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## Political Culture and Judicial Research

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# POLITICAL CULTURE AND JUDICIAL RESEARCH

JOEL B. GROSSMAN AND AUSTIN SARAT\*

The application of social science concepts and methods to the study of law and legal institutions has come a long way since the first quantitative efforts to measure Supreme Court behavior were met with widespread scorn and derision. In the intervening years, the preponderance of work by political scientists concerned with the law has focused on the judicial decision-making process, with particular attention paid to explaining the voting behavior of Supreme Court justices.<sup>1</sup> Recently, scholars have shown an increased concern with policy outputs and the impact of Supreme Court decisions.<sup>2</sup> The reciprocal and constant interaction between the judiciary and the political system no longer seems open to question. The idea that, somehow, law and legal institutions operate separately and distinct from politics is impossible to maintain. And, yet, there have been relatively few efforts to define or actually investigate empirically linkages between law and the political system. While the focus of research was the Supreme Court, this linkage could be—or in any case was—assumed to exist. But with increasing efforts to study the operation of state courts and a rapidly developing behavioral literature on foreign court systems, the need to clarify this linkage is underscored. In particular, the differential role and operation of appellate courts modeled after the Supreme Court of the United States suggests a renewed effort to explore political and environmental factors which may contribute heavily to the workings of a judicial system.

In what ways does a legal system respond to demands from the political system? How and why are these demands made to the legal

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1. Grossman & Tanenhaus, *Toward a Renaissance of Public Law* and Pritchett, *The Development of Judicial Research*, in *FRONTIERS OF JUDICIAL RESEARCH* (J. Grossman & J. Tanenhaus eds. 1969) [hereinafter cited as *FRONTIERS*].

2. See *THE IMPACT OF SUPREME COURT DECISIONS* (T. Becker ed. 1969); S. WASBY, *THE IMPACT OF THE UNITED STATES SUPREME COURT: SOME PERSPECTIVES* (1970); J. Levine & T. Becker, *Toward and Beyond a Theory of Supreme Court Impact* (paper presented to the American Political Science Ass'n 1969); Levine, *Methodological Concerns in Studying Supreme Court Efficacy*, 4 *L. & SOC. REV.* 583 (1970).

system? How are they transformed into policy outputs? And how do these outputs affect the processes of change and the maintenance of stability? Our purpose in this article is to suggest an approach to research on these questions. Specifically, we will suggest ways in which the concept of "political culture" can be used to sensitize and guide judicial research to a better understanding of environmental influences.

### I. THE CONCEPT OF POLITICAL CULTURE

The generic concept of culture is certainly no stranger to judicial scholarship. It has been used widely, if implicitly and somewhat loosely, in traditional as well as more modern studies. Indeed, one significant branch of legal scholarship, jurisprudence, is almost entirely devoted to an exploration of what today we would call cultural variables, treated in such conceptual terms as norm enforcement and in descriptive and prescriptive propositions about the behavior of judges and other legal actors. The concepts of legality and justice, the nature of legal reasoning, the development of legal doctrines, questions about sovereignty and constitutionalism, and the role of law as an instrument of social change were among the questions receiving the greatest attention among early legal scholars. Sociological jurisprudence emphasized the social consequences of law, the impact of sociological, historical and philosophical factors in the decision-making process, and the impossibility of separating law from the society in which it existed. Emphasis was on the law in action, "as it really was," rather than on its formal existence as a body of doctrine.<sup>3</sup> To this, the Legal Realists added a Freudian dimension, seeking in particular to free the decision-making judge from the constraints of the prevailing theory of mechanical jurisprudence.<sup>4</sup>

Certainly the most explicit cultural emphasis was reflected in the writings of legal anthropologists, who sought to explain the workings and development of law in primitive societies through kinship arrangements and other forms of status relationships.<sup>5</sup> Particular forms

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3. See summary and citations in E. SCHUR, *LAW AND SOCIETY: A SOCIOLOGICAL VIEW* 24 *et seq.* (1968).

4. In particular see J. FRANK, *COURTS ON TRIAL* (1963) and *LAW AND THE MODERN MIND* (1963).

5. M. GLUCKMAN, *THE JUDICIAL PROCESS AMONG THE BAROTSE OF NORTHERN RHODESIA* (1955) [hereinafter cited as GLUCKMAN]; E. HOEBEL, *THE LAW OF PRIMITIVE MAN* (1961) [hereinafter cited as HOEBEL]; K. LLEWELLYN & E. HOEBEL, *THE CHEYANNE WAY* (1941); Nader, *The Anthropological Study of Law*, in *THE ETHNOGRAPHY OF LAW* (L. Nader ed., special

of legal process and structure were explained by reference to more general characteristics and needs of the particular society. For many years the dictum of Sir Henry Maine, that the development of progressive societies was characterized by the movement from "status to contract," was generally accepted as authoritative, although it has recently been subject to considerable revisionist criticism.<sup>6</sup>

Although culture variables were to be found in the work of both traditional and behavioral scholarship in political science, there was little reliance upon them. Considering cultural/systemic factors along with attribute and attitudinal variables, Schubert, for example, suggested that these macro-level variables were the most remote and hence least reliable predictor of decisional behavior of judges. Attitudes of judges were seen as the most important cause of decisions, followed by the judges' attributes (e.g., their social backgrounds) and only then by cultural or systemic factors.<sup>7</sup> While this may very well be true, it cannot be tested empirically when the judges or court system being studied are products of the same, or similar, cultural experiences. Moreover, as we shall suggest below, even in a situation where culture variables are effectively controlled, as in studies of the Supreme Court's decision-making process, they may still exert a more direct and important influence than Schubert suggests. Furthermore, none of these studies has attempted to probe sub-cultural deviations within a predominant culture.

Political culture was first introduced into systematic political analysis by Gabriel Almond. As used by him and others, it has been developed to "connect individual tendencies to system characteristics."<sup>8</sup> The concept has been defined by Verba as "the system of empirical beliefs, expressive symbols, and values which defines the situation in which political action takes place," and includes cognitive, affective and evaluative dimensions.<sup>9</sup> As so defined, political culture is in Patterson's words a "somewhat open-ended, multi-faceted, sensitizing concept," and not a theory of politics in itself.<sup>10</sup>

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publication of the *American Anthropologist* 1965). See also *LAW AND CULTURE IN SOCIETY* (L. Nader ed. 1969).

6. H. MAINE, *ANCIENT LAW* (1863).

7. G. SCHUBERT, *JUDICIAL BEHAVIOR* 447 (1964).

8. See G. ALMOND & G. POWELL, *COMPARATIVE POLITICS: A DEVELOPMENTAL APPROACH* 52 (1966).

9. Verba, *Comparative Political Culture*, in *POLITICAL CULTURE AND POLITICAL DEVELOPMENT* 513 (L. Pye & S. Verba eds. 1965) [hereinafter cited as *POLITICAL CULTURE*].

10. See Patterson, *The Political Culture of the American States*, 30 *J. POLS.* 187-88 (1968).

As used generally in the literature, the dimensions of political culture are interpreted in the framework of a systems model. Following that pattern, we can describe four significant areas of impact. First, the political culture may have an important effect on the regulation of demands made on a political system; as Patterson suggests, it may affect the "frequency, intensity and quality" of demand input.<sup>11</sup> The degree to which a political culture may facilitate participation will determine the sorts of demands made on a system and thus constitute the parameters of power within which political leaders can operate. Systems with low political participation are normally those in which citizens have a low sense of efficacy and are willing to defer to relatively high government autonomy.<sup>12</sup>

Second, political culture may have a significant impact on the operation and style of political institutions, or put more simply, how government does what it does. This transformation of demand inputs into outputs is normally referred to as the "conversion" process. It would include the formal and informal procedures of various political processes, definition of political roles to be played by political actors, and-similar factors.<sup>13</sup>

Third, political culture may affect the scope of governmental activity—the "outputs" of the political process. As Verba notes, the political cultural "expectations the members of a system have as to the output of the government—what they believe it will and ought to do for them" help delineate the boundaries of government activity.<sup>14</sup>

Finally, the political culture is likely to affect the feedback mechanisms of the system, e.g., the ways in which citizens respond to outputs and thus the impact which these outputs will have on processes of stability and change within a society. The perceived legitimacy of government activity is a critical component of this feedback mechanism.

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11. *Id.* 190.

12. G. ALMOND & S. VERBA, *THE CIVIC CULTURE* 101-124 (1963) [hereinafter cited as ALMOND & VERBA].

13. For a more detailed description of the conversion process at the Supreme Court level see Grossman, *A Model for Judicial Policy-Analysis: The Supreme Court and the Sit-in Cases*, in *FRONTIERS* 416-19. See also G. SCHUBERT, *JUDICIAL POLICY-MAKING* ch. 5 (1965); Grossman, *Social Backgrounds and Judicial Decisions: Notes for a Theory*, 29 *J. POLS.* 334 (1967).

14. Verba, *Comparative Political Culture*, in *POLITICAL CULTURE* 513, 537; see also R. WATSON & R. DOWNING, *THE POLITICS OF THE BENCH AND BAR* 64 (1969) [hereinafter cited as WATSON & DOWNING]. In their study of non-partisan judicial selection in Missouri they assert: "In recent decades the distinguishing feature of that political culture has been a fundamental economic and political conservatism, one reflecting a traditionalistic orientation. . . . The result in terms of policy has been a status quo orientation toward virtually all political issues." *Id.* 164.

Citizens are likely to have differentiated orientations toward the system as a whole, toward its sub-systems, and, to a lesser degree, toward specific outputs as well.<sup>15</sup>

## II. THE AMERICAN POLITICAL CULTURE AND THE JUDICIARY

Our primary interest in this paper is the judicial sub-system and its operant cultural environment. This environment is not, however, an isolated and discrete phenomenon, but more likely a mix of attitudes and orientations toward and traditions of the political system as a whole as well as its judicial component. One value of introducing a political culture variant is the possibility of more precisely defining areas of congruence and conflict between the two. It must be remembered that while the structure and many of the roles of the judicial system in the United States are politically defined, some date back well before the existence of the political system itself and do not owe their existence to it. Partly as a result of their different origins, political and judicial cultures are not always consonant; where large disparities exist, competition and incongruence may prevail. Indeed, in many ways the judiciary is the antithesis of prevailing democratic ideals. Or perhaps it might be more accurate to say that where there are competing strains within the American political culture, the judiciary is as likely as not to be the focal point of the minority strain. The clash of judicial and democratic values was perhaps best exemplified by the actions of the Supreme Court in the 30's. Yet, this tension appears to be a continuing feature of the operant political system.

The American political culture has been found to be "allegiant, participant and civic",<sup>16</sup> and to a large extent the judicial sub-system is the beneficiary of these more general orientations. But courts are perhaps the least well known agencies of government; attitudes towards the judiciary may differ significantly from attitudes toward executive and legislative agencies.<sup>17</sup> Furthermore, the opportunities for citizen "participation" in the judicial process are very limited and it would be highly inaccurate to describe courts primarily in these terms. What should be noted, however, is that the level of citizen participation in and support for the judicial sub-system may vary in different states or

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15. Patterson, *The Political Culture of the American States*, 30 J. POLS. 187, 190 *et seq.* (1968).

16. ALMOND & VERBA 440-455.

17. Dolbeare, *The Public Views the Supreme Court*, in LAW AND POLITICS IN THE FEDERAL COURTS 196 (H. Jacob ed. 1967).

regions where the prevailing *political* sub-culture favors political participation generally.

Differentiating between the general political culture and the sub-culture of the judiciary is an important first step in understanding the impact of culture on the judicial process. Richardson and Vines, in their recent book on the federal courts, have made the first systematic effort to distinguish empirically and conceptually between the two.<sup>18</sup> They seek to explain the operation of the federal courts as a merging of what they call the “legal” and “democratic” sub-cultures. The legal sub-culture is composed of “rules and norms governing the judicial process, the recruitment of judges, and the behavior of judicial actors.”<sup>19</sup> For them, bench and bar groups are the primary advocates and reinforcers of legal values; the possible roles of citizens in the development of such values is not explicitly recognized. Interacting with the legal sub-culture is a “democratic” sub-culture. As we interpret their scheme, it is that although courts in general, and the federal courts in particular, are insulated from the primary participatory values of the democratic sub-culture, some aspects of the latter have been incorporated into the judicial system. Richardson and Vines argue that the merger of these two structures “results in a judicial process and structure accomodating to both.” Thus, the courts are seen as reflecting this cultural clash; cross-pressure is frequently reflected in who is selected to serve on the courts, the kinds of cases which are decided, and the sorts of decisions made.<sup>20</sup>

We would suggest one conceptual refinement in what we regard otherwise as a potentially fruitful approach. It seems advisable to differentiate between legal and judicial sub-cultures, recognizing that the roots of the former, and indeed much of its day-to-day activity, fall somewhat outside the judicial process, and are influenced to a lesser extent by the political culture generally and the democratic sub-culture. What we suggest as an alternative conception is the existence of a judicial sub-culture which is defined by the merger between the legal and democratic sub-cultures, but which over time has developed certain unique features and norms different from those of its parent cultures. As we will discuss later in this paper, the structures and processes of the American judiciary are not identical to those of the common law courts which form our legal heritage. And there is also some basis for

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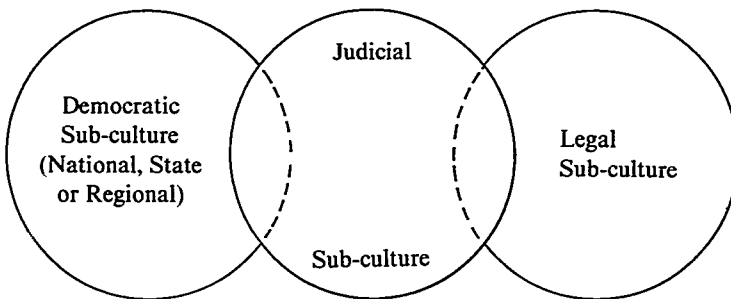
18. R. RICHARDSON & K. VINES, *THE POLITICS OF FEDERAL COURTS* 8 (1970) [hereinafter cited as RICHARDSON & VINES].

19. *Id.*

20. *Id.* 11.

differentiation between attitudes and orientations towards the law generally and towards the courts.

Figure 1



While we are still operating on a fairly general conceptual level, it would appear that the model we propose is more likely to take account of the needs of judicial research. Construction of any model may be premature, since there is as yet little in the literature of an empirically adequate nature to verify even macro-level hypotheses. Before we can truly understand the impact of culture on the judicial process we must be able rigorously to deal with single variables and relatively simple hypotheses. It is to this more immediate task that we suggest further attention, and it is in furtherance of this objective that in the remainder of this paper we explore the cultural dimension of judicial research and the operationalization of several hypotheses.

### III. SOME PROPOSITIONS AND HYPOTHESES

#### A. Regulation of Demand Inputs

Regulation of demands, the “gatekeeping” function, is crucial to the maintenance and stability of a system.<sup>21</sup> The system’s capacity to function is in part defined by the locus and scope of demands made upon it, by expectations as to how it will deal with these demands, and by the perceived legitimacy of its responses to them.

The frequency, intensity and quality of demands made on a judicial sub-system are likely to be strongly related to cultural factors in several ways: first, indirectly to the extent that particular adjudicatory

21. See Grossman, *A Model for Judicial Policy Analysis: The Supreme Court and the Sit-in Cases*, in *FRONTIERS* 414; *THE FEDERAL JUDICIAL SYSTEM* 4 (T. Jahnige & S. Goldman eds. 1968).



structures are culturally determined and have the capacity to respond to certain types of demands; and, second, to the level of litigiousness in a particular society. The particular judicial structures (including norms of procedure and substantive and procedural rules) of a society can be said to reflect the special functions which legal institutions are expected to perform. Hoebel has categorized four basic "law jobs" common to most societies—social control, conflict resolution, adaptation and social change, and norm enforcement.<sup>22</sup> But different cultures may emphasize different jobs, and this emphasis is likely to be reflected in—or a reflection of—the particular judicial processes of that culture. Generally, only societies recognizing the legitimacy of third party, public intervention in the settlement of private disputes have developed formal adjudicatory structures.<sup>23</sup> Miller and Schwartz, and others, have found significant relationships between cultural norms and expectations as to what subjects or concerns are appropriately to be settled by courts. The degree to which bargaining and compromise prevail as norms may limit or enhance the perceived efficacy of courts as problem resolving institutions. For example, Nader found that the dominant norm for dispute settlement among the Zapotec Indians in Mexico was a balancing of equities and results rather than a rigid determination of fault.<sup>24</sup> Negative responses to recent suggestions about transforming the current adversary negligence basis of resolving automobile accident cases into a no-fault insurance system have indicated how deep rooted may be the need to determine right and wrong in the American culture.<sup>25</sup>

A culture may encourage or discourage use of the courts to solve disputes. Danelski reports that in Japan, prior to the post-war constitution, "litigation was not regarded as a socially acceptable means of dispute resolution. Disputes, when they arose, were usually resolved informally by conciliation in which judges were seldom involved."<sup>26</sup> By contrast, DeTocqueville was perhaps only the first of many who have observed the tendency in the United States to invoke the courts in the

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22. HOEBEL 10-12.

23. See GLUCKMAN 94; Schwartz & Miller, *Legal Evolution and Societal Complexity*, 70 AM. J. SOC. 159 (1964).

24. L. Nader, *Styles of Court Procedure* (unpublished paper), at 31.

25. R. KEETON & J. O'CONNELL, *AFTER CARS CRASH: THE NEED FOR LEGAL AND INSURANCE REFORM* (1967).

26. Danelski, *The People and the Court in Japan*, in *FRONTIERS* 47. Elsewhere he suggested that in traditional Japanese society courts played a small role because obligations were more important than rights, and status relations were paramount. Danelski, *The Supreme Court in Japan*, in *COMPARATIVE JUDICIAL BEHAVIOR* 123 (1969).

resolution of disputes. This is true not only at the level of private litigation, but also in the realm of political disputes which are frequently argued in terms of, or transformed into, constitutional issues. Politicization of some aspects of the litigation-process in the United States has affected the style as well as the substance of that process. The existence of large scale organizations and strategies devoted largely, if not exclusively, to litigating political grievances is perhaps uniquely characteristic of the American polity.

Recent critics have noted in the United States the analagous tendency toward "overcriminalization"—the attempt to control a wide variety of behavior and to impose moral standards through the use of the criminal law.<sup>27</sup> This tendency involves vastly more people involuntarily in litigation and criminal court proceedings than would otherwise be the case. Since many of these "crimes without victims" involve conflict between the competing moral views of the dominant culture and deviant sub-cultures, the courts become little more than the enforcement agents of the prevailing culture.

Jacob's recent study of bankrupts and wage garnishees in four Wisconsin cities suggested that "political culture may be a significant explanatory device for accounting for differences in litigation rates," and that the choice to employ the courts for private purposes may be guided by "orientations toward public life as well as by public norms of what constitutes appropriate use of government facilities."<sup>28</sup> Jacob attributed to the litigants in his study the cultural characteristics of the cities in which they lived, whereas it was not clear just how important those characteristics were for the individual decisions involved. In his study of the courts of Nassau County, New York, Dolbeare has also implied a connection between political culture and propensity to litigate, although he was unable to test systematically the validity of this assumption.<sup>29</sup> And in their study of the selective service system, Davis and Dolbeare found significantly different litigation rates among those seeking deferment or exemption in California and Tennessee. These

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27. J. CAMPBELL, J. SAHID & D. STANG, *LAW AND ORDER RECONSIDERED: A STAFF REPORT TO THE NATIONAL COMMISSION ON THE CAUSES AND PREVENTION OF VIOLENCE* ch. 23 (1970). See also G. HAWKINS & N. MORRIS, *THE HONEST POLITICIAN'S GUIDE TO CRIME CONTROL* (1970); H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* (1968); E. SCHUR, *CRIMES WITHOUT VICTIMS: DEVIANT BEHAVIOR AND PUBLIC POLICY* (1965); Kadish, *The Crisis of Overcriminalization*, 374 *ANNALS* 157 (1967).

28. H. JACOB, *DEBTORS IN COURT* 92 (1969) [hereinafter cited as JACOB].

29. K. DOLBEARE, *TRIAL COURTS IN URBAN POLITICS: STATE COURT POLICY IMPACT AND FUNCTIONS IN A LOCAL POLITICAL SYSTEM* chs. 3, 4 (1967) [hereinafter cited as DOLBEARE].

differences were attributed in part to the different state or regional cultures.<sup>30</sup>

City or region is only one possible unit of cultural influence; sub-cultural norms within the population as a whole may also influence litigation propensity. For example, recent studies have shown that poor people are much less likely to perceive the advantages of taking their grievances to court; one of the most important tasks of many legal services programs was to break down this low sense of efficacy toward litigation in the culture of the poor.<sup>31</sup> Wilson's study of the police similarly found certain people more willing to call the police into family quarrels; cultural explanations of these differences appear relevant.<sup>32</sup> Studies have revealed a comparable unwillingness to litigate in the black sub-culture of the South, although this may have undergone change in recent years.<sup>33</sup> Finally, Macauley's study of businessmen's unwillingness to resort to formal legal sanctions in contract disputes suggests that cultural inhibitions toward litigation may be more widespread than is commonly believed.<sup>34</sup>

The trouble with many of the above propositions, plausible though they may be, is that they have not been adequately tested empirically. In some cases they fail to meet Lempert's criterion of elimination of plausible rival hypotheses.<sup>35</sup> Future research in this area should be designed and operationalized so as to avoid this pitfall as much as possible. Controlling for rival hypotheses is easiest when alternative structures or institutions performing similar functions can be compared.

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30. J. DAVIS & K. DOLBEARE, *LITTLE GROUPS OF NEIGHBORS: THE SELECTIVE SERVICE SYSTEM* 113 (1968).

31. See, e.g., Carlin & Howard, *Legal Representation and Class Justice*, 12 U.C.L.A. L. REV. 381 (1965); Sykes, *The Legal Needs of the Poor in the City of Denver*, 4 L. & SOC. REV. 255 (1969).

32. J. WILSON, *VARIETIES OF POLICE BEHAVIOR* 24 (1968).

33. This was undoubtedly related to, first, a practical fear of the consequences of such an action, and second, to a low sense of political efficacy. There is conflicting evidence on just how low this sense of efficacy was. Almond and Verba, in their five nation study, find a low level of Southern Negro efficacy, and pessimism at the possibility of changing bad local conditions; by contrast there is little difference between northern Negroes and northern whites—reported in Marvick, *The Political Socialization of the American Negro*, in *NEGRO POLITICS IN AMERICA* 34 (H. Bailey ed. 1967). On the other hand, Matthews and Prothro find that the political efficacy of southern Negroes, while low, is not substantially lower than that of southern whites—*NEGROES AND THE NEW SOUTHERN POLITICS*, ch. 10 and *passim* (1966) [hereinafter cited as MATTHEWS & PROTHRO].

34. Macauley, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963).

35. Lempert, *Strategies of Research Design in the Legal Impact Study; The Control of Plausible Rival Hypotheses*, 1 L. & SOC. REV. 111 (1966); see also Levine, *Methodological Concerns in Studying Supreme Court Efficacy*, 4 L. & SOC. REV. 583 (1970).

Research into litigation rates and patterns in the American states—or regions—would lend itself to this purpose by allowing for controlled comparative analysis. There is already a substantial literature linking the political cultures of the states to other political attributes, and a similar effort could be made to link culture with litigation and demands on judicial systems.

The political cultures of the states have been characterized in different ways. Elazar has impressionistically classified states along a Moralism—Individualism—Traditionalism continuum,<sup>36</sup> and Sharkansky, while questioning some aspects of this classification, has validated its relationship to political participation variables.<sup>37</sup> As identified by Elazar, a Traditional culture is marked in part by the view that the political activity of citizens should be minimal and that effective political participation is best left to elites. A Moralist orientation holds that all citizens have the obligation to participate in politics, while an Individualist view sees political participation in the more narrow vein of enlightened self-interest.

There is, of course, no way that political culture as such can be measured. However, attitudes toward political participation, said to be characteristic of particular cultural orientations, can be operationalized through surrogate variables. Sharkansky found a fairly strong relationship between the traditional political culture and a low percent turnout for gubernatorial elections.<sup>38</sup> Using this measure of culture (say, over the last five elections), we could correlate percent turnout for governmental elections with litigation rates such as the number of civil cases per 10,000 population, or perhaps with certain substantive types of litigation, controlling for numbers of courts and judges, relative litigation costs, rules regarding standing to bring an action in court, and other institutional variables likely also to have some effect on rates and patterns of litigation. There is some evidence that the populations of various states vary in litigiousness. Vines has documented such differences,<sup>39</sup> as have Kalven, Zeisel and Bucholz in their study, *Delay in the Courts*.<sup>40</sup> The latter found some states consistently ranking high in personal injury cases. As Dolbeare has noted, the authors' explanation

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36. D. ELAZAR, *AMERICAN FEDERALISM* 85 (1966).

37. See Sharkansky, *The Utility of Elazar's Political Culture*, 2 *POLITY* 68 (1969).

38. *Id.* 79.

39. Vines, *Courts as Political and Governmental Agencies*, in *POLITICS IN THE AMERICAN STATES* 256 (H. Jacob & K. Vines eds. 1965).

40. At 234 *et seq.* (1959).

of these patterns in terms of urbanization is not entirely convincing,<sup>41</sup> but the suggestiveness of the results surely warrants further study.

Another norm which would seem to be related to litigation rate in a state concerns the scope of governmental activity. Hypothetically, the more traditional a state's political culture, in terms of its attitudes toward the scope of government activity, the lower the litigation rate in that state's courts. The traditional culture values only a limited role for governmental activity; this orientation can be operationalized through the use of such surrogate variables as the number of public employees per 10,000 population, the length and frequency of state legislative sessions, relative numbers of lobbyists registered for legislative sessions, etc. Traditional states seem unlikely to have or encourage frequent government intervention in private disputes.

A final suggested avenue of research would be into the effect of the norm of non-competitive politics on litigation—the more hostile a state's culture is to competition, the less litigious its population. Since government is conceived of as a chore better left to the elite, the traditional culture is characterized by the belief that political competition should be minimized. This can be operationalized by measures of inter-party competition, such as the average percent vote for the losing major party gubernatorial candidate in the past five elections. A culture which discourages public contention in one arena seems likely to discourage it elsewhere. It may be that the contrary hypothesis is also plausible. First, litigation is not *all* politically related. Much is private both in form and perception of those involved in it. It might be profitable if, in future investigations of linkages between political culture and demand input to the courts, scholars ascertain which types of litigation are politically relevant and which are not. In this regard, Jacob suggests that courts may be used as a forum for negotiating settlement of private disputes or as a device for legitimizing private settlements.<sup>42</sup> Litigants using the courts in these ways, *e.g.*, those involved in automobile accident cases, probate hearings or family relations cases may not see these cases as at all politically relevant. Consequently, prevailing political cultural expectations would be unlikely to effect the input of these types of litigation. Although Jacob appears to argue to the contrary, the somewhat unexpected findings he reports on the relation of experience in court to political efficacy call his argument into doubt. We

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41. K. Dolbeare, *The Supreme Court and the States: From Abstract Doctrine to Local Behavioral Conformity* (unpublished manuscript), at 12.

would expect that only where litigants perceive their cases as politically relevant would their experience in court affect their political attitudes. Litigants involved in disputes involving questions of constitutional rights, allocation of political benefits and sanctions, or conflicts between private citizens and government agencies may perceive these cases as political and hence be guided in their behavior by political cultural norms. Second, where a culture disdains political competition, it may seek—or need—alternative ways of resolving disputes. Thus, the possibility of an inverse relationship cannot be discarded at this point.

These hypotheses are only suggestive of the sorts of cultural variables that might be linked with the generation of demands on a judicial system. Other possibilities to be explored would certainly include variables dealing with the structure of the Bar. We are not aware of any attempt at categorization of states by the structure of its legal profession. But such variables as the number of attorneys in private practice per unit of population,<sup>43</sup> the number of attorneys hired by government agencies, the ratio of solo practitioners to firm lawyers, existence and scope of legal services agencies, and the geographic density and distribution of the lawyer population of a state would certainly be relevant in effecting litigation. Likewise, litigation demands may be crucially affected by cost factors and the degree of accessibility of a state's judicial agencies. Finally, we might suggest investigation of such variables as ethnic homogeneity of a state's population, income distribution, and economic variables denoting the extent to which the state is industrialized.

### *B. The Style and Structure of Government Institutions—The Conversion Process*

The ways in which the judicial system operates, in particular the structures which have developed, the kinds of people recruited into those structures, and the norms which govern their behavior have all been identified in the literature as in some way influenced by cultural norms and values.

Legal anthropologists, perhaps more than anyone else, have been concerned with explaining why courts are structured differently in

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42. JACOB 16.

43. The authors of *Delay in the Courts*, *supra* note 40, found no correlation between number of claims and number of lawyers. However, this finding would not bar further efforts to explore this variable.

different societies, and why they handle disputes in particular ways. Such an orientation suggests that the structure and function of a court is in some sense an expression of "community values." Nader, for example, asserts that the structure and informal functioning of Mexican village courts is largely determined by the values of the inhabitants.<sup>44</sup> Nagel suggests a positive relationship between the complexity of division of labor in a society and the development of formal adjudicatory procedures.<sup>45</sup> Additional examples of supposed linkages between culture and judicial structure can be found. Morrison, studying the Swiss Federal Constitutional Court, found that the high value placed on democratic citizen participation in that nation is reflected in the fact that the decisional conferences of the court are open and public (and, of course, multi-lingual).<sup>46</sup>

At the trial court level, the differentiation between juries as triers of fact and judges as expositors of the "law" seems almost certainly a reflection of cultural norms. Indeed, the American attachment to and faith in juries may be quite unique. Not only does it disguise the fact that juries are less and less relied upon in American courts, but it ethnocentrically assumes that juries are indispensable to a fair system of criminal justice. As Becker has noted, the degree of lay participation in the judicial processes of a country may be a highly relevant cultural variable.<sup>47</sup> Additionally, Blumberg has suggested classifying urban trial courts as conforming either to a "due process" or "bureaucratic" model, and that these "judicial systems . . . embody and personify particular interpretations of the collective conscience of a social order,"<sup>48</sup> a conclusion in agreement with that of Banfield and Wilson concerning the relationship of culture and government structure.<sup>49</sup>

Future research efforts might consider the following hypotheses. First, we would hypothesize that a city which is reformist in orientation would be more likely to evidence a bureaucratic trial court system. A reformist culture values efficiency in government and emphasizes administrative solutions to political problems. One index of a reformist culture might be the presence of a non-partisan, council-city manager form of

44. L. Nader, *Styles of Court Procedure* (unpublished paper), at 3.

45. See S. NAGEL, *THE LEGAL PROCESS FROM A BEHAVIORAL PERSPECTIVE* 69-71 (1969).

46. MORRISON, *The Swiss Federal Court: Judicial Decision Making and Recruitment*, in *FRONTIERS* 143.

47. T. BECKER, *COMPARATIVE JUDICIAL POLITICS: THE POLITICAL FUNCTIONING OF COURTS* ch. 6 (1970) [hereinafter cited as BECKER].

48. A. BLUMBERG, *CRIMINAL JUSTICE* 20 (1967).

49. E. BANFIELD & J. WILSON, *CITY POLITICS* 154, 171 (1963).

government. The presence of a bureaucratic court might be indicated by short trials, a large ratio of guilty to innocent pleas, and a higher than average conviction rate in contested cases. Controls would have to be introduced for the size of the city and the crime-rate per capita, since the need for bureaucratic efficiency might be a result of caseload as well as of cultural expectation. There are few, if any, systems which perfectly fit the "due process" or "bureaucratic" models. In assessing the reasons for the existence in any locale of a particular mix of the two, the existence of a strong middle to upper-middle class element in the community would have to be considered, since such an element might be presumed to have a greater than average attachment to at least the concepts, if not always the carrying out, of due process values.<sup>50</sup>

At the appellate court level, there are a number of variables that might be investigated in terms of their possible cultural origins or supports. It is at this level particularly that the impact of the democratic sub-culture on structures and processes initially part of the legal culture can be observed. The observance of the majoritarian norm in decision-making, the increasing frequency of dissent, and the gradual breakdown of the myth of the invincibility and infallibility of judges may all be attributable to the democratic sub-culture. That judges should, *to some degree*, be independent of the political system is taken for granted in the United States. But as Becker has shown, the concept of judicial independence—and hence the independent functioning of the judicial structure—is by no means universal.<sup>51</sup> Likewise, as Becker and Kommers and others have shown, judicial review *as it operates in the United States* is peculiar to the United States.<sup>52</sup> Forms of it exist elsewhere, but always with modifications (usually limiting its scope) reflecting cultural expectations.

Variance in the internal decision-making processes of appellate courts may also reflect cultural differences within the same general form. Studies have shown some variations among state appellate courts in the frequency of dissent, norms of unanimity, opinion assignment procedures, conference and oral argument procedures, and other similar

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50. See Prothro & Grigg, *Fundamental Principles of Democracy: Basis of Agreement and Disagreement*, 22 J. POLS. 276 (1960). These authors note differences in abstract and concrete views of free speech ideals.

51. BECKER ch. 4.

52. *Id.* ch. 5; see also D. Kommers, *Cross-National Comparisons of Constitutional Courts: Toward a Theory of Judicial Review* (paper delivered at the Sixty-Sixth Annual Meeting of the American Political Science Ass'n, Los Angeles, 1970).



decision-making variables.<sup>53</sup> All the states to some extent share the common law heritage of the American legal system, and thus we would not expect to find great differences. But for this very reason, such differences as are found may be attributed to the influence of local democratic sub-cultures. Jaros and Canon report high rates of appellate court dissent in states with great socio-economic diversity and high levels of partisanship and political competition.<sup>54</sup> They find that dissent rates on state supreme courts which receive cases from intermediate appellate courts can be explained by political and cultural attributes of these states. But they also find that where state supreme courts hear cases directly from the trial level, dissent is better explained by reference to the characteristics of the judges themselves.<sup>55</sup> The reasons for this distinction are not entirely clear, but the results reported so far indicate the potential of seeking at least partial explanations of decision-making norms outside of the courts themselves.

Another way in which cultural norms affect the functioning of courts is by influencing the recruitment process and the kinds of individuals selected as judges. Recruitment is perhaps the key link between a culture and its judiciary, encompassing as it does the means to reinforce old values and inculcate new ones through the socialization of prospective decision-makers.<sup>56</sup> All of the available evidence supports the notion that men selected as judges will be those who understand and reflect the dominant values and norms of the community. Recruitment also performs the additional function of cultural representation, particularly in multi-ethnic communities.<sup>57</sup> The evidence suggests that while different methods of judicial recruitment may produce some variable effect, basic cultural norms are likely to control regardless of the particular method of selection.<sup>58</sup> Recruitment is also a major policy link between the political process and the courts; changes or proposed alterations in a selection system usually reflect political dissatisfaction with existing judicial policies, although there is little evidence that structural changes

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53. See Ulmer, *The Political Party Variable on the Michigan Supreme Court*, 11 J. PUB. L. 352-362; G. SCHUBERT, *QUANTITATIVE ANALYSIS OF JUDICIAL BEHAVIOR* 129-142 (1959); see also Adamany, *The Party Variable in Judges' Voting: Conceptual Note and a Case Study*, 63 AM. POL. SCI. REV. 57-73 (1969).

54. *Dissent on State Supreme Courts: The Differential Significance of Characteristics of Judges* (unpublished manuscript), at 2.

55. *Id.* 16.

56. J. GROSSMAN, *LAWYERS AND JUDGES* 7-20, 196-207 (1965) [hereinafter cited as GROSSMAN].

57. RICHARDSON & VINES 71.

58. WATSON & DOWNING 353.

could accomplish the reforms intended.<sup>59</sup> A particular method of recruitment may also reflect cultural ideas of how judges ought to be selected, with only implicit reference to the types of judges who will be chosen or judicial decisions which will result from a particular scheme. For example, the preference for electing judges, a heritage of our Jacksonian—Populist tradition, seems to be supported on general ideological grounds (*e.g.*, “its more democratic”) than for any substantive policy reason. On the other hand, efforts to change the prevailing systems of judicial recruitment are frequently oriented toward, or result from, policy considerations.

The recruitment process variables most likely to reflect cultural norms are (a) the key elite officials who make the effective choice, (b) the degree of remoteness from popular participation and control, (c) role of the legal profession and/or organized Bar, (d) length of term of office of judges, (e) the perceived need for and actual ethnic, religious, geographic or political diversity or balance, and (f) the degree of professionalization of persons selected as judges. In considering relationships among these variables, one would have to control for the perceived or actual political role of the court to which the judges are to be appointed, in itself perhaps a cultural phenomenon.

The more traditional the political culture of the selecting unit (*e.g.*, state, municipality, nation), the less likely its judges are to be recruited from among politically active attorneys. A culture which discourages participation generally is unlikely to encourage the recruitment of “political” judges. Likewise, the more traditional the culture as measured by the usual turnout rate and the size of the government bureaucracy, the less likely there is to be significant popular participation, short terms of office and provisions for recall of judges, and the selection of non-professional judges (*e.g.*, those without significant prior judicial experience or whose primary vocation is politics rather than law). We can think of some immediate exceptions to these hypotheses which in one sense detract from their validity, but in another merely underscore the complexity of the comparative study of judicial recruitment. First, if we try to explain and understand the recruitment of federal judges in the United States, there are both system-wide and local and regional norms which must be accounted for. The particular method of selection is a culturally induced factor, but one of a distant rather than contemporary nature. It can be explained in terms of the politics of the

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59. *Id.* 343.

formation of the Constitution and the first Congress as well as by any specific or current cultural factor. In fact, the system was a compromise, dictated by contemporary political necessity, between the prevailing traditional Anglo-Saxon idea of appointment of judges by the sovereign, the developing American counter-culture of democracy, and the conflict and tensions between the states and the newly formed federal government. As the system operates today it emphasizes elite rather than popular participation, partisanship and a moderate role for the organized Bar, and results in the selection predominantly of political rather than professional judges. On the other hand, it allows for a significant amount of decentralization which tends to reinforce the "balance" factors of representation for sub-cultural groups.<sup>60</sup>

Second, if we consider some foreign court systems, we find patterns which can be attributed to cultural differentiation, but which do not necessarily fit our hypotheses. For example, Japan is a very traditional society on which was imposed a democratic post-war constitution and an "American-style" Supreme Court which, according to Danelski, is for cultural reasons a vastly different institution. Judges are appointed, but then subject to a periodic "people's review", and, despite the formal openness of the process, hierarchy remains an important factor in determining who becomes a justice; it is, as Danelski says, "a social phenomenon as well as a bureaucratic phenomenon."<sup>61</sup> In Switzerland, judges are elected either by the populace or representative assemblies. In this respect, the Swiss do not follow the "pure" continental system of career judges who enter a separate and distinct judicial service directly from law school and work their way up the judicial ladder. And, yet, despite this structural deviation, Swiss judges, according to Morrison, are vastly more professionalized than American judges who are appointed rather than elected. In operation, though not in form, the Swiss system of judicial recruitment is similar to that of Germany, France and Italy; political parties play the role of bureaucratic evaluation and control which in other countries is played by the ministry of justice.<sup>62</sup>

A final way in which culture can influence the judicial conversion process is by influencing the orientations of incumbents of the judicial role. The concept of role by its very definition is an attempt to link the

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60. GROSSMAN 29-34, *passim*.

61. Danelski, *The Supreme Court of Japan*, in FRONTIERS 128.

62. Morrison, *The Swiss Federal Court: Judicial Decision-Making and Recruitment*, in FRONTIERS 150-51.

functioning of institutions with their respective cultures. It denotes the expectations of a society as to how a particular incumbent ought to behave or his perceptions of these expectations. These expectations may range from such diffuse and widely shared norms as honesty, impartiality and non-partisanship to more specific norms defining the limits of a judge's function or the alternative styles which he may adopt.<sup>63</sup>

Many of the key role norms relate to differentiating the judge's role from that of other political actors (in itself the *need* for such differentiation is culturally defined) and particularly legislators. The concept said to distinguish the judge's role in common law systems is adherence to precedent; ideally he is supposed to adjudicate disputes by reference to prior solutions of similar problems, and not "make" law himself except, perhaps, interstitially. The normative component of the ideal judicial role is the theory of judicial self-restraint, and it is in terms of this concept that judges' behavior is most frequently described and evaluated.

Most research utilizing the concept of judicial role has not sought specifically to link it with cultural variables, except in the general sense of attributing the self-restraint precedent norm to the legal sub-culture and considering the contrary norm (often inaccurately and pejoratively called judicial activism) as a perversion from the ideal. One exception has been the study by Vines and Glick of role perceptions and behavior of supreme court judges in four states. On the basis of in-depth interviews, respondent judges were classified as law interpreters, law-makers and pragmatists, the latter being a residual category combining elements of the first two. No relationship was found between these roles and either party affiliation or method of selection, and they concluded that the differences might be explainable by factors indigenous to each state such as prevailing norms of political culture.<sup>64</sup> Future research might well focus on testing this and related hypotheses. For example, the more traditional a state's political culture in terms of its attitudes toward the scope of government activity, the more likely its judges are to perceive their role in "law interpreter" or self-restraint terms.

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63. BECKER ch.1; T. BECKER, *POLITICAL BEHAVIORALISM AND MODERN JURISPRUDENCE* (1965); Grossman, *Dissenting Blocs on the Warren Court: A Study in Judicial Role Behavior*, 30 J. POLS. 1068 (1968); James, *Role Theory and the Supreme Court*, 30 J. POLS. 160 (1968).

64. Vines, *The Judicial Role in the American States*, in *FRONTIERS* 471; see also Glick & Vines, *Law Making in The State Judiciary*, 2 *POLITY* 142 (1969).

Operational measures of such role behavior might include per cent of cases overruling prior precedent, per cent of cases invalidating statutory enactments, etc. Vines' own attempt to identify those cases in which role concepts were explicitly mentioned was unsuccessful, but there is no reason to believe that role concepts are operative only when cited. Studies such as these, of course, must focus on courts as a whole rather than on individual judges. As such they cannot deal with the situation in which some judges, but not others, respond to role stimuli. Nor can they distinguish between cases in which a decision seems explainable in role terms but which might well have resulted from personal values or other individual traits not attributable to the political culture of a state. It has recently been suggested that, contrary to most studies which conceive of role as an independent variable, role is better conceived of as a dependent variable—the result of the interaction of a number of factors such as personal values and attitudes, the conflict and compatibility between overlapping role expectations, and the potential impact of certain behaviors.<sup>65</sup> Our suggested linkage of role with political culture would be quite compatible with this view.

Role concepts have also been used to explain the behavior of non-judicial actors in the legal system, and the linkage between role and culture can also be explored with them as well. Undoubtedly, the crucial link between citizens and the law is the attorney. His role is prescribed by norms codified in the Canons of Ethics, and by a miscellany of statutes. The traditional view of the attorney is as the devoted advocate for his client, for whom he will perform services for a fee. The attorney is not seen as the advocate of particular causes, since he presumably is willing to take on any client who can afford his fee and who solicits his services. As traditionally defined, the role of the attorney is a limited one. Casper and others have noted, however, the development of new types or styles of attorneys—men who are primarily policy rather than client oriented, and whose activities in furtherance of particular causes may conflict with the traditional view of the attorney-client relationship.<sup>66</sup> The development of organizations of attorneys designed to achieve certain political goals through litigation has produced an even greater conflict between the political system and the legal culture. Differences in styles of

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65. Allen & Sarbin, *Role Theory*, in *THE HANDBOOK OF SOCIAL PSYCHOLOGY* 557 (G. Lindzey & E. Aronson eds. 1968).

66. See Casper, *Lawyers and Loyalty: Security Litigation*, 3 L. & SOC. REV. 575 (1969); Casper, *Lawyers Before the Supreme Court: Civil Liberties and Civil Rights, 1957-1966*, 22 STAN. L. REV. 487 (1970).

legal practice and the increasing politization of at least some attorneys' roles might well be investigated in comparative cultural terms. Attorneys are crucial if often overlooked components of the conversion process, since they are responsible for initiating the demand inputs which will shape the ultimate policy outputs of the courts. Cultural variables also influence the role behavior of government lawyers. Eisenstein's study of federal prosecutors suggests several variables affecting the decision to prosecute in a particular case. These include knowledge of local norms and whether or not juries could be expected to convict for certain offenses, the expectations of the judge—particularly if there is a single judge before whom all business must be transacted, the expectations of fellow prosecutors in larger districts, and the prosecutor's own values and role conceptions.<sup>67</sup> Since prosecutors (federal and state, alike) are almost always products of the district in which they serve, and since many if not all have higher political aspirations, the political and cultural nature of the decision to prosecute is obvious.

### C. *Outputs—The Scope of Governmental Activity*

Institutional outputs seem to be objects of political cultural orientations, and courts no less than other agencies are subject to this influence. There are, in fact, very few empirical studies of court outputs. Outputs are, of course, of central concern to lawyers, and analysis of case holdings and doctrines occupies the efforts of many legal scholars. Behavioral studies have tended to conceptualize outputs primarily in "liberal-conservative" terms, and have been little concerned either with actual policy outputs or with the testing of political culture variables.<sup>68</sup> Obviously patterns of decision-making identified as predominantly liberal or conservative, or mixed, are likely to reflect culture in some indistinct sense.

Cultural variables can be said to relate to judicial outputs at three levels. First, the rules of decision of a particular institution are likely to reflect the expectations which citizens have of that institution. Second, the breadth and scope of policy pronouncements is closely related to role expectations and is thus likely to be culturally defined. And, third,

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67. J. Eisenstein, *The Federal Prosecutor and His Environment* (paper delivered at Sixty-Fourth Annual Meeting of the American Political Science Ass'n, Washington, 1968).

68. It should be noted, however, that attempts to explain judicial decisions in terms of judges' attitudes frequently assume, and occasionally state explicitly, the cultural and societal roots of these attitudes. See, e.g., G. SHUBERT, *THE JUDICIAL MIND* 203, *passim* (1965).

specific policy outputs may be found to relate to the prevailing culture in which the institution functions.

Rules are never neutral (although they may be neutrally applied). A close inspection will usually reveal concealed premises and value judgments. While there are numerous studies of the policy implications of jurisdictional rules or rules governing the grant of review in appellate courts, few are empirical, and almost none have attempted any culture link. Until recently, few social scientists evinced an interest in the administrative side of the judicial process, but several recent studies have demonstrated the significance of certain administrative patterns for policy outputs.<sup>69</sup> Exploratory studies of differential rule structures in the American states or in the federal circuits, correlated with culture variables, *might* uncover evidence of both policy implications and cultural links.

The breadth and scope of policy pronouncements is, of course, very likely to be culturally related. The basic parameters outlining the judicial function traditionally came from the common law. Notions of what judges could or could not do were largely inherited and assumed to be inherent in the judicial function. With the growth of statutory law in the United States (which initially met fierce judicial resistance as an incursion on traditional judicial prerogatives), the political culture began to sanction legislative policy-making prerogatives formerly held by judges alone. The very terms used by Vines to describe basic judicial role orientations underscores the tensions of overlapping judicial and legislative power.

The concept of judicial self-restraint well illustrates the limitations of the political culture on the judicial prerogative. Self-restraint has two strains: the first, responsive to the very pragmatic considerations of preserving judicial power largely dependent on legislative grant, and without adequate enforcement powers; and, the second, responsive to the ideology of majoritarian democratic theory. The fact that judges believe or accept the fact that theirs is a deviant institution, non-democratic and nonrepresentative, is a basic limit on what sorts of cases they will take and what sorts of decisions they will make. Since extreme attachment to the theory of self-restraint would render the Supreme Court virtually

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69. B. Cook, *Federal District Judges in the Seventh Circuit* (paper delivered at Sixty-Sixth Annual Meeting of the American Political Science Ass'n, Los Angeles, 1970); *see also* Fish, *The Circuit Councils: Rusty Hinges of Federal Judicial Administration*, 37 U. CHI. L. REV. 203 (1970); Glick, *Policy-Making and State Supreme Courts: The Judiciary as an Interest Group*, 5 L. & SOC. REV. 271 (1970).

functionless, most judges take a more moderate view, but few would reject the concept in its entirety.

To the extent that self-restraint is a cultural norm affecting policy outputs, it seems to have developed its own antithesis. Although the proposition has never formally been accepted by a majority of the Court, the notion that the Court has a special responsibility to protect the rights of "discrete and insular minorities otherwise excluded from the political process" has certainly characterized its recent activities. This has operated as a cultural corrective, allowing the Court to get involved in certain types of cases which would otherwise be rejected under the traditional self-restraint formula. Similarly the Court has made a major contribution to the development of the egalitarian strain of the American political culture. By setting increasingly high standards of equality it has given to that concept a legitimacy which in turn has sparked increasing demands through litigation, and otherwise, for equal treatment in all walks of life. Although we will not be dealing directly with it in this paper, the role of courts, and particularly the Supreme Court, in introducing new norms into the culture, or reinforcing or rehabilitating old ones, should not be overlooked.

It is easiest to speculate about the operation of cultural variables at the level of specific policy outputs, and it is at this level that the most fruitful hypotheses are likely to be developed and operationalized. In his study of federal district courts in the South, Vines found an inverse correlation between districts with relatively small black populations and favorable handling of civil rights claims by courts in those districts.<sup>70</sup> His findings correspond to those of Matthews and Prothro, and others, that the sub-culture of segregation is likely to be less strident and more tolerant where blacks do not approach numerical supremacy, and in urban rather than rural areas of the South.<sup>71</sup> Vines' study of state supreme courts in the South also found that these courts are substantially less likely to favor civil rights claims than are federal district courts. He suggests this finding can be explained in terms of the cultural norms which dominate in these states and the closer linkage between, and greater impact of, these norms on state rather than federal judges.<sup>72</sup> Similarly, Watson and Downing report that decisions of the

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70. RICHARDSON & VINES 93-100.

71. MATTHEWS & PROTHRO 115-120, *passim*. See also V. KEY, SOUTHERN POLITICS IN STATE AND NATION 5 (1949).

72. L. Nader, *Styles of Court Procedure* (unpublished paper), at 31.



Missouri Supreme Court appear to reflect the “conservatism and status quo orientation typical of the outside political culture.”<sup>73</sup> These authors seem to share Schubert’s view, quoted earlier in this paper, that cultural factors are likely to have some influence on court decisions, but that this influence is rather indirect.

Empirical research in this area, despite its scarcity to date, seems unusually promising. If we could hypothesize that cultural variables would relate to the scope, breadth, intensity and substance of state judicial policies, then several types of studies would materialize. Borrowing the concept of innovation from Walker’s recently published study,<sup>74</sup> we might hypothesize that the more traditional a state’s political culture in terms of its attitudes toward government activity, the less innovative its state supreme court will be. Where a state’s cultural orientations favor a low profile in government, as reflected in a small bureaucracy, the state’s supreme court is unlikely to lead the way towards solution of important policy problems. (We do recognize the possibility of the converse proposition being true—that in the absence of an activist state legislature the state supreme court might succumb to great pressure to either fill the void of policy-making or stimulate greater legislative activity.) The concept of policy innovativeness may be operationalized by several measures, such as the degree to which state supreme courts resolve public policy issues prior to legislative action in the same state on a select grouping of policy issues which are common to all states. A second measure might involve the substantive differences between judicial and legislative policy treatment, although this would admittedly involve the introduction of some subjective criteria. State supreme courts could be compared with each other in terms of the scope and intensity of their treatment of common issues—for example, which were the first state supreme courts to outlaw abortion statutes, or anti-birth control laws? Finally, using the same sorts of data, state supreme courts might be contrasted to the federal courts having jurisdiction in the state. For example, one measure of the lack of innovativeness of a state supreme court might be a relatively high percentage of cases that might have been lodged in the state courts but were instead initiated in the federal courts.

Measuring the policy outputs of trial courts is somewhat more

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73. WATSON & DOWNING 175.

74. See Walker, *The Diffusion of Innovations among the American States*, 63 AM. POL. SCI. REV. 880-82 (1969).

difficult. Most decisions are unreported and systematic analysis is difficult. What studies there are suggest a relatively limited policy role, albeit a role defined by the local political culture. Dolbeare found that trial "courts are sporadic participants in the . . . political process, producing occasional (and occasionally far reaching) bits of policy determination but generally operating around the margins to shape the structure and processes which will ultimately lead to policy production." He also found a "total integration" of the courts with the local political system, "extending well beyond issues and functions." He found little basis to attribute this lack of policy concern to the partisan and elected character of the courts he studied, although the degree of integration of a court system with a local political system would seem, at least in theory, to depend on the linkages and reinforcements provided by inputs from the political system. He also suggests that, at least when the courts are integrated into the local political system, little reliance can be placed on a hierarchical theory of judicial policy-making.<sup>75</sup> While these judges were part of a much larger legal system, and theoretically subject to policy guidance from appellate courts, they did in fact take many if not most of their cues from, and represented the values of, the community of which they were so intimately a part. Dolbeare's findings came from a case study of one suburban county; further efforts to replicate his findings with respect to other communities would certainly seem warranted.

Perhaps the most culturally related output of trial courts is their handling of criminal cases and, particularly, their sentencing norms. Disparities in individual sentencing norms are well known and documented, but, at least in the United States, few cultural links have been identified. The increasing practice of indeterminate sentence options provided by law and the fairly wide-range limits within which most judges may operate would certainly suggest an invitation for strong sub-cultural influences. Disparities in sentences for draft evaders during war and during peacetime suggest a variable national culture impact, which differences in the treatment of conscientious objectors or draft-card burners in different regions also suggests. Different norms, not only of sentencing, but of trial and appellate court procedures, are frequently found in the federal circuits, and these differences are recognized by those on whom the decision to prosecute lies. For example, Mitford reports the likelihood that Boston was chosen as the site of the trial of Dr. Spock and his alleged co-conspirators because of a desire to avoid

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75. DOLBEARE 110-13.

having the inevitable appeal in that case lodged in either the Second Circuit Court of Appeals in New York or the Court of Appeals for the District of Columbia—both of which would have been more natural sites in terms of the facts of the case.<sup>76</sup>

Certainly the most notable example of the impact of cultural norms on sentencing would be the vastly disproportionate imposition of the death sentence on blacks, specifically, but not exclusively, where black men were accused of raping white women in southern communities.<sup>77</sup> The Supreme Court recently turned down the opportunity to recognize this obvious discrimination in the workings of criminal law, although it may well void most existing death sentences on other grounds.<sup>78</sup> A similar type of differential influence in the treatment of criminal offenders might be found in the handling of certain crimes of vice which are particularly offensive to certain types of communities, or in the very great disparities revealed in the lenient and indulgent manner in which “white collar” criminals are treated by our courts.<sup>79</sup> Earlier in this paper we referred to the competing “due process” and “bureaucratic” models of the criminal system. Certainly one characteristic of the latter model would be attempts to mitigate and mediate between conflicting norms of ghetto and middle-class cultures.

Considerable light can be shed on the cultural aspects of sentencing and treatment of criminals by reference to the norms of alien cultures. For example, Berman, Feifer and others have emphasized the focus of Soviet courts on the rehabilitation of the individual more than on the exact nature of his crime.<sup>80</sup> The theoretical norm in the United States is

76. J. MITFORD, *THE TRIAL OF DR. SPOCK* (1969); RICHARDSON & VINES 129-134.

77. See Lassers, *Death Takes a Holiday*, 8 *TRANS-ACTION* 10-13 (1971); *THE DEATH PENALTY IN AMERICA* (H. Bedau ed., rev. ed. 1967).

78. *Maxwell v. Bishop*, 90 S. Ct. 1578 (1970), was remanded to the district court for reconsideration in the light of *Witherspoon v. United States*, 391 U.S. 510 (1968), which held unconstitutional a death sentence by a jury from whom those opposed to capital punishment had been excluded. *Maxwell* was argued on the grounds that imposition of the death penalty by a “standardless” jury, and/or by the jury at the same time it decided on guilt or innocence, was unconstitutional. The assumption is that the Court, with only eight justices sitting, split evenly and was thus, forced to decide the case on alternate grounds. New cases before the Court have again raised the issues argued in *Maxwell*. Initially the Legal Defense Fund had argued in *Maxwell* that the death penalty violated the eighth and fourteenth amendment because it was disproportionately applied to blacks, but the Court refused to hear argument on this point. It seems fairly clear that the Court is grasping for a way to end capital punishment by indirect routes.

79. See Andenaes, *The General Preventive Effects of Punishment*, 114 U. PA. L. REV. 949 (1966); Ball & Friedman, *The Use of Criminal Sanctions in the Enforcement of Economic Legislation*, 17 *STAN. L. REV.* 197 (1965).

80. H. BERMAN, *JUSTICE IN THE U.S.S.R.* (1963).

quite different, although in actuality the trend is more toward the Soviet model.

*D. Impact, Compliance and Feedback: Citizens' Response to Judicial Action*

The degree to which courts have an impact on society is dependent on several factors: first, the perceived legitimacy of the courts as institutions; second, the existence of a general culture of "law-abidingness" and willingness to comply with what the law requires; third, factors likely to determine in individual instances whether or not the law will be complied with, such as the cost-benefit ratio of compliance and value congruence between the law and those on whom it impinges; and, fourth, the scope and effectiveness of sanctions and weapons of implementation.

The question of legitimacy is difficult to handle empirically, although it is much written about in the literature.<sup>81</sup> Judges, jurists and law professors talk of it in terms of *their* perceptions of the congruence between judicial power and democratic theory. Their point of reference often is *Marbury v. Madison* and the development and legitimacy of the power of judicial review. It is, of course, unlikely in the extreme that such specific considerations have *any* substantial effect on citizen response to the Supreme Court, although it cannot be denied that such considerations are likely to have a strong effect on the judges' self-perceptions of legitimacy and thus, as discussed previously in terms of role concepts, on their policy decisions.

Empirical indicators of legitimacy are, of course, more reliable. But what they suggest is that legitimacy is not either a general problem or a general phenomenon. Most citizens do not know enough about the courts to have any opinion, although in times of crisis whatever predispositions they may have, no matter how inchoate or unexpressable, may permit them to be led or induced to certain responses. Murphy and Tanenhaus report that 27% of their national survey were both aware of the Supreme Court and held some opinion about the legitimacy of the Court as an institution. And of these, less than half gave the Court "diffuse" support. But many or most of the opinion leaders probably fall within this category.<sup>82</sup> However, it should

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81. See Petrick, *The Supreme Court and Authority Acceptance*, 21 WEST. POL. Q. 5-19 (1968).

82. Murphy & Tanenhaus, *Public Opinion and the United States Supreme Court: A Preliminary*

be-recognized that where the question of legitimacy is relevant it is subject to considerable cultural influence. We would expect, as a consequence, substantial variation in perceptions of judicial legitimacy by culture.

Almond and Verba report in their five-nation study that the United States, along with England and Germany, rank high in law-abidingness—at least by comparison with Italy and Mexico.<sup>83</sup> There are other studies which show much the same thing. Hess and Torney report that young children strongly believe that laws should be obeyed,<sup>84</sup> although a recent unpublished study suggests that “willingness to obey the law may not be a general orientation at all.”<sup>85</sup> Studies also show that adults strongly support the norm of obeying a law with which they might not agree. In this case, the question referred to a law passed by the state legislature, and it may be that reference to a judicial decision would not have evoked such strong support.<sup>86</sup>

But this general cultural norm must be further refined to determine the conditions under which it is likely to prevail, and those likely to reduce its impact. There is also no evidence to indicate possible state or regional deviations. Deviations are most likely to be found in economic or social sub-cultures or in deviant cultures, particularly the culture of poverty. Law-abidingness is likely to be related to allegiance and efficacy, measures not likely to receive high sub-culture support. Likewise, law-abidingness is almost certainly related to legitimacy. The concept of law-abidingness is also useful in another respect, since it emphasizes the distinction between a law and its source, and is to that extent different from the concept of legitimacy.

Whether or not an individual will comply with a law or court decision is not only a function of his culturally induced general predisposition, but also of the utility of compliance. Despite a general culture of compliance, studies have shown that where issues are salient, individuals will evaluate their response to these specific issues in terms of their

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*Mapping of Some Prerequisites for Court Legitimation of Regime Changes*, in *FRONTIERS* 295; K. Dolbeare, *The Supreme Court and the States: From Abstract Doctrine to Local Behavior Conformity* (unpublished manuscript) (Dolbeare found differences among attitudes expressed about the court in three states).

83. ALMOND & VERBA 172.

84. R. HESS & J. TORNEY, *THE DEVELOPMENT OF POLITICAL ATTITUDES IN CHILDREN* 59 (1968).

85. D. Brown, *Report of a Pilot Study on an Orientations Toward Law among Children in the Schools of Madison, Wisconsin* (unpublished paper).

86. Boynton, Patterson & Hedland, *The Structure of Public Support for Legislative Institutions*, 12 *MIDWEST J. POL. SCI.* 163 (1968).

attitudes toward these issues, their feelings about the protagonists or participants in the controversy, their sense of justice as applied to the circumstances, and their calculation of the likelihood of incurring sanctions where those are applicable, rather than in terms of any general feeling of law-abidingness.<sup>87</sup> The dilemmas of compliance may frequently cause psychological tensions which may be manifest through the occurrence of cognitive dissonance,<sup>88</sup> and which may be reduced or alleviated through a variety of means of dissonance reduction. A person may comply because he sees no other choice, but soften the blow by adopting attitudes consonant with the act of compliance. Or he may defy and rationalize his defiance on the basis of strongly held values—all the easier if these are widely shared by other members of his community. Finally, he may find a legal directive “liberating” in the sense of supporting what he thinks is right in the face of widespread contrary attitudes. Thus, an individual may find the social costs of defying community norms greater and less acceptable than the risk of legal sanctions. Or he may find obedience to the law, under threat of sanction, worth the risk of community obloquy. Any calculus of costs and benefits is likely to be more complex than this summary. But the relationship between compliance and cultural norms seems clear enough, since these norms establish the standards of community compliance to particular decisions and regulate the treatment of “deviants”. Additionally, cultural norms appear to affect what people expect of government in general and courts in particular. When court decisions violate these expectations, we may expect a decline in “specific support” and consequently a rise in non-compliance. Patterns of school desegregation in the south<sup>89</sup> and of compliance with the prayer decisions of the Supreme Court,<sup>90</sup> and Rodgers’ study of the Amish dispute in Iowa, give ample evidence to support this description of the compliance process.

Looking at the question of compliance from the perspective of the institution rather than of the individual, important cultural dimensions are also apparent. We have already suggested a link between the scope, breadth and substance of legal directives and cultural norms. To these we might add the following. The type and severity of sanctions thought

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87. H. RODGERS, *COMMUNITY CONFLICT, PUBLIC OPINION AND THE LAW* 111-15 (1969).

88. W. MUIR, *PRAYERS IN THE PUBLIC SCHOOLS: LAW AND ATTITUDE CHANGE* (1967) [hereinafter cited as MUIR].

89. R. CRAIN, *THE POLITICS OF SCHOOL DESEGREGATION* (1968).

90. R. JOHNSON, *THE DYNAMICS OF COMPLIANCE* (1967); MUIR; Way, *Survey Research on Judicial Decisions: The Prayer and Bible Reading Cases*, 21 *WEST. POL. Q.* 189 (1968).

appropriate to enforce a particular directive, and the intensity and uniformity of that application, are almost certainly related to norms of both the legal and democratic sub-cultures. For example, the unwillingness of the Supreme Court to apply meaningful sanctions against federal district judges who openly defied the implementation of *Brown v. Board of Education* (1954) reflected the impact of the political cultural norm of decentralization and judicial responsiveness to local conditions, not the formal idea of a hierarchical judicial system in which policy is made at the top and carried out at the bottom. It also reflected a recognition by the Justices that there have always been, and likely always will be, substantial differences between their decisions and local applications. Yet the culture of the law reflects—and, indeed, seems to assume—that once the Supreme Court has acted, other judges and political officials will comply with alacrity. Nowhere is the clash between legal norms and the reality of the political culture more apparent. As Dolbeare has suggested, “judges . . . are at once professional carriers of the traditions of the law and the role of judges, and creatures of their political environments, with all the pressures and accommodations which that involves.”<sup>91</sup>

Despite the burgeoning literature on impact and compliance, there has been little direct effort at validating the role of political culture, particularly by differentiation of state political cultures. Dolbeare has found interesting differences in the frequencies with which certain states appear as party litigants before the Supreme Court,<sup>92</sup> and Way’s survey study of responses to the prayer decisions has isolated one region—the South—as evincing markedly different attitudes.<sup>93</sup> But no effort has been made to link these differences with explicit cultural variables. For example, there might be a link between the traditional culture of a state, disdaining government activity, and a culture of non-compliance with court decisions which extend the role of the federal government, or which loosen the legal barriers to political participation by all elements of a state’s population.

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91. K. Dolbeare, *The Supreme Court and the States: From Abstract Doctrine to Local Behavioral Conformity* (unpublished manuscript), at 26.

92. *Id.* 32-36.

93. Way, *Survey Research on Judicial Decisions: The Prayer and Bible Reading Cases*, 21 WEST. POL. Q. 189, 199-200, 204-05 (1968).

#### IV. CONCLUSION

Our purpose in this survey has been to suggest plausible links between the operation of the courts and the interaction of political and legal cultures. Our findings, though suggestive, also underscore the difficulty of operationalizing an elusive, but potentially, useful concept. As Wilson has suggested, “[t]he critical problems in the use of the concept of political culture (other than defining it) are in finding a good measure of it and showing a linkage between that culture and the behavior of government institutions.” The problem as applied to the courts is both particularly relevant and particularly acute.



