course of action she will pursue in the legislature; that she fixedly pursue their interests rather than compromising it away; and that they be able to see her every move to make sure that is what she actually does. And they may rightly demand that their legislature gives assent only to laws that are in the interests of the people (and perhaps of their constituents).

But maybe they will not demand so much at least for certain kinds of decisions. Certainly some legislative committees meet in secret B presumably there are compensating justifications for this. It seems to me that the trend has been away from legislative secrecy in recent times except in special (and important cases) concerning security and war. This may not be a good development. Here is table that tries, ideal typically, to outline the expectations for governmental functions or departments. Real governmental entities may fail to achieve their normatively expected degree of openness -- partly because of a lack of commitment capacity. Notoriously kings had trouble making themselves open to bad news. [5]

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involves elaborating the coordinating norms generated from above, but also with generating new norms. And insofar as they generate new norms, there is an expectation that courts meet expectations normally focused on legislatures. For example, when making forward looking norms, that they listen to parties not involved in the particular case (as with amicus briefs); that they are chosen to be representative in some sense B or at least be acceptable to representatives of diverse political groupings; and that they follow procedures providing notice of new norms and recourse to those who are dissatisfied with them.

[5] DANGER: FUNCTIONALISM ALERT!!! I see no brief way of saying this without a resort to functional classification. Don't worry. I do not invoke functions as explanations but

only as a short hand description of what I imagine causal mechanics would tend to bring about. This is and Elster conference so we can expect the Function Police to be on patrol.

Organizational Standards of Governmental Departments

	Legislature	executive	courts
upwards	open/grievances	Open	open
downwards	open/assent	Closed	Semi-closed

Secrecy in a legislature surely entails costs B agency costs B since electors are deprived of relevant information that might be useful to them in deciding whether to reelect or reject their representatives.[6] Sometimes there may be good reasons to bear these agency costs B voters may be unlikely to know how to pursue their interests in complex policy areas, and their views of the appropriate actions for a legislature may place too much weight on the voter=s narrow self interest. I think these concerns are appropriate. But there must in these cases be some reason to believe that unsupervised representatives will do better in some sense, all things considered. Or that there are indirect means of controlling representatives (perhaps the party leaders play a disciplining role and are themselves disciplined by electoral incentives); maybe representatives of an opposing party can be counted on to expose bad behavior.[7] As a general matter it seems

[6] Recently Nadia Urbanati and Jeremy Waldron have argued (following Mill) that there are benefits to representative rule that cannot be achieved in direct rule so that representation not be regarded as a kind of second best system when political units are very big or issues very technical. Kant made an argument in Perpetual Peace that makes more or the less claim but with very different argument that would apply to the smallest city state as well as to the modern state. He argued that direct democracy is intrinsically despotic (as would be the direct rule of single person) -- rule of will rather than reason -- whereas representation can limit the willfulness of direct rule. I can agree if this is meant as a claim about good government. But it is meant as a claim about democracy (in my sense as a kind of "self" rule) I am not convinced.

[7] This seems doubtful since committee members normally engage in repeated interactions and have reasons to cooperate on matters of this sort.

unlikely that the voters will tolerate a very high level of secrecy in legislation.

In fact legislatures have almost universally restricted secrecy to committees and caucuses (including the leadership group) whose tasks concern agenda setting B including developing bills to bring to the legislature as well as scheduling them and their possible amendments B but not final decisions. For final decisions, legislatures almost always choose to be transparent.[8] Possibly this is because it is not expected in most legislatures that Aserious@ deliberation will take place at the final stage: mostly it is concerned with legitimizing a bill that has already been deliberated about extensively and usually in secret venues (official and unofficial).[9] Of course it is well known that the power to develop and set the agenda is very consequential and so insofar as such things can happen in secret, much significant legislative activities is invisible. But at least one symbolically significant act is reserved for the citizens: a proposal can only become a law through the assent by the representatives of the people to accept or reject it. This could be seen as the minimal democratic condition as it permits a law, binding on the people, to be enacted only if the people have, through their representatives, approved it. A meager kind of self government.

If I am right then, both kinds of secrecy (in voting as well as in deliberation) entail

[8]This point may illustrate a feature of the oft-made comparisons of the French and American constitutional conventions. Notoriously the first met in the open and was subject to intimidation by outsiders and the second met in secret session. But the French body was entitled to make final decisions whereas the American one could only make a proposal. The arguments for secrecy at the proposal stage seem much stronger than at the final decision stage of a legislative operation.

[9] The US Congress opened up many committee decision making (mark up) sessions in the early 1970s, in response to pressure from progressive groups. The result seems to be that organized interests mostly show up at the open markups, that some markups are closed on an ad hoc basis, and that very often, important deliberations occur in unofficial venues (in offices or on the phone or internet).

serious costs. And much of the loss is informational. In the first case opportunities for persuasion are lost. Good ideas in the voting booth count no more than any other idea, however frivolous. In the second, there is loss of information relevant to controlling agents and therefore a transfer of power to elected officials.

II. Voting

Recent results in voting theory may call some of the intuitive notions about secret voting that I discussed above into some question. I use secret voting to mean taking votes Asimultaneously@ where what is meant is that no-one knows how another is voting or has voted when casting her own vote. This excludes, in my view, voice votes since there is an always an instant where a voter can know something about how many are voting (if she hesitates just a bit), the enthusiasm for the two sides, and possibly how particular people are voting before actually casting her (voice) vote -- so it cannot really be simultaneous or secret. The same seems true of shows of hands or other kinds of Adivisions@. All are at least partly open to the flow of information prior to the actual casting of a particular ballot. It seems to me that a genuinely simultaneous vote must be in some stronger sense secret from others B and specifically from others inside the group B even if those others try to hesitate and draw inferences of various sorts (within the voting rules). So I am thinking of paper ballots, or voting machines (computers nowadays), or pebbles that can be successfully concealed prior to being dropped into an urn.

Consider first a situation in which a voting body has to decide between x and y by some form of majority rule (ie. The rule is decisive so that the size of a Awinning@ coalition is at least (n+1)/2, where n is odd). When the issue is decided by open sequential voting and the voting order is fixed in advance, as long as n is odd no one has x and y indifferent, the voting Agame@

can be solved by backwards induction so that there is a strategy vector, s*, which is a sequential equilibrium. This can be done for any voting order, k. so we have a function s*(k) of sequential equilibria. When information is complete each of these equilibria will yield the same outcome. There are of course other equilibria to this game B say where everyone votes for x, regardless of her preference. But these others are not sequential equilibria. And it is also easy to see that, in this case, simultaneous voting will produce the same outcome as long as weakly dominated strategies are removed B since then each voter votes her most preferred outcome. So in this trivial case, the results of secret voting and sequential voting seem to coincide.

Recently theorists have noticed that this result extends (in part) to a much more complex case in which voters have private information about the value of enacting x rather than y. In this situation, voting sequentially has the possibility of revealing information to those who vote later in the process, whereas on the face of it, such a thing could not happen if voting is done simultaneously. But in a simultaneous voting game over two alternatives, it is rational to condition your vote on the event that it is pivotal to the outcome B if it is not then it makes no difference how you vote. The reason for this is that is that there is Ainformation@ that is revealed to Ayou@ (actually the cipher who casts your vote learns something)) when your vote is pivotal. For example, in a unanimous rule jury you are only pivotal if all of the other players have voted to convict. So Ayou@ have to decide how to vote Aknowing@ that everyone else has voted for conviction. To do otherwise is to play a weakly dominated strategy.

Dekel and Piccione (2000) have recently proved the result:[10] in a symmetric voting game, if s* is an equilibrium with simultaneous voting, then for any way of sequential voting,

[10]Eddie Dekel and Michele Piccione, ASequential Voting Procedures in Symmetric Binary Elections, A JPE,vol 108 (2000), 34-55

s*(actually this needs to be defined) will be a sequential equilibrium. This implies two things: first, that pivotal voting effectively transmits as much information as can gotten in sequential play. In that sense, pivotal voting is efficient. (An earlier result by Feddersen and Pesendorfer established that when the group gets large, pivotal voting effectively aggregates all the information in the sense that the same outcome occurs as would if the voters had complete information to start with.[11]) Second, it implies that sequencing doesn=t matter, since s* (suitably defined) is an equilibrium in every sequence, so there is a sense in which there is no point in trying to manipulate the sequence in which people vote. Moreover it suggests that there is no possibility of information cascades in the voting system (again because the sequential equilibrium is sequence independent)

I am not alone in finding this result puzzling. If it is robustly true (more on that below) it suggests that if people vote Arationally@ in the sense of conditioning their votes on pivotality, then it doesn=t make a difference whether or not the vote is taken in secret. And in particular, if there are other reasons for secret voting B avoiding corruption for example B the choice to vote in secret is costless to the group. There is, in this sense, a free lunch. That makes even me nervous since, unlike Friedman, I think a free lunch can exist but that it would probably be terrible.

[11] Tim Feddersen and Wolfgang Pesendorfer, AVoting Behavior and Information Aggragation in Elections with Private Information,@ Econometrica, vol 65 (1997) 1029-58.

Further research has produced some grounds to doubt the robustness of the Dekel-Piccione finding. Battaglini has show that introducing some small voting costs undercuts the result in the sense that the sequential and simultaneous voting equilibria diverge. But, in the case he examines he shows that the simultaneous voting equilibrium pareto-dominates all the sequential equilibria. So, Battaglini=s result suggest that in some cases simultaneous voting is unambiguously better which suggests that you will actually be paid to eat lunch.[12]

I don=t think matters are anywhere near settled in this research since all of the mentioned nations from rational play (first voters tend to vote Atoo often@). And generally they find that sequential aggregation is somewhat superior to simultaneous information aggregation (which goes the opposite direction from the above results), that there is little evidence of cascade effects, and that there is a good deal of free riding by those who come early in the sequence.

Perhaps these results are sufficient to undercut the puzzle that I have tried to sketch: I don=t yet think os. It is only one set of experiments and the results are not that strong. And besides these results may only indicate that real people B students B are not really rational and that is the reason that sequential voting is more informative than simultaneous voting. Maybe it is simply too hard, or too nonintuitive, for people to condition their votes on pivotality so they leave lots of information on the table so to speak. And this Airrationality@ interpretation might help explain why cascade behavior was not observed in sequential treatments. But to say that real voters are not rational is not really to say **how** they are irrational and to give no reason, analytic or empirical, to be confident that sequential play will be more effective in aggregating information.

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[12] Marco Battaglini, ASequential Voting with Abstention,@ working paper (2004) Princeton, Economics Department.

III. Deliberation, Information Cascades, and Commitment Institutions

In this section I want to consider a simple deliberative problem stated in the way that a student of Habermas might structure it: A bunch of people are discussing what to do. Each has some private information about the value of taking some public course of action and the action will be selected by a vote after the discussions are finished. Let=s assume for the moment that people do not behave rationally but, instead, tell the truth whenever they are asked about their beliefs. And let=s assume that they listen carefully and respectfully to anyone else=s expression of their own beliefs, not only in taking their report to be truthful but also in fully taking it into account in updating their own beliefs. Thus at each period, t, someone, i, makes a speech, m(i,t), conveying his private information about the proper course of action, and f**ollowing** each speech people update their t-1 beliefs.

So, when it comes to his turn at t, member i will already have updated his initial belief t-1 times (so will everyone else) and, if t is large one would expect that all their beliefs will have substantially converged so that he would want to give the "same" speech at t (ie. a speech that conveys his beliefs, which are by that time nearly the same as everyone else's) that anyone else would have had it been their turn. But this means that very little of i=s own private information (what i believed at t=0) will be conveyed so that some information is effectively left behind. This is simply a statement that beliefs will tend to cascade if people are truthfully conveying their beliefs at each point in the deliberation, and if each listener is willing to believe the statements. Thus, ideal deliberators may be unable to learn as much from each other as they should. And this is because they are maximally respectful of the opinions of others at each point in time. They

refuse to treat others are mere data reporters of their t=0 beliefs (to do that would be to treat others as a mere means), which in any case, none except the first speaker believes anymore when called upon to speak.

My question in this section is how to think about this. It may be true that rational deliberators would not be so gullible (truthful behavior is probably not going to be sequentially rational) but that really won=t stop cascading since cascades are consquences of rationality -- but they may not be as fast as cascades among truthful-gullible types. Besices, to behave strategically rationally is to depart from Habermas=s neo-Kantian speech norms -- and the neo-Kantian claims support for that norm from nonconsequentialist foundations (ie. it may not matter to her that the consequences of these norms are bad). So maybe we have to deal with this issue as we find it. I am not sure.

One thing that seems true is this, we can construct another more or less ideal speech situation in which each person writes down her initial beliefs on a slip of paper and all the papers are then aggregated at the end, perhaps my a non-Kantian machine of some kind. Actually it is a kind of secret ballot where the size of ballot is large enough to describe one's beliefs. Then at the end of the process someone (or machine) aggregates all the beliefs using something like Bayes rule. This is effectively to transform ideal speech into ideal non-speech. So, as some say of Rousseau=s theory, we end up with a Adeliberative@ theory where talking is prohibited. Ironical possibly but if that=s where we need to go....

Another possibility is to ask a different question: ask people to report their time 0 beliefs rather than their current ones. As I suggested earlier this seems to be treating the members as a means B mere data reporting devices B and not to credit them with human intelligent capacities. Somehow it seems unsatisfying. No doubt I am missing something.

IV. Acting Together: Joint Action and Collegial Voting

Sometimes a decision making body has reasons to present itself as a unified entity and to repair or, failing that, conceal internal disagreements. I argued that insofar as a lawmaker is in course of giving or promulgating a new norm, or making an authoritative statement as to what an existing norm actually requires, members of that body might want to speak in a single authoritative voice. If they can do that, listeners will have reason to understand what they are required to do or refrain from doing. If the members speak in several voices, there may be confusion and failure to coordinate.

Philip Pettit has argued that for certain kinds of groups (which he calls social integrates) this may be relatively easy to do. A social integrate is a group which has already a great deal in common B largely shared preferences and beliefs or perhaps a shared understanding of standard to apply to possible courses of action. His examples of such entities were political parties of the kind seen in the UK and other parliamentary systems committees which are given a defined Acharge@ along with the delegated authority to make some decision or recommendation or other. Such entities could, he argued, have or at least exhibit (act as if it had) a kind of Agroup mind.@ I am not sure if that is still his view. In that paper he labored to make the group Amind@ requirements pretty weak so they might be palatable to group mind skeptics (probably this didn't work). Maybe it became so frail a creature that he may have abandoned this idea altogether. And, by now (having worked in this area for a long time), he probably wants to apply the notion of collegial decision making to internally diverse groups for which any kind of group Amind@ claim would be pretty implausible. So my guess is that he would want to rest collegiality -- the shared commitment of a group of presenting themselves as a unified body -- on somet other

basis.

And certain kinds of groups seem to wish to present themselves as having one view on range of subjects even if they are internally divided. A standard example of the kind of issue that is raised is the doctrinal paradox which can occur when group preferences or beliefs are diverse in a certain way.[13] Here is it illustrated with a three judge courts deciding a case in contract law where the plaintiff has alleged a breach of contract. Notice that doctrine requires that plaintiff prevails only if there is a valid contract that the defendant has breached.

Breach of Contract

	Contract	Breach	plaintiff wins
judge 1	Y	N	N
judge 2	N	Y	N
judge 3	Y	Y	Y

Note that, if asked to decide the case by themselves Judges 1 and 2 would rule for the defendant and only Judge 3 for the plaintiff, so that if the case is decided by a majority in the court the defendant would prevail. However, were the court to decide on the issues one at a time and then determine the case in terms of its holdings on the issues, the case would come the other way since a majority thinks that there was a valid contract and that it had been breached.

This circumstance, should it arise, is considered to be a kind of embarrassment for a court since for either way it decides (case by case or issue by issue) there seems an objection from the

[13] cite Kornhauser and Sager

opposite viewpoint. The embarassment is, of course, evident only because lawyers can count to three: the losing lawyer can see the disagreement pattern and rationalize opposite result. So this might be a case where secrecy could come in handy. The court could decide to discourage its members from writing separately and instead simply announce the result of their decision. They may themselves decide in advance to work case by case or to work issue by issue in figuring out who wins. We'll never know since there won't have been published evidence (in the form of separate opinions). The judges, though, will know as presumably when arguing in conference their views would have become transparent to each other. So the paradoxical elements are hermetic.

I have argued that in this example, what is at issue is that the judges disagree as to whether the facts of this particular case are such that there is or is not a valid contract, and whether (if there is) there has been reason to think it has been breached (ei that the failure to perform was not somehow excusable). And presumably the court does not merely want to do justice (ex post) in this case; it also wants to refine the norms of contract formation and breech in a way that guides future actors. My intuition is that from th ex post viewpoint, there is a lot to be said for case by case aggregation. A wrong has been alleged and issues of justice to the parties seems paramount. But from the lawmaking posture the opposite seems apposite: the court wants to lay out a doctrinal structure that can guide future parties in ways that make it unnecessary to resort to courts to solve their problems. Has secrecy helped or hurt in this later "lawmaking" role of the court?

If the "common law" aspects of this example are distracting, we could state the problem from the viewpoint of a legislature creating a new contractual regime. It may want to set up a regime that can say what counts as a valid marriage, and what counts as a valid claim for

divorce; or it could want to specify what kind of "shrink wrapped" warning label on a computer disk counts as a contract, and what counts as a breach of that contract. So, the legislature enacts a statute containing instructions (to judges) as to how future cases should be decided. Presumably in its posture as a lawmaker, the legislature takes the issue by issue stance. After all, it has no concrete dispute to consider so diverse interpretations of fact patterns are not visible to it. Presumably, insofar as it can imagine fact situations, legislators will debate about where the lines should be drawn and try to construct legislative language that is transparent to judges and to interacting parties. All this will, appropriately be done in public discussion since interacting parties will have valuable information to inject into the legislative debate. Some of this "record" may, of course, make its way into subsequent litigation when judges have to ask where a particular dispute "fits" into the statutory scheme. But once the law is enacted, it stands as an assurance to future parties that any dispute, should it reach a court, will be decided on the issues. Whatever legal advice they are given prior to taking action will presumably be aimed at fitting into the legislated doctrinal structure. Only after the fact will the defendant's lawyer point out that to win the case, she can exploit the possibility that the judges may disagree as to where to draw the statutory lines, and that this may give her a somewhat lower burden to win her case than the plaintiff faces, if she can somehow she can persuade the judges to decide on a case by case basis.

This is where the embarrassment of the paradox appears and, perhaps from the viewpoint of civilian law, it ought to be repressed by requiring courts to rule per curiam. But if secrecy is acceptable for civilian courts, why should it not be imposed (or self imposed) in common law courts. But in any case, repressing the conflict is not, however, the same as abolishing it. So the possibility remains open that civilian and common law courts may behave equivalently (ceteris

paribus) or not. Both may confer an ex post and possibly unannounced (and possibly unjustified) burden on plaintiffs. Or civilian courts, living with collegial decision making, may simply decide cases issue by issue, which is perhaps the way the legislature itself would "prefer" (warning!!! this is a group mind notion), even if many (perhaps a majority of its members) would not. It is hard to say.

V. Discussion: is Secrecy Necessary

I guess the lesson is that you can do things with secrecy. And these things could be valuable in a democracy, perhaps enhancing its democratic character. As to voting, it is presumably commonly accepted that the secret ballot helps protect the voting act and is valuable in that respect, even though it makes it possible for people to vote irresponsibly (whimsically) and unaccountably (ie. they don't have to give reasons -- indeed they are prohibited from doing so as Cicero complained). From the standpoint of deliberation, secrecy can create commitment capacity but only at the price of departing from the Habermasian ideal speech situation. And from the standpoint of collegial decision making, secrecy can permit courts to retain more or less the stance of the lawmaker as opposed to that of the individual judge doing ex post justice to the parties. Though there is no guarantee of this. These are all values that could be important in democracy. But is secrecy necessary or just kind of a nice option?

Returning to my conception of minimal democracy, secrecy seems justifiable and valuable in the downward activities -- lawmaking to some extent, and law promulgation, execution and application -- but less so in upward activities. But there are upward activities where, it seems to me that secrecy can be justified. The Habermasian example may be one of those. Another would be where deliberation is largely organized by membership driven political

parties that choose to organize their views collegially in order to urge them forefully and responsibly within the larger polity. Such parties may not discuss matters in the ideal way that Habermas considers but may close themselves off from certain kinds of evidence and argument at some stages of coming to the views they will try to advance. Maybe, as some have thought, party democracy is the only real and attractive option for modern democratic states. If that is right, secrecy may well be central to the conduct of modern democratic politics -- even if, in a more ideal world, it would be better to get along with out it. But as Rousseau said, (ideal) democracy is a government for gods not men.