

## The Best of All Possible Worlds? A Rejoinder to Justice Liu

Daniel J. Bussel



### AUTHOR

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Justice Liu's response<sup>1</sup> to *Opinions First—Argument Afterwards*<sup>2</sup> treats *Opinions First* as an attack on the court—which it is not<sup>3</sup>—rather than a well-supported proposal for reform, which is the ground I had hoped to occupy. Instead of addressing the ways out of the box the court unfortunately finds itself in post-*Stevens v. Broussard* (I identified several),<sup>4</sup> the *Liu Response* chooses to deny the existence of a problem and advance post-hoc rationalizations for current practice. Here is the heart of Justice Liu's response to the thesis of *Opinions First*:

[T]he [California Supreme Court's] preargument preparation often heightens the value of oral argument in the decisionmaking process. That is because the key sticking points in the case have been identified through the preliminary response process, and the justices tend to focus oral argument accordingly.<sup>5</sup>

Justice Liu's claim is that forming a "preliminary" consensus through the court's "substantial written deliberation before oral argument[,]"<sup>6</sup>—consensus that culminates in what is clearly a signed draft majority opinion—*enhances*, rather than diminishes, the role of oral argument.<sup>7</sup> This claim is grounded on his personal experience of the past two plus years on the court and his two federal court clerkships.

Although I have never sat on any court, much less a court of last resort, I cannot accept the truth of the matter asserted. For one thing, Justice Liu's core claim, so stated, mischaracterizes the central feature of the process both he and I describe: the preargument formation of a tentative consensus view in writing. The preliminary written response process does not identify "the key sticking points"<sup>8</sup>; it tentatively *resolves them* through majority vote as expressed in the preargument circulation of signed written memoranda.

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1. Goodwin Liu, *How the California Supreme Court Actually Works: A Reply to Professor Bussel*, 61 UCLA L. REV. 1246 (2014) ("the *Liu Response*").
  2. Daniel J. Bussel, *Opinions First—Argument Afterwards*, 61 UCLA L. REV. 1194 (2014) ("*Opinions First*").
  3. Bussel, *supra* note 2, at 1201 n.22 (discussing the current stature of the California Supreme Court).
  4. See Bussel, *supra* note 2, at 1230 nn.111–18 and accompanying text.
  5. Liu, *supra* note 1, at 1255.
  6. *Id.*
  7. Liu, *supra* note 1 at 1249 ("If anything, our process enhances the opportunity for attentive litigants to address what the court regards as the true sticking points . . .").
  8. I am all for identifying sticking points for counsel in advance of argument. See Bussel, *supra* note 2, at 1233 n.118 (discussing "focus letters"). That is not the same thing as circulating and preliminarily agreeing to an undisclosed draft majority opinion prior to argument. To the extent that the court truly believes that the value of argument is enhanced by identifying collectively-held sticking points in advance, focus letters, rather than relying on counsel to

But the real problem with Justice Liu's claim is not that it glosses over the nature of the court's preliminary deliberative process. The real problem is that it defies common sense to suggest that meaningful persuasion can take place at the subsequent oral argument, after an undisclosed preliminary consensus has been forged on the basis of the reporting justice's draft opinion, which is vetted through a process of intensive written deliberation, particularly under the pressure of the 90-day rule. Justice Liu's claim that this process enhances the role of oral argument in the court's decisionmaking process is implausible on its face.<sup>9</sup>

The intensive preliminary written deliberation aspect of the court's decisionmaking process is, as Justice Liu notes, "unconventional."<sup>10</sup> Justice Liu never disputes that this unconventional process was imposed on the court in 1988 through the settlement of personal claims for disgorgement of salaries against certain former justices,<sup>11</sup> and that other common law courts not so constrained have uniformly forgone "heighten[ing] the value of oral argument" by adopting the California Supreme Court's practice.

Indeed, imagine if jury trials were run this way, with jurors deliberating before closing arguments by circulating their preliminary views to one another in writing. Imagine further that closing arguments were deferred until the jury foreperson advised the trial judge that the jury had successfully developed a "preliminary" consensus around a draft written verdict. Imagine finally that, after the deferred closing arguments are at last held, deliberation were reopened with the jury remaining free to revise the "preliminary" verdict, provided, however, that each juror would be subject to a personal fine of \$500 per day for every additional day of postargument deliberation. Would anyone dare to suggest that such a process is consistent with due process, much less that it actually "heightens the value of oral argument in the decisionmaking process"?<sup>12</sup>

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deftly and accurately infer sticking points from the justices' questions and craft a response on the spot in argument, are the answer.

9. Justice Liu implicitly concedes the counterintuitive nature of his claim when he states that the court's "substantial written deliberation before oral argument may be thought to support Professor Bussel's thesis . . ." Liu, *supra* note 1, at 1254.

10. *Id.* at 1250.

11. See Bussel, *supra* note 2, at 1202–04.

12. Indeed, the California Supreme Court itself concluded quite to the contrary in *Shippy v. Peninsula Rapid Transit Co.*, 197 Cal. 290 (1925):

It is the long-established right of both of the parties thereto to have an opportunity to argue the cause and to have the jury after such argument instructed by the judge of the court as to the law of the case; and it was equally the duty of the jury under the admonition of the court not to form or express an opinion with respect to the merits of either the facts or the law of the case until the case should be finally submitted to them.

Leaving to one side the *Liu Response's* central claim that the court's current practice enhances the role of oral argument, the *Liu Response* essentially confirms the description of the court's processes in *Opinions First*.<sup>13</sup> The *Liu Response* does not present new data or analysis that materially undermines the description or findings reported in *Opinions First* regarding the functioning of the court. I acknowledge Justice Liu's points that the California Supreme Court achieves greater unanimity than the Supreme Court of the United States (though there is no reason to believe that unanimity per se, as opposed to a clear majority opinion, is a particularly important goal or a marker of high quality judicial decisionmaking in a court of last resort exercising discretionary jurisdiction),<sup>14</sup> that its work product is widely cited and respected,<sup>15</sup> and that its ability to manage its docket and put its resources to optimal use is undermined by the burden of automatic appeals of capital cases.<sup>16</sup> None of these points is particularly novel or controversial. None of them negates the central thesis or findings of *Opinions First*.

There is much truth and much value in the *Liu Response's* call for greater study and understanding of appellate court decisionmaking processes given the importance of these institutions in our society and the paucity of relevant research on such questions. I applaud Justice Liu's effort to identify specific issues to focus further study.<sup>17</sup> I note, however, that such relevant research into

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*Id.* at 294; *see also* United States v. Wexler, 838 F.2d 88, 92 n.3 (3d Cir. 1988) (“[T]he firmly-rooted prohibition against premature jury discussion is well-founded. An instruction that permits the jurors to discuss the evidence before conclusion of the case is erroneous.”); Winebrenner v. United States, 147 F.2d 322 (8th Cir. 1945) (reversing conviction on basis of premature jury deliberations).

13. Justice Liu suggests that I failed to capture material aspects of the California Supreme Court's decisionmaking practices, but the process he describes is essentially the same appellate process described in *Opinions First*. Our descriptions are fully consistent both with one another and with the court's formal internal operating procedures. Justice Liu's confirmatory elaboration of that process in the *Liu Response* is certainly a welcome contribution to fuller public understanding of the court's decisionmaking process.
14. Liu, *supra* note 1, at 1261–63; *see also* Bussel, *supra* note 2, at 1221 n.88.
15. Liu, *supra* note 1, at 1264–65; *see also* Bussel, *supra* note 2, at 1201 n.22.
16. Liu, *supra* note 1, at 1263–64; *see also* Bussel, *supra* note 2, at 1217–18 n.83. I don't know what more I could have done in *Opinions First* to acknowledge that California's dysfunctional capital sentencing system is inappropriately burdening the court, other than write a different article about that problem rather than the article that I wrote. The discussion and analysis in *Opinions First* is focused entirely on the court's non-capital discretionary docket, which Justice Liu and I agree has in recent years totaled about eighty cases per year, and excludes about twenty automatic appeals annually in capital cases. *Cf.* Liu, *supra* note 1, at 1263 n.62.
17. Liu, *supra* note 1, at 1268–69. As Justice Liu acknowledges, an unfortunate obstacle to such work is many courts' penchant for maintaining the secrecy of their internal processes. Greater transparency is much to be wished for. *Cf.* Bussel, *supra* note 2, at 1235 nn.120–21

decisionmaking processes as does exist supports my thesis, not his. In general, research shows that committing in writing to a position leaves one overconfident in the correctness of that position and less open to contrary evidence. In experiments, the overconfidence effect tends to overwhelm any improvement in the quality of decisionmaking that arises from the greater analytic rigor that putting it in writing requires, especially if that writing is shared with others.<sup>18</sup>

In any event, a state supreme court interested in optimizing its processes need not await the findings of social science research or further academic theorizing before acting. Nothing stops the court from testing Justice Liu's claim about how "front-loading" enhances the value of oral argument by experimenting with a less "unconventional" practice, and comparing for itself. Why not allow parties to waive the 90-day rule by mutually opting for a fast-track oral argument that does not require a consensus calendar memorandum in advance of argument and see how it works?<sup>19</sup> Surely some, perhaps many, or

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and accompanying text (noting the failure of the court to publish statistics showing how long the court takes to consider merits appeals).

18. ROBERT CIALDINI, INFLUENCE: SCIENCE AND PRACTICE 72–73 (4th ed. 2000) (describing seminal 1955 Deutsch and Gerard experiment finding that subjects given evidence that their initial choices were wrong were most likely to revise their judgment if they had never written down their initial choice, somewhat less likely to revise on the basis of new evidence if they had privately written their initial choice, and that "by far, it was the students who had publicly recorded their initial positions who most resolutely refused to shift from those positions later"); Winston Sieck & J. Frank Yates, *Exposition Effects on Decision Making: Choice and Confidence in Choice*, 70 ORGANIZATIONAL BEHAVIOR & HUMAN DECISION PROCESS 207 (1997) ("[A]lthough exposition about the given decision problem yielded modest improvement in decision quality, in the sense of resistance to framing influences, subjects' increased confidence that they had chosen well seemed to outstrip that improvement."); Norbert L. Kerr & Robert J. MacCoun, *The Effects of Jury Size and Polling Method on the Process and Product of Jury Deliberations*, 48 J. PERSONALITY & SOCIAL PSYCHOLOGY 349–363 (1985) (finding jurors more willing to revise judgment after secret ballot than public ballot). Finally, as a point of contrast, the leading social science study on oral argument at the Supreme Court of the United States (SCOTUS), RYAN C. BLACK ET AL., ORAL ARGUMENTS AND COALITION FORMATION ON THE U.S. SUPREME COURT: A DELIBERATE DIALOGUE (Univ. of Mich. Press 2012) finds that at SCOTUS "oral arguments provide the foundation for the resolution of most cases" precisely because those arguments "represent the first stage of the coalescing of outcomes." The data and analysis of these researchers leads to their final conclusion that so structuring the coalition formation process to begin at oral argument affords SCOTUS a highly efficient mechanism for decisionmaking that yields "a remarkable payoff to the American system of government." *Id.* at 113–14, 119.
19. *Cf.* *Bickel v. City of Piedmont*, 16 Cal. 4th 1040 (1997) (holding that parties may waive statutory deadlines for rendering administrative decisions; subsequently abrogated as to the Permit Streamlining Act only by Stats. 1998, ch. 283, § 5). Although CAL. GOV'T CODE § 68210 requires each of the justices to submit an affidavit that no cause has been pending for more than 90 days from submission in order to receive his salary, nothing on the face of the statute or CAL. CONST. art. VI, § 19 prevents the parties from agreeing in exchange for fast-track oral argument that their cause shall not be deemed submitted until opinions are ready

even most, parties would prefer the fast track, and its popularity alone would be an important datum. Moreover, the court would then be positioned to compare the two processes directly and make a more informed judgment about what works better.

In the final analysis, I find the *Liu Response* disappointing. Justice Liu's suggestion that the court chooses to engage in intensive written deliberation and consensus formation prior to oral argument because that procedure tends to *heighten* the value of oral argument in the court's decisionmaking process is ahistorical, counterintuitive and unsupported by anything more than his own subjective assessment of the process. He never acknowledges that the only reason the court adopted the practice in the first place was to evade pay-suspension under the 90-day rule.<sup>20</sup> Justice Liu is quite right that at some point a court must finally decide a case before it, and deliberation on that matter must come to an end.<sup>21</sup> But court processes, unlike cases, remain continuously open for examination, revision and improvement. Changing the court's argument-afterwards procedure would not lengthen the court's decisionmaking process—it would almost surely shorten it.<sup>22</sup> Doing so requires no commitment of new or greater resources.<sup>23</sup> Moreover, the change would move oral argument practice closer to the role oral argument held historically and still holds in other jurisdictions and the public imagination. All that is required is that the court part ways with Dr. Pangloss and acknowledge that we are not now living in the best of all possible worlds with respect to how oral argument proceeds at the California Supreme Court.<sup>24</sup>

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for filing in the discretion of the court. Were the parties to do so, I see no problem with the justices submitting truthful conforming affidavits.

20. See *Liu*, *supra* note 1.

21. See *id.* at 1257 (“each justice’s initial views must eventually crystallize into an actual vote”).

22. See Bussel, *supra* note 2, at 1215–21, nn.78–88 and accompanying text; BLACK ET AL., *supra* note 18, at 114 (suggesting that without oral argument the opinion writing process would be less efficient and more time consuming).

23. See Bussel, *supra* note 2, at 1212 nn.64–65 and accompanying text.

24. See VOLTAIRE, *CANDIDE, OU L’OPTIMISME* (1759).