CONCLUSION: DISPUTES AND REPORTED CASES*

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> ". . . the judicial opinion is a human document and a fascinating record, there, for anybody's use. From the standpoint of behavioral study these are data in which so many factors are held equal as to outrun the results of an ordinary ten-or even hundred-thousand-dollar grant. All there. All waiting. Already gathered. Merely neglected," (K. Llewellyn, 1960:514).

Reported opinions are a rich source of dispute data. Ideally they answer a wide variety of questions: who are the parties, what do they want, where have they gone for redress, how was the dispute processed, when was it resolved? Many of these questions can be answered with case data, but caution is required. Disputes leaves trails and traces in many places. Judicial opinions capture part of the story (namely, the official response to specified claims on a particular occasion), but they are spotty dissiers.

In this afterword, I would like to note some problems in applying reported opinions to two kinds of theoretical issues: (a) stratifications hypotheses about the effect of party characteristics on case outcomes (Galanter, 1975); and (b) integration models of appellate review (Mayhew, 1971). These comments will be based, in part, on an on-going study of state supreme courts, but they should be applicable to other settings as well.

PARTIES AND OUTCOMES

Stratification studies ask who wins or loses and why. The researchers needs to decide: who is a party? what are his characteristics? how was the case decided? Unfortunately, appellate cases often produce complex and ambiguous party-outcome ascriptions: multiple appellants and respondents appear, each with different claims and counterclaims; parties are added and dropped across levels; data on stratification characteristics (such as age, occupation and residence) are often missing; and court

* Work on this note was supported in part by N.S.F. Grant GS-384-13, An Historical and Comparative Study of State Supreme Courts, in collaboration with L. Friedman, R. Kagan, S. Wheeler. Special thanks to the project coders and research assistants especially D. Polise, who brought cheer and craft to the least glamorous but most important job of all, data cleaning.

https://doi.org/10.2307/3052982 Published online by Cambridge University Press

decisions at any given level are not always the final outcomes (appellate courts reverse lower court outcomes, lower courts decide cases after remands). Perhaps the best way to see these problems is to consider some examples of typical research issues.

Unidentified parties. It is harder than one might imagine to identify the parties before the court. One problem is the title convention, "Jones et al. (appellants)," with no mention of the remaining appellants.[1] Another problem is nominal parties. Judges in mandamus suits, workmen's compensation boards in agency appeals, and the state (or the attorney general) in ex rel. cases are all named parties in the title, but they rarely appear before the court. Conversely, insurance companies, trade associations and granger groups do not always appear in the title, but their presence is sometimes evident. In general, parties are not always disputants and disputants are not always parties.

Party-Issue Correlations. Party characteristics often depend on area of law. For example, many hypotheses distinguish between natural persons and organizations. This distinction is usually clear-cut in criminal cases (State v. Jones), divorce actions (Jones v. Jones) and stockholder suits (Jones v. Sludge Corporation). But the person-organization line gets blurred in many contract, property and tort cases. Here is the difficulty: courts usually discuss civil disputes in terms of segmented roles and transactions (buyer v. seller; landlord v. tenant; pedestrian v. driver); underlying structural-organizational characteristics may not be mentioned.[2] Unless explicit company-corporate names appear in the case title, there may be insufficient factual evidence to distinguish among large-scale enterprises, sole proprietors and natural persons engaged in business activities on a temporary or part-time basis (*e.g.*, a landlord can be a city-wide realty company, a widow with a boardinghouse or a homeowner with an occasional room to rent).[3] Furthermore, data on a

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1. Sometimes there are embarrassing riches. Instead of too few parties, there are too many (e.g., 23 illegitimate descendants, 35 directors, 190 property-owners, 4,000 flood victims). Variable-information accounting schemes (recording party attributes for each party 1 . . . N regardless of N) minimize arbitrary cut-offs, but coding efficiency drops quickly when parties share identical interests and attributes. Partitioning common and conflicting interests is a risky business (especially for organizational agents and class actions), but conservative aggregation rules are unavoidable with large groups of parties.

2. As a general rule, factual evidence is more complete for recent cases than older cases (opinions in the 1870-1920 period often limit party information to appellant-respondent designations). In addition, information on precedent citations and party claims is more complete than information on party characteristics and pre-litigation dispute activities.

3. There is no happy solution to this problem. Counting any business-related activity as a group over-estimates organizational parties and

https://doi.org/10.2307/3052982 Published online by Cambridge University Press

natural person's social status (*e.g.*, occupation, income, education, geographic location) is available in only about 5-10% of appellate cases. When this information does appear, it also will be connected with particular areas of law (*e.g.*, occupation with workmen's compensation; income with alimony and child support; geographical location with property disputes).[4] The caveat is clear: area of law is an important variable, but it should be used with caution in controlling party-outcome relations.[5]

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leaves the natural person category correlated with area of law (comprising crooks, divorcees and disinherited nephews). On the other hand, requiring positive evidence of group structure underestimates the number of organizations. Of the two, the latter is probably preferable, but the choice depends on the study.

4. The lack of stratification information on persons rules out most social-economic-status scales. But researchers should not ignore organizational scales. For example, coders on the state supreme court project found that the two-digit Standard Industrial Code discriminated well for business data. Likewise, sufficient information is usually available to classify most government parties by structural domains (state, county, city) and functional tasks (executive, judicial, public finance, etc.).

5. Area of law is frequently classified by doctrine (sub-divisions within torts, contracts, real property, estates, criminal law, etc.). It poses several measurement problems.

(A) MULTIPLE DOCTRINES. Appeals frequently touch disputed intersections of several doctrines. For example,

1. assertions of property rights often rely on tort "theories" such as trespass and nuisance;
2. mortgage actions, including foreclosure, may depend on contractual obligations;
3. government employer-employee disputes blend public law and contract norms;
4. lending and credit transactions, particularly leasing arrangements, can mix real and personal property claims;
5. regulatory health-welfare-safety actions may invoke criminal penalties and procedure for non-payment of fines;

Doctrinal clarity also varies over time as rising and falling theories churn and erode, settle and unsettle, expand and contract the status quo. Contractual principles, reigning and self-evident in 1870, became residual bargain-basement patches in 1960 (Friedman, 1965).

(B) WHOSE CLAIMS. Rights, norms and doctrine can be interpreted differently by appellants and respondents, majority and minority judges, and even the same judge at the beginning and end of an opinion. At what stage in the process and from whose vantage point should claims and counter-claims be defined? For example, a case can involve tort claims and contractual defenses; contractual claims and corporate defenses; contractual claims and property defenses; foreclosure claims and usury defenses; property claims and criminal defenses.

(C) MULTIPLE ISSUES. Not only is doctrine problematic for any given claim or counter-claim, but appellate cases can cover many different issues, each ranging over separate areas of law. For example, an estate dispute may involve rights under a will (probate), paternity claims (family law), creditor claims (contract), ejectment actions (real property), charges of executor mismanagement (criminal or civil fraud) in addition to innumerable procedural motions and evidentiary issues. These issues also vary in importance. Party briefs may devote pages to arguments which judges dismiss in a line and vice versa.

These variations undermine the notion of a unitary case, characterized by a single law dimension. But disaggregation also has its costs. Discriminating, partitioning and weighting the importance of

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Changing Parties. Students of social mobility can generally assume they are tracing the same person over time. But tracing a dispute (analogous to tracing households) is a different story. Legal disputes join disparate parties into temporary social units ('forced marriages') whose identity through time is always problematic:[6]

1. some heirs settle, other appeal (Trust Co. v. Bass, 1965).
2. businesses dissolve, creditors remain (Home v. Harper, 1900).
3. parties die and executors appear (Jacksonville National Bank v. Beesley, 1895).
4. executors die and new executors appear (Boyton v. Ingalls, 1880).

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issues across parties and judges requires subtle, sensitive and expensive coders. Close-knit judgments also produce inter-coder disagreements and unreliability. It is a familiar dilemma: global categories, concealing overlapping and interacting dimensions, are reliable but vacuous, while disaggregated measures are substantively interesting but unreliable and awkward to assemble. Doctrinal scholars have wrestled with these problems for a long time, but it remains to be seen which legal categories prove useful in large-scale sampling studies.

6. For example, in Matthiessen v. Ott (1915), the moving party in the initial action (J. Clayton) is denied standing in subsequent actions:

> This was a petition in the circuit court of LaSalle county for a common law writ of certiorari to review the action of the highway commissioners of Deer Park township, in LaSalle county, in a proceeding to lay out a road for private and public use. The petition for the road was presented by Julia A. Clayton and others to the commissioners June 7, 1909 . . . The commissioners of highways, without giving "at least ten day's notice of the time and place" of hearing, as required by section 33 of said act, fixed the time of hearing for the following day, June 8, and denied the prayer of the petition. Plaintiffs in error thereupon took an appeal to three supervisors under the provisions of said Road and Bridge act, and an order was entered by said supervisors granting the prayer of the petition, and further proceedings were had which result in the assessing of damages at $733 to defendant in error for his lands taken for the road and the entry of a final order laying out said road, on November 12, 1910. Thereafter this writ of certiorari was sued out at the March term, 1911, of said circuit court . . . On June 26, 1911, plaintiffs in error appeared and obtained leave of court to file written motions for leave to become parties, but no motions appear to have been filed until June 6, 1913, when plaintiffs in error filed a motion, supported by affidavits, to become defendants or appear as amicus curiae, and, for leave to enter a motion to quash the writ of certiorari . . . After a hearing . . . a cross-motion having been filed by defendant in error to strike plaintiffs in error's motion from the files, an order was entered denying said motion and denying plaintiffs in error's motion to become parties to the proceeding and to quash the writ, and further finding the highway commissioners did not have jurisdiction in the original proceedings to enter any legal or binding order. A judgment was thereupon entered quashing said proceedings before the highway commissioners. On appeal to the Appellate Court this judgment was affirmed, and the cause has been brought here on a petition for certiorari. (Matthiessen v. Ott, 1915).

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5. unions, banks and creditors intervene in mid-stream (B & L Pharmacy v. Metropolitan Life, 1970).
6. felons abscond leaving litigious bondsman (State v. Overby, 1965).
7. judges become respondents via writs of prohibition (Bell v. District Court, 1905).
8. sub-sets of plaintiffs and defendants become joint appellants (Cannon v. Cannon, 1945).
9. defendant interpleaders become appellants and respondents (Savings Institute v. Johnson,1935).
10. citizen petitioners below are replaced by commission above (R.R., Appellants, 1905).
11. commission below is replaced by intervening taxpayers above (Rydalch v. Glauner, 1061).
12. insane plaintiffs are replaced by guardians (Torrence v. Strong, 1870).

Furthermore, cases vary in initial starting points, stopping points and routing sequences. On the output side, some cases are terminal decisions;[7] other cases are appealed or remanded. On the input side, some reported "appellate" cases are original actions (especially mandamus and habeas corpus writs); some originate in courts (state trial courts, inferior city and county courts, and even intermediate appellate courts); others originate in tribunals outside the judicial system (school boards, bar associations, administrative and regulatory agencies). Depending on the state and issue, intermediate levels can be by-passed and collateral appeals can be moving in separate courts. In cases

7. Sometimes an ostensibly terminal judgment is short-lived:

> The judgment and decree rendered in the original case was for foreclosure of a mortgage or trust deed, and decreed a recovery by Clora Markle Dahlstrom in the sum of $85,800.10, and a judgment in favor of Alvan Markle in the sum of $68,620.03. These judgments were entered against the Portland Mining Co. and ordered and decreed the sale of certain mining property covered by the mortgage as security for the payment of the debts. Immediately after the satisfaction of these judgments on January 10, 1905, and on the same date, confessions of judgment were entered in favor of the respective parties for the same sums. Mr. Featherstone, who had been attorney for Alvan Markle, in procuring the original judgment filed a petition in the district court setting forth the facts of his services in the premises and that he had not been paid, alleged the amount still due him, and that the original judgment had never in truth and in fact been paid, but that the satisfaction was entered through collusion and fraud, practiced between the judgment creditor and judgment debtor, and prayed for an order vacating the satisfaction of judgment and establishing his claim and authorizing the issuance of an execution against the Portland Mining Co. for the sale of the property on which the judgment was a lien for the amount of his claim. (Dahlstrom v. Featherstone, 1910).

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with a long procedural history, it is possible to have repeated loops and cycles across levels.[8] As a result, researchers face not

8. Kidder (1974) and Morrison (1974) find protracted litigation in India. But the United States has its share of vexatious litigants too (see Wilson v. Bittick, 1965). Whether American courts are significantly more efficient than Indian courts is debatable. Consider, for example, the 17-year appellate career of the New York Central Railroad:

> The New York Central Railroad Company appeals to this court from a judgment of the circuit court of McLean County affirming an order of the Illinois Commerce Commission entered on December 11, 1947, directing appellant to restore certain industries to its switching district in the city of Bloomington and fixing switching rates therein.
>
> This cause has been before the commission for a number of years. Originally a complaint was filed before that body by the Bloomington Association of Commerce, Union Gas & Electric Company and Funk Brothers Seed Company, appellees here. Later, The Alton Railroad Company and Illinois Central Railroad Company, who are also appellees, intervened in the proceeding. The complaint charged that appellant, on August 1, 1933, by amendments to its tariffs on file with the commission, had eliminated from its switching district in the western section of Bloomington, certain industries, including the two named above. It was alleged that such action deprived them of the benefit of reasonable switching rates fixed for the entire district, and it was prayed that appellant restore such industries to its switching district. On July 28, 1939, the commission, after hearings, entered an order restoring the industries to the district. This order was reversed on rehearing and on November 8, 1940, the commission entered an order which found the revision of appellant's switching district and its fixing of higher switching rates for the industries involved to be lawful, and dismissed the complaint. From this latter order an appeal was taken to the circuit court of McLean County, which court on January 17, 1942, set aside the commission's final order and remanded the cause. This judgment was affirmed by this court in *Alton Railroad Co. v. Illinois Commerce Com.*, 382 Ill. 478, where the facts relating to the litigation more fully appear.
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> Upon remandment to the commission from this court, no further pleadings were filed except a cross complaint by appellant which charged that The Alton Railroad Company had also excepted certain industries on its tracks from its switching district at Bloomington, to the detriment of appellant in its division of through freight rates. The cross complaint prayed that the Alton be required to include the enumerated industries in its switching district. Extensive hearings were again held and a large volume of testimony and exhibits placed into evidence for appellant's now-stated purpose of showing that the circuit court and this court had been misinformed and misled concerning the determinative facts on which the previous court decisions were based.
>
> The commission entered an order October 2, 1945, requiring appellant to restore its switching district as originally established, thus including the complaining industries, and further to fix a connecting line switching rate of not to exceed 14 cents per ton, minimum $2.97 per car, maximum $5.45 per car, which was then the prevailing switching rate of all railroads in Bloomington. The cross complaint against the Alton was dismissed.
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> Appellant filed a petition for rehearing on said order, which was granted on November 10, 1945, following the commission's denial of appellee's motion to strike the petition on the ground that it had not been filed within the time provided by law. Later, on December 4, 1946, the commission vacated its order granting a rehearing and struck appel-

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only measurement problems but accounting problems as well: the more complex the administrative structure, the more complex the accounting scheme required to log changing parties through time.[9]

Measurement Unreliability. As should be evident at this point, party-outcome judgments present serious problems of measurement reliability: the more administrative steps separating initial party identifications from final outcomes, the greater the likelihood of mismatched parties and outcomes. The obvious solution is to restrict party-outcome ascriptions to a single level or court. Stratification theories, however, predict equalizing or nonequalizing consequences for court systems as a whole. Stratification researchers are not primarily interested in inter-level outcomes (the affirming-reversing results). They want to know the final outcomes: who were the initial plaintiffs-defendants? After all is said and done, how were they treated? But accurate plaintiff-defendant labels require reliable answers to the question, (assuming plaintiff is the moving party in the initial court,) which court is first? With multiple parties pursuing multiple

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lant's petition from the record. On January 16, 1947, it again reversed itself and reinstated, then granted, the petition for rehearing. New hearings were held at which both appellant and appellees presented further testimony and appellant introduced a series of exhibits. December 11, 1947, the commission entered the order which is the subject of this appeal. It incorporated the above-described order of October 2, 1945, by reference, but specifically modified it, first to enable appellant to take advantage of state-wide freight increases which had been granted subsequent to October 2, 1945, and, second, to extend the time within which appellant could file its new schedule of tariffs.

Appellant followed by again appealing to the circuit court of McLean County. In that court appellees filed a motion to dismiss, first, because no petition for rehearing had been filed with the commission to the order of December 11, 1947, and, second, asserting that the petition for rehearing filed to the order of October 2, 1945, upon which appellant relied as establishing his right to appeal, had not been filed within thirty days after the service of that order, as required by statute. The trial court denied the motion to dismiss the appeal but, as previously pointed out, affirmed the commission's order of December 11, 1947, on its merits. Appearing in behalf of the commission, the Attorney General has filed his separate brief in this court alleging that the court erred in not granting the motion to dismiss the appeal. (Alton R.R. v. Illinois Commerce Comm'n, 1950).

9. As much as possible, coding schemes should allow for recording varying levels of a case and should record parties, issues and outcomes at each level. The greater redundancy and disaggregation by levels, the easier it becomes to disentangle and verify shifting roles and parties. Conversely, merging and dropping steps increases doubts whether plaintiff and appellant are the same person. Practical limitations, of course, are unavoidable (e.g., older cases are often intractably obscure; there may be too many stages; overlapping collateral sequences are sometimes chronologically ambiguous), but without the ability to trace steps forwards and backwards, errors cannot be separated from rare species.

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actions in multiple courts (a frequent occurrence in estate cases), the designation of an initial forum is rarely self-evident. Investigators selecting different forums will select different plaintiffs-defendants, and therefore, will disagree about who finally won or lost. Measurement reliability can be increased by detailed coding rules and accounting procedures,[10] but cases are administrative contrivances, not research instruments: investigators will always find it necessary to make theoretical, not administrative judgments about the identity of dispute participants and the temporal boundaries of a dispute.[11]

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10. The following may be helpful.
First, when constructing a code, there is no substitute for case-reading. Given the ornery nature of the beast, *a priori* assumptions are always wrong. Second, compromises and trade-offs are inevitable, some benign, others less so. Aggregating common-interest parties is innocent enough, but dropping parts of the procedural history invites trouble. Third, coding is not cheap. Good coders are expensive and hard to find. Error-checks are absolutely essential, tedious and time-consuming. Never underestimate the number of errors from even the best trained coders. Fourth, in addition to one-shot, collect-and-run scholarly projects, we also need sustained, continuous, in-house data collecting and monitoring by the courts themselves. Many problems require tailor-made codes and designs, but encouraging court administrators to keep systematic quantitative records, subject to periodic audits by scholars and the bar, would go a long way towards developing a public data base for a wide range of theoretical and policy questions. (For methodological and accounting suggestions, see Campbell, 1974; Ebersole and Hall, 1972; Nihan, 1974). Finally, on days of doom and gloom, try Hurst (1971). It does wonders for morale.

11. For the researcher who feels confident about his classification scheme for plaintiffs and defendants, the affairs of W.W. Peebles pose a formidable but not atypical challenge to the coder's art:

> This was a civil action, tried at the spring term, 1889, of Northampton Superior Court, J. before MacRae.
>
> The complaint alleges in substance—
>
> 1. That in 1873 Virginia A. Johnson died in Northampton County leaving a last will and testament, which was duly proved on the 3d day of March, 1873, and that Catharine T. Johnson, the executrix therein named, qualified as such.
>
> 2. That on the first day of April, 1876, said executrix was, by a decree of Court, removed, and J.J. Long, the intestate of the plaintiff Gooch, was appointed administrator d.b.n.c.t.a.
>
> 3. That in September, 1876, said Long, administrator &c., instituted a proceeding to sell the real estate belonging to the testatrix, known as "Diamond Grove," to make assets to pay debts. In said proceeding, Catherine T. Johnson, Mary L. Johnson, C.W. Johnson, P.M. Johnson, Jennie V. Johnson, James Johnson, Mrs. M.B. Cook, C.A. Johnson, S.B. McMillan, W.W. Peebles and R.B. Peebles were defendants.
>
> 4. That, by decree made in said special proceeding, said land was sold, and thereafter the sale was confirmed, and a distribution of the proceeds directed . . .
>
> 5. That W.W. Peebles, one of the defendants in the action was a defendant in said special proceeding, at the same time acting as attorney for the plaintiff J.J. Long; was surety on the prosecution of said Long as administrator, and, as such attorney, he drew the petition for sale of said land, the decree directing the sale thereof, the order directing the

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APPELLATE REVIEW: THE INTEGRATION MODEL

Reported opinions can also be used to study the appeal process itself. Theorists influenced by Durkheim and Parsons emphasize the integrative functions of appellate review. They see appellate courts as centralized judicial bodies which resolve conflicts, monitor lower-court procedures and synthesize conflicting institutional norms. The integration model assumes that a

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distribution of the funds, the order confirming the sale, and order of publication; he acted throughout said proceeding as attorney for plaintiffs and attorney for defendants.

6. That C.T. Johnson, the executrix above named, one of the plaintiffs in this action, and one of the defendants in the special proceeding above mentioned, employed said W.W. Peebles as her attorney, while she acted as such executrix; and reposing the utmost confidence in his integrity and disposition to deal fairly by her and the other distributees and legatees under the will of the said Virginia A. Johnson, employed and relied upon said W.W. Peebles to manage and protect the interest of herself and the other legatees and distributees under the will of the said Virginia A. Johnson during the administration of said J.J. Long; that she and the other legatees and distributees under said will filed no answer in said special proceeding, because never informed by said W.W. Peebles it was necessary so to do to protect their interests; that she never saw said petition, and believed, till within a short time prior to the beginning of this action, that the scope of said petition only extended to the sale of said land merely to make assets to pay the debts of Virginia A. Johnson; that she did not employ said W.W. Peebles as her attorney in person, but her brother, the late James Johnson, the husband of the said Virginia Johnson, who attended to all matters of business for her, retained the said W.W. Peebles for her, to attend to all their interests in said estate.

7. That since the beginning of this action, she, and the other legatees and distributees under said will, heard for the first time of the claim of the defendants W.W. Peebles and R.B. Peebles to the surplus from the sale of said land remaining after the payment of the debts of Virginia A. Johnson; that had the legatees and distributees under said will been apprised of any such claim, they would have resisted the same; they are informed that said claim is based upon a sale under executions issuing on judgments in favor of sundry parties against one James Johnson, husband of the said Virginia A. Johnson.

8. These plaintiffs are informed and believe, and so charge, that the said James Johnson took nothing under the will of the said Virginia A., and that the sale under which the plaintiffs claim was null and void.

9. That J.T. Long (sic) died in the county of Halifax, North Carolina, on the — day of April, 1877, and that the plaintiff James T. Gooch, was soon thereafter appointed administrator de bonis non with the will annexed of Virginia A. Johnson, was qualified and entered upon the discharge of his duties as such, and is still administrator; that on the 14th day of December, 1877, the said James T. Gooch was appointed administrator de bonis non of J.J. Long; was qualified as such, entered upon the discharge of his duties, and is now such administrator; that both of said appointments were made by the proper Court, and according to law.

10. These plaintiffs are informed, believe, and so charge, that the said decree directing the payment of the surplus of the proceeds arising from the sale of said land to the defendants W.W. Peebles and R.B. Peebles was without warrant of law, is null and void, and is a fraud upon the rights of the plaintiffs. (Gooch v. Peebles, 1890).

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specialized hierarchal legal system supplies diversified but coordinated norms designed to reaffirm and reintegrate basic cultural values.

There are several problems with this model. *New Values.* As Hurst (1971:15) points out, law not only reaffirms and declares, it also innovates and changes values. Preserving and protecting past ideals is the most visible of appellate judicial tasks, but cumulative low visibility decisions can also create new value priorities—favoring logging to fishing (Hurst, 1964:222), farming to mining (Scheiber and McCurdy, 1975:120), railroads to shippers (Levy, 1957:145), builders to laborers (Horwitz, 1974: 954)—in areas rarely seen or supervised by public opinion.

Constituent Isolation. Like any production process, appellate courts require raw materials. As the social division of labor increases the number of dispute-processing forums and decreases the costs of legal avoidance (Felstiner, 1974:82), normatively incisive, institutionally challenging disputes do not always reach the appellate courts. For example, in his study of contract law in Wisconsin, Friedman (1965) found that the growth of alternative public forums isolated the Wisconsin Supreme Court from business constituencies and produced a decline in the frequency, representativeness and typicality of market-oriented appellate disputes. As business cases decreased, the Supreme Court shifted its appellate functions from abstract policy formation to case-by-case "equitable" dispute resolution.

Nonintegrating Responses. Even with a steady flow of high grade legal ore, appellate courts can sidestep and temporize as well as synthesize. As Mayhew (1971) points out, a division of labor in society produces integrative pressures, but it also creates insulating devices to segment constituencies (e.g., industry-dominated regulatory agencies). Given well-tuned institutional compromises among powerful differentiated constituencies, specialized appellate courts, commanding legitimacy but few economic or administrative battalions, may decide that a prudent concern for the limits of judicial authority is more becoming than normative confrontations.

> ". . . consider the specialized school system. The independent authority of the school system vis-a-vis the representatives of solidary groups was purchased by limiting central political control over compulsory education. The stable differentiation of home and school was not achieved by making one dominant and the other subordinate, but an institutionalized standoff. Each institution has power within its own realm. The law must either respect the terms of the compromise or funda-

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mentally alter the underlying legal arrangement of the system. The legal system cannot merely pass messages down a hierachy of control with law at the top, school in middle, and solidary groups at the bottom. Rather all three are autonomous but interrelated institutions. The legal sector cannot change the other sectors of society without itself profoundly changing. This would not be the change through reaffirmation supposed by the theory of the hierachy of control," (Mayhew, 1971: 210).

Do these objections disqualify the integration model? Not necessarily. *Homeostatic Resources.* Appellate courts may be reactive, but they are not static and defenseless. To counteract increased workloads and local-parochial pressures, state judiciaries have promoted the consolidation of lower courts, the creation of intermediate appellate courts and increases in the docketing discretion of supreme courts (Glick and Vines, 1973:14-35). To reduce delay and procedural bottlenecks, federal courts are now experimenting with computerized accounting schemes to improve the speed, accuracy and flexibility of appellate control (Nihan, 1974). While appellate courts cannot initiate litigation, they do screen, filter and deflect cases in the system. For example, with the establishment of an intermediate appellate court in Michigan 1965, the average number of cases per year before the Michigan Supreme Court decreased from 231 in 1955-65 to 90 in 1965-72 (Harris, 1974). Likewise, with the Court Reorganization Act for the District of Columbia (1972), total civil and criminal filings in the Federal Columbia District decreased approximately 24%, from 2770 cases in 1972 to 2100 cases in 1973 (Administrative Office of the U.S. Courts, 1973:17, 42).[12]

New Constituences. Unlike special-purpose regulatory agencies and many inferior courts, appellate courts lack a fixed constituency. This means that they are potentially open to continual innovation from new clients. Rather than a steady loss of business, new business is likely to replace old business in periodic waves. For example, from 1957 to 1969, the proportion of auto accident cases on the Wisconsin Supreme Court docket decreased from 23% to 13% while criminal cases increased from 2% to 26% (Wisconsin Judicial Council, 1969).

Reviewing Cycles. Appellate deference to other courts and institutions is often a temporary phenomenon. Instead of the constant or declining appellate review postulated by integration critics, appellate deference probably cycles over time as appellate courts gain and lose confidence in particular forums. For ex-

12. Given the magnitude of these homeostatic adjustments, it seems likely that external forces, such as urbanization and industrialization, bear no long-term *linear* relations to gross litigation rates (cf. the negative results on these relationships in Grossman and Sarat, 1975).

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ample, Nonet (1969:35,174) suggests that the California Industrial Accident Commission received selective attention from appellate courts. Starting as a new agency opposed to classical tort doctrines, the IAC had low appellate autonomy 1911-1917, relatively high autonomy 1918-1929 (as a result of a favorable constitutional amendment) and then relatively low autonomy 1930-1945 as appellate courts became increasingly critical of its internal procedures. Similar dynamics can also apply to legal doctrines. As doctrine becomes unsettled and settled, case frequencies within an issue typically increase and decrease over time. A basic mechanism in this cycle is the affirmation rate: by screening out routine cases, a high affirmation rate increases the likelihood of tough cases; tough cases increase the likelihood of reversals; reversals, by breeding uncertainty and expectations of greater access and success increase volume (for that issue); high issue volume increases the likelihood of routine cases; and routine cases lead to a higher affirmation rate. The importance of normative synthesis also varies across this cycle: unsettled doctrine demands normative clarification and reorganization, whereas settled doctrine can rely on periodic reaffirmations of established principles, perhaps tempered with equity.

Mixtures of Reviewing Cycles. At any given time, an appellate court deals with a mix of many different issues appealed from diverse forums. Since both Mayhew and Friedman estimated court functions from selected issues and cases, the model of constituent isolation producing decaying appellate integration is plausible but not proven. As a rival hypothesis, one might argue that the up-down career history observed by Friedman for contractual issues is constantly repeated for different issues at different times, so that the reaffirming synthesizing functions of the court, measured across issues, are relatively stable. Alternatively, one could imagine what different forums are treated with varying degrees of scrutiny at different times so that average reviewing activity, measured across forums, remains relatively constant in the long run.

What can reported opinions tell us about these processes? Reported opinions are poor guides to judicial impact, and large scale sampling studies cannot provide the close-grained detail of traditional doctrinal research. But case samples can be used to map potential variations in judicial functions across time and jurisdictions. For example, assuming that the potential for specifying and synthesizing norms is increased by appellate docketing discretion (e.g., presence of an intermediate appellate court, few issues appealed by right), do states with varying degrees of ap-

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pellate discretion but similar social-economic characteristics produce varying degrees of integrative activity? Measuring these functions will be difficult because integration is obviously a complex multi-dimensional concept. But the integration model would gain plausibility if relationships like the following obtain. Suppose that, controlling for state social-economic characteristics, all courts show similar and relatively stable outcome (value) profiles, but the greater the appellate discretion:

1. the greater the rate of change in issue frequencies and party characteristics over time (an index of appellate receptivity and responsiveness to diverse problems and constituencies);
2. the greater the proportion of decisions involving two or more areas of doctrine (an index of a court's willingness to synthesize and scrutinize doctrinal boundary distinctions);
3. the greater the likelihood that the court's opinion will be cited by out-of-state courts (an index of court's ability to specify new, nonparochial norms);[13]
4. the greater the likelihood, in the long run, of a uniform distribution of appeals across the population of initial forums (an index to systematic and periodic monitoring of different forums);
5. the greater the overall efficiency of appellate homeostatic mechanisms (*e.g.*, in an efficient 'signaling' system, the appeal rate for an issue will probably drop quickly after a few reaffirmations of prior precedent, whereas in an inefficient system, repeated reaffirmations may have little or no effect on appeal volume).[14]

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13. Case references are useful indices. They take two forms: citations in the instant opinion to past decisions, and citations to the instant opinion in future decisions (available in Shepards). Case references can be used to measure such variables as,
    1. the relative importance of a decision and the prestige of a court (via the frequency of Shepard cites);
    2. inter-court communication patterns including regional networks, satellite relations and unattached isolates;
    3. inter-court diffusion flows including federal-foreign influences and issue leadership across state courts.

    Coding efficiency, not lack of information, is the main citation problem. Citation counts (which range from 0-100 per case) are time-consuming. In addition, since citations denote volume numbers within series (*not* chronological years) and older citations denote the reporter's name (*not* jurisdictional names), special coding routines (manual or computerized) are needed to translate citation notation into date and state variables. Coding policies are also needed for (a) string cites (long lists of cases not discussed in the opinion); (b) repeated citations to the same case; and (c) sign changes (favorable versus unfavorable citations).

14. Black's (1973) distinction between proactive and reactive control mechanisms provides a useful way of categorizing initial forums, but

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The assumption of value homogeneity is obviously questionable, but in contrast to case studies of selected issues and time periods, these hypotheses have the virtue of stressing overall docket distributions and the importance of time-series data to discriminate constant, monotonic and cyclical case distributions. They also raise serious methodological and theoretical issues. For example, many of these hypotheses require reliable measures of doctrinal categories for future research. Precedent clustering techniques may provide a reliable, nonjudgmental method of identifying issues groupings (on the analogy of using sociometric choices to identify social cliques). But until such techniques are perfected, current judgmental methods of measuring doctrinal categories pose severe reliability problems, particularly in distinguishing appeals within 'old' versus 'new' issues (see footnote 5). In addition, most of these hypotheses require large samples with a high degree of temporal density and specificity. Until we gain more familiarity with appellate case distributions, we simply know very little about the duration, frequency, intensity and shape of the average appellate issue, and, therefore, we have no way of estimating the relative cost-benefits of different temporal sampling designs (e.g., exactly what kinds of information are lost by sampling every two years or five years as opposed to every year?). Finally, while the integration model stresses the causal importance of appellate decisions in shaping case distributions, it is remarkably vague about the substantive content of rival hypotheses. We know, or at least suspect, that a large number of social-economic-political-professional pressures also shape and modify case frequencies (e.g., changes in judicial political affiliations, the quality of the bar, legislative interventions, demographic relocations of potential litigants). But in the integration model all these factors are essentially *ad hoc*, residual initiators of litigation or disruptors of 'normal' routines but never the prime movers of case flow. I hope future theoretical and empirical work will be able to sharpen and specify the relative weighting and interdependence of these social and appellate court forces

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it fails to capture the dynamics of appellate review. Appellate courts neither patrol for culprits in the streets, nor do they take everything at their door. Rather than mobilizing business through organizational mechanisms, appellate systems, much like financial markets depend on communicated intentions and expectations to encourage or discourage potential business (Cartwright and Warner, 1975). Sometimes the signals get through and an orderly sequence of litigants appears. But often there is either a dearth or deluge of litigants, and then an appellate court must rely on docket discretion to restore equilibrium. This produces a system partially reactive, partially proactive depending on the relative efficiency of appellate homeostatic mechanisms.

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so that we can retain the theoretical subtlety of the integration model without losing the richness of exogenous theories of appellate litigation.

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In contrast to Llewellyn's lyrical optimism, these notes seem to project doom and gloom. Not at all. Reported opinions are probably the best single source of systematic historical data on the law. If problems appear, it only means the social science folk-wisdom is wrong: instead of knowing a lot about upper courts and little about lower courts, we, in fact, know very little about either.

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