COMMUNICATION OF APPELLATE DECISIONS: A MULTIVARIATE MODEL FOR UNDERSTANDING THE SELECTION OF CASES FOR PUBLICATION

BURTON M. ATKINS

Much of the judicial process literature assumes that appellate courts routinely publish all decisions they make. In fact, even with the proliferation of case law in the United States, since the 1970s many appeals court decisions have not been published. In England, however, selective publication of appellate decisions has always been an integral part of how courts interact with the broader legal and political system. This article explores some theoretical implications of selective reporting of appellate decisions within common law systems that rely on the published appellate ruling as a primary mechanism of communication between courts and the broader legal and political environments. The focus is on how appellate decisions are selected for publication, especially in the English Court of Appeal. The author proposes an empirical model that conceptualizes reporting as a communications process. He hypothesizes that the basis of selection can be viewed in the context of a cue theory that dichotomizes the communication of passive and dynamic cues between senders in the Court of Appeal and receivers within the community of law reporters.

In common law systems selective reporting of appellate decisions is the norm. For example, about half of all U.S. courts of ap-

This article is a revision of a paper presented at the Annual Meeting of the Midwest Political Science Association, Chicago, 13–15 April 1989. The research was supported by a grant from the National Science Foundation (SES-86-7878) and by grants from the Florida State University Foundation. I wish to thank Florida State University for extending to me the use of its facilities at its London Study Center. I would like to express gratitude to Mr. Stuart Cole, Chief Librarian of the Supreme Court Library at the Royal Courts of Justice when the data in this paper were being assembled, for allowing me access to, and use of, the Library's materials and facilities. Mr. Cole proved to be very patient in answering my many questions about the Court of Appeal and the transcripts of its judgments. I must also acknowledge that the many hours Mr. Gavin Drewry, Professor of Public Administration, University of London, spent with me discussing the English legal system helped immeasurably in the conceptualization and execution of the project. Mr. Peter Ruckman served admirably as my research assistant through much of this project. Neither he, nor Messrs. Cole and Drewry, of course, bear responsibility for any errors of fact or interpretation that I may have committed. I also wish to thank Shari Diamond and the anonymous reviewers for their helpful comments.

LAW & SOCIETY REVIEW, Volume 24, Number 5 (1990)

peals cases disposed of by oral argument, or after submission without a hearing, are unpublished (Steinstra, 1985: 38–46).[1] Even fewer appellate decisions are published in England. One study, for example, found that only 38.5 percent of Court of Appeal judgments were reported (Eddey, 1977). Another study (Tunkel, 1986) found that between 1955 and 1980 the percentage of published Court of Appeal judgments declined from 50.2 to 22.8 percent, with an average rate across the six years sampled of only 36 percent.[2]

Since common law systems are rooted in precedent, such selective publication seems inconsistent with the assumption that reported decisions help make law and judicial behavior reckonable. Yet, legal authorities nevertheless see in selective publication a mechanism by which to control an apparent proliferation of redundant case law produced by appellate courts. Those who defend the process typically claim that it is a rational way to cope with a litigation and lawmaking explosion characterized by large numbers of appellate decisions which, because they are decided solely on the facts, convey no new principles of law and do not add in any appreciable way to an understanding of existing precedent and policy (e.g., Posner, 1985: 120ff.).[3] Still, selective publication has been criticized on several grounds. Some have questioned whether decisionmakers in selecting cases for publication can distinguish appropriately between cases with or without precedential value and whether the official standards for publication can provide adequate guidance for identifying cases with precedential value (e.g., Foa, 1977; Reynolds and Richmond, 1978; Neubauer, 1985).

While such criticisms alert us to problems intrinsic to a system of selective reporting, a more interesting question is whether selective publication skews the availability of information distributed by legal systems. Much of the power available to litigants competing in the legal arena stems from how well they are able to assess formal and informal standards of law and policy. In assessing such standards, parties may need to take into account not only what reported precedents provide but also the empirical pattern associated

[1] In each year from 1981 to 1984 the average nonpublication rate across all circuits was 48.8, 54.1, 52.5, and 52.8 percent, respectively. Substantial variation also exists among federal appeals courts in the nonpublication rate. In 1984, for example, publication rates ranged from only 17 percent in the Eighth Circuit to 77 percent in the Third.

[2] Although Tunkel (1986: 19) leaves open the question of how to explain this drop, he suggests that too many cases were reported in early years or that law reports can accommodate only a fixed number of cases in any one year.

[3] That unimportant cases should not be published makes two further assumptions. One is that the law-reporting system screens effectively and efficiently so-called important from unimportant cases. Some literature, in both America and England, calls this assumption into question (see, e.g., Foa, 1977; Munday, 1983; Tunkel, 1986; Songer, 1988). For useful summaries of the selective publication debate, as well as analysis relating to the procedure's efficiency in the administration of justice, see Reynolds and Richman (1978, 1981) and Hoffman (1981). For an interesting empirical study of publication in the Dutch system, see van Koppen and Kottenhagen (1990).

with how courts respond to disputes. To the extent that information embedded in unpublished decisions differs from information appearing in published reports, access to the landscape of judicial opinion will not be equally available to litigants or to parties contemplating litigation.[4]

In light of the potential importance of publication patterns as a means of litigant control, we examine more closely the process by which legal systems select cases for publication. One important aspect of this process concerns the basis by which a legal system allocates responsibility for selecting cases and what inferences we can draw about how the allocation affects the kinds of values distributed formally through court decisions. In U.S. courts of appeals, for example, the court decides whether a case will be published.[5] The selection process is guided by formal criteria established in each circuit.[6] By contrast, in England the selection process is a commercial and competitive enterprise carried out by barristers working in the private sector for a multitude of publishing firms.[7] English judges have no formal control over which cases are selected for publication and thus integrated with existing precedent.[8]

The bifurcated process of law reporting in England in which one set of actors decides cases and another chooses the cases that will become embedded formally in official precedent by virtue of publication has two important consequences. First, the process seems on the surface to leave judges unable to control which decisions will become incorporated in the framework that structures legal argumentation and judicial discretion. Such control seems vital since publication status defines the parameters of citable precedent in arguments presented to courts.[9] Second, if much of the

[4] Robel (1989: 955ff.) provides an excellent treatment of this problem, especially as it relates to litigation strategies of government attorneys.

[5] Robel (1989) argues that these decisions are sometimes made by the staff rather than by the circuit judges themselves.

[6] For an excellent review of these policies see Reynolds and Richmond (1978, 1981) and Robel (1989).

[7] It is odd that a common law system leaves to the private sector beyond the court itself the decision whether rulings become integrated with the existing written record of citable precedent. Yet law reporting has, in fact, had a curious history in England. Initial attempts to systematize law reporting emerged in the nineteenth century as the doctrine became established that precedent was binding on future court decisions, as opposed to it merely being evidence, albeit very strong evidence, as to the status of the law (Walker and Walker, 1985: 132). The system of private law reporting that emerged in the last century has been largely retained today. As one former Law Lord has described this process, "judges spin but others weave" (Devlin, 1979: 180).

[8] Walker and Walker (1985: 133) describe this system as an "extraordinary anomaly" in a common law system.

[9] In England, counsel are discouraged from citing unpublished cases in argument unless the relevance and importance of such cases can be demonstrated. See the House of Lords decision in *Roberts Petroleum Ltd. v. Kenny Ltd.* (1983: 200), and the Court of Appeal decision in *Stanley v. International Harvester Co. of Great Britain Ltd.* (1983, unreported).

power in a legal system rests with how it structures the flow of information regarding law, policy, and values, we must look carefully at the behavior of law reporters to understand how information is allocated.

In this article I examine in greater detail this bifurcated process of selecting cases for publication. My focus in the English system is on the reporting of cases decided by the Civil Division of the Court of Appeal.[10] The initial sections analyze how appellate cases in England are selected for publication and, specifically, how legal authorities identify so-called important cases. To help understand what drives this process, I propose a theory of case selection derived from the cue theory that has evolved to explain certiorari decisionmaking in the U.S. Supreme Court. As explained below, I used this theory to identify the kinds of cues that should most strongly predict to case publication status. The final sections test the utility of the proposed cue model and examine some implications of the findings for understanding the kinds of values distributed by a legal system.

CASE SELECTION CRITERIA

The formal criteria provided by legal authorities in England to guide the selection of cases for publication underscore the need for barristers employed by the publishing firms to distinguish important from unimportant cases.[11] One commonly accepted set of

[10] This court, with its twenty-two Lord Justices of Appeal, serves as the intermediate appellate court in the English judicial system. Although it sits in two divisions, one civil, the other criminal, the research reported here is based on decisions handed down by the civil division only. There are a variety of reasons why the civil division is a more interesting sector to study. For a more detailed discussion see Atkins (1988, 1990). More information about the Court is provided below in the text. For a general discussion of the English legal system and the role of the Court of Appeal in it, see, e.g., Walker and Walker (1985) or Smith and Bailey (1984).

[11] The English system of law reporting has had some curious consequences for Court of Appeal decisions. Until 1951, no provision was made whatsoever for the regular transcription and retention of Court of Appeal decisions. Whether any record was retained at all, no less reported, was a matter of chance. If a court reporter happened to be present and believed a case to be noteworthy, it would usually appear in one of the various privately published series. No other decisions were retained in any form, and thus only a fraction of the record of the Court of Appeal prior to 1951 exists. The assumption was that if a case were sufficiently important, a reporter would take notice; if not, the case need not be retained. This view of appellate law reporting became, for all intents and purposes, the official policy when the Simond's Committee, appointed to examine the problem of law reporting, rejected a proposal to retain transcripts of all judgments of the Court of Appeal (see Law Reporting Committee, 1940). The Master of the Rolls revisited the dilemma of law reporting in *Gibson v. South American Stores* (1950). In *Gibson*, the Court had been referred to an earlier unreported decision (*In Re Laidlaw*, 1935) the details of which had been retained by chance in the Attorney General's office (Eddey, 1977: 16). In *Gibson,* Evershed noted that it is "a peculiar and unfortunate characteristic of our system that, although in a great majority of cases which come before it this court is the final Court of Appeal for England, no provision whatever is made for taking a note or making a record of the judgments of the

guidelines proposes that a presumption against publication should exist when cases (1) contain little or no discussion or consideration of the law and thus hold no value as precedent and (2) do little more than restate what has already been reported in other cases. Alternatively publication should be encouraged when decisions (1) introduce or "appear" to introduce a new principle of law; (2) "materially" modify existing principles; (3) seem to resolve questions when the law has been doubtful; or (4) for a number of reasons might be particularly instructive (Lindley, n.d.).

Although these criteria provide a starting point for understanding the basis on which cases are selected for publication, they have some intrinsic and significant limitations. First, the general language used in these rules provides law reporters only limited guidance in distinguishing important from unimportant cases, since it offers little insight into the specific factors that should allow reporters to distinguish objectively between the two sets of decisions.[12] Recognizing this, some publishing firms have attempted to make these standards more precise by providing their own guidelines.[13] These attempts, however, are typically little more than restatements of general principles regarding the need to select important cases while ignoring trivial ones.[14]

These standards may not capture the process of case selection not only because they provide vague guidance but also because the

---

court." In 1951, the Lord Chancellor's office accepted Evershed's suggestion and directed that transcripts be made by the Association of Official Shorthand Writers of all judgments made by the Court of Appeal and that these be retained in the Bar Library in the Royal Courts of Justice. These have since been transferred to the Supreme Court Library. A second copy is sent to the court from which the appeal arose.

[12] Law report editors, and the barristers employed as reporters, will admit in casual conversation the limits of the formal standards. They mention, e.g., that it is more their expertise as trained barristers than it is the formal standards per se that allows them to recognize which cases are worthy of publication.

[13] Law reporters still have much de facto discretion over which cases to publish since little real control is exercised by the central editorial offices. Law reporters do not meet routinely with each other or with their editorial staffs to discuss the merits of cases or to ensure a focused adherence to formal standards regarding which cases should be deemed important and publishable.

[14] E.g., *All England Law Reports* provides that cases should be published that (1) make new law, because they either deal with novel situations or extend the application of existing principles; (2) restate old principles of law in modern terms or function as examples of modern applications of old principles; (3) clarify the law by an appellate court when inferior courts have reached conflicting decisions; (4) interpret legislation likely to have more than a very narrow application; (5) interpret commonly found clauses in, e.g., contracts (especially commercial contracts such as charter parties) and wills; and (6) clarify points of practice or procedure in common use.

All England Law Reports also publishes appellate judgments when the decision below had already been reported. On the other hand, judgments of courts of first instance assumed to interest only specialists and likely to appear in one of the many specialized series will not, as a general rule, be published by *All England*. If no recognized specialist series exist, *All England* publishes if a case seems sufficiently important.

judges may signal which cases should be selected for publication by how they write their opinions. Judges have a stake in determining case publication status and thus an incentive to affect how law reporters interpret appellate decisions. Since they cannot control directly which cases are to be selected for publication, they may seek to influence the case selection process indirectly by controlling the contextual environment of appellate decisionmaking and, thus indirectly, the kind of information on which law reporters base their decisions.

A Cue Model

If formal criteria provide only limited guidance for selecting cases for publication and judges wish to retain some control over which cases are reported, how can judges influence which cases reporters will select for publication from among the more than one thousand judgments handed down each year by the Civil Division of the Court of Appeal?[15] One answer may be found in a model of the process derived from cue theory, explicated here as a subset of a general communications model.[16] Cue theory is an adaptation of a more complex theory of decisionmaking drawn from a variety of behavioral and social sciences. The theory's tap root is the concept of a heuristic, an ad hoc model of decisionmaking employed under constraints of information, time, and bounded rationality. It is applied when these constraints "limit to a few cues or variables the amount of information which can be processed, and above all, that it is demonstratively the predominant mode of actual decisionmaking in everyday life for men and organizations" (Inban, 1979: 17).

Although it has proven to be a useful framework for understanding agenda setting in the U.S. Supreme Court, cue theory is a

[15] Arguably, formal criteria could still be applied if law reporters studied appellate decisions with great care. However, larger systemic conditions may make this difficult. E.g., the number of decisions produced by the Court of Appeal has almost doubled since the early 1960s to more than one thousand. The major publishing companies, such as the Incorporated Council of Law Reporters, which publishes the *Weekly Law Reports* and *All England Law Reports*, seek to ensure that a barrister is assigned to cover each of the nine courtrooms occupied by the Court of Appeal in the Royal Courts of Justice. The number of barristers employed by the Incorporated Council of Law Reporters has doubled over the past two decades to cope with the increase in appeals and to thus maintain its policy of having one reporter in each panel of the Court of Appeal.

[16] A number of scholars have explicitly or implicitly adapted communication models in judicial research, often in the context of how legal doctrine is transmitted across American jurisdictions. E.g., Canon and Baum (1981) drew on diffusion of innovation theory (Walker, 1969; Gray, 1973; Eyestone, 1977) to study the transmission of tort precedent. Caldeira (1983, 1985, 1988) used communication theory as a context for studying the transmission of precedent among state supreme courts, mapping the network of interaction established through their adoption of precedent. Harris (1985) examined regional interaction and communication among state courts of last resort. Wasby (1976) used a communication model to study the transmission of Supreme Court policy to parties in states and communities.

general theory of decisionmaking that should be applicable in a variety of contexts.[17] Yet, cue theory is vulnerable to criticism. One criticism has been that the theory does not specify in advance, as a good theory should be able to do, which cues should be included in a model of the process. In addition, cue theory cannot pose in advance which cues should be the strongest predictors in a multivariate context.[18]

Such criticisms suggest that the theory is underspecified conceptually. We can address such criticisms and provide a theoretical basis for identifying cues to incorporate in a model to apply to the case publication process by assuming cue theory to be a specific application of a more general communication model. In such a context, cues serve two functions. One function is to provide decisionmakers with reference points for making choices, either when existing standards are vague or when a large volume of decisions precludes careful consideration of each problem. In this context, cues provide signs for decisionmakers that serve as a basis for choice. A second function is to provide a medium by which information is transmitted between different sets of actors in a system. In this context, one set of actors we can designate as senders seek, by manipulating cues, to communicate expectations to, and thus affect the behavior of, a second set of actors. These actors, the receivers, use the information communicated through such cues as a basis for the decisions they make.

Passive Cues. Two types of cues are likely to aid law reporters in their decisions. The first are passive cues, case characteristics generally associated with important decisions and that the judges do not control or are unlikely to manipulate. In the English judicial process these passive cues include the kind of forum from which the appeal was brought, the kind of appellant seeking a reversal of the lower court action, the type of issues raised on appeal, and whether the court reverses or affirms the lower court ruling.[19] Although it is within the court's discretion to reverse or affirm on appeal, we consider this cue as passive since there is no reason to assume that Lord Justices overturn or sustain decisions made by lower forums with an eye toward encouraging or dissuading publication.

---

[17] The ground-breaking research on the Supreme Court was conducted by Tanenhaus *et al.* (1963). Other studies building on the original Tanenhaus research are Ulmer (1984), Ulmer *et al.* (1972), Teger and Kosinski (1980), and Provine (1980).

[18] Tegar and Kosinski (1980: 845) observe, "Seen in this light, cue theory is not much of a theory. . . . There are no criteria for defining salience in advance of analysis."

[19] Detailed descriptions of how these and other cues operate in the context of the English judiciary are provided below at appropriate points.

Dynamic Cues. Unlike passive cues, cues we characterize as dynamic can be manipulated by one set of participants to encourage other participants to engage in, or refrain from, certain actions.[20] In the context of the selection of cases for publication, for example, the Court of Appeal may be regarded as a cue source, or a sender in a communication model, that seeks to influence case selection decisions made by law reporters, the receivers of the information, by how it structures the content of the information it conveys.

Dynamic cues are important in the communication model because they are the means by which the Court of Appeal can influence publication decisions. Since they are susceptible to manipulation by the court and offer evidence about the court's priorities by emphasizing its willingness to expand its resources, dynamic cues may be an especially salient source of information for law reporters. There is considerable anecdotal evidence that the Court of Appeal does attempt to convey impressions about the relative importance of cases.[21] For example, judges can encourage publication by

---

[20] Much of the literature on cybernetics and communications assumes senders and receivers in a communications network (see, e.g., Cherry, 1957, and George, 1959). The cue theory of certiorari decisionmaking in the Supreme Court, at least as explicated in the published research, does not address expressly the interaction between a sender and a receiver. Rather, cues represent signs in appeals that are available to the justices to read should they so desire. No assumptions are made, however, as to whether the signs represent intentional actions of senders seeking to influence the justices' behavior.

[21] The publication history associated with *Dormeuil Freres SA v. Nicolian International (Textiles) Ltd.* (1988) shows how direct the communication process between the judiciary and the law reporting community can sometimes be. In *Dormeuil Freres*, the Court of Appeal was confronted with two motions, one by the plaintiff to restrain the defendant until trial from the manufacture and sale of cloth bearing the plaintiff's trademark, and a second by the defendant to set aside a so-called Anton Piller order allowing certain of the defendant's goods to be seized by the plaintiff's solicitors. In the context of these motions and counter-motions the central issue concerned whether the *ex parte* order should be set aside because it was made in the absence of a full disclosure by the plaintiff of all relevant facts and issues.

In the original transcript version of the judgment (22 April 1988) lodged in the Supreme Court Library in the Royal Courts of Justice, the court digresses to discuss the importance of the principles on which the case was grounded and, more pointedly, why earlier Court of Appeal decisions outlining the principles on which *Dormeuil Freres* rested were never reported. "It is a surprise to me," wrote Mr. Justice Brown-Wilkinson, "that decisions on a point of such great everyday importance in dealing with these matters have not found their way into the Official Reports" (transcript p. 10). The Court of Appeal decisions to which the vice-chancellor was referring were *Yardley & Co. Ltd. v. Higson* (1984), *Bowmaker Ltd. v. Britania Arrow Holding, PLC* (1987), and *Brinks Mat Ltd. v. Elcombe* (1987). Brown-Wilkinson's comment was interpreted by the *All England Law Reports* as a very strong hint that the law reporters had passed over some important cases. To correct this omission the publication of *Dormeuil Freres* was accompanied by the belated publication of *Yardley*, *Bowmaker*, and *Brinks Mat* in 3 *All England* 1988, pp. 178 and 188. It speaks volumes about the intensive, albeit latent, communication network that exists between courts and law reporters that the version of *Dormeuil Freres* ultimately published omits reference to Brown-Wilkinson's "surprise" comment, even though it appears in the text of the unpublished transcript found in the

building into their judgments the kind of formal analysis of precedent and statutes that signals to law reporters that the case is nonroutine. Alternatively, judges can discourage publication by omitting such formal analysis and by peppering judgments, as they often do, with comments that characterize a case is unimportant. It is not uncommon, for example, to find such comments as "this case raises no new principle of law" or "this case can be resolved on the facts alone." Indeed, judges can all but ensure that a case is not published by stating at the outset that "this is an appeal which should never have been brought," a phrase often found in Court of Appeal judgments, or by indicating at the outset that an appeal is "hopeless." Such statements may serve as a salient message to law reporters, and to the editors, that there is little new in the case and that existing case law is readily determinative of the outcome.[22]

Like passive cues, then, dynamic cues can be used by law reporters to aid them in sorting important from unimportant cases. However, dynamic cues are distinguishable by the fact that their content can be controlled by the sender, in this instance the Court of Appeal itself. Among the dynamic cues we can identify are the size of the appellate panel to which a case is assigned; whether the court's administrative head, the Master of the Rolls, participates on the panel; whether the judgment is consensual or conflictual; whether the court's judgment is a collective judgment of the Court as opposed to a seriatim judgment; and the length of the judgment itself.

THE DATA BASE AND RESEARCH DESIGN

The article examines empirically, in both bivariate and multivariate contexts, the utility of the cues identified. The data employed for this purpose are a universe of decisions produced by the Civil Division of the Court of Appeal over the three-year period 1983, 1984, and 1985.[23] Publication data were assembled from two

Supreme Court Library. Information on this case was kindly supplied to me by Mr. Peter Hutchesson, Editor, *All England Law Reports*. I also wish to express my gratitude to Ms. Carol Ellis and Mr. Robert Williams, both of the Incorporated Council of Law Reporters, for sharing with me their insights concerning the process by which cases are selected for publication.

[22] I did not seek to code systematically such comments. It would be possible, however, to test empirically whether the appearance of such statements are related to publication status.

In some instances cases are published after members of the legal profession make suggestion to law-reporting companies. *All England Law Reports*, e.g., will consider for publication judgments submitted to them by barristers and solicitors in a particular case who feel that some aspect of the policy, precedent, interpretation, or facts of the case deserve to be brought to the attention of the legal profession. This is a particularly telling aspect of their policy regarding case publication, since it expressly recognizes the existence of a communications network between participants in the judicial process and law reporters.

[23] I assembled these data at the Supreme Court Library in the Royal

sources. The primary source, LEXIS, routinely indicates in its files the publication status of Court of Appeal decisions. It also lists citations for published cases. Unpublished cases contain no such citation list and are identified only as having been produced by the "Transcript Association," the body that prepares the official transcripts of the court's judgments. The LEXIS data were verified by comparing the information assembled on each case with the entries found in the *Current Law Case Citator* (Butterworths), which systematically lists the publication status of all decisions produced by the superior courts in England.

Each Court of Appeal decision was coded using reporting status as a dichotomous variable (published or not published). The private reporting process in England sustains a large number of case publication series, some general but most specific to particular segments of the law and geared primarily to the practitioners in those fields. A decision was considered published if it appeared in (1) any general series (e.g., *All England Law Reports* or *Weekly Law Reports*); (2) the select and "authoritative" *Appeals Cases* published by the *Incorporated Council of Law Reporters*; (3) any specialized series that focuses on a particular substantive component of the law such as patents, tax, labor relations, family law, or land use, for example; or (4) any of the "popular" outlets, such as the *Times*, which employs barristers to report systematically on cases assumed to have some public appeal or importance.[24] Only 33.5 percent of the decisions produced by the Court of Appeal were published in any of the four categories. Indeed, it is a telling indicator to the limited flow of information from the Court of Appeal to the legal system and beyond that only about 12 percent of the cases were published in either of the two general series, *All England Law Reports* and the *Weekly Law Reports*, which select cases

Courts of Justice, London, from a universe of judgments, published and unpublished, handed down by the Court of Appeal during a three-year period from 1983 to 1985. Data were coded from the 3,167 transcripts of judgments produced during the three-year period. The categories of variables included (1) case identification characteristics; (2) sources of appeals in terms of forums below, type of judges below, and the region of the country from which the appeal emerged; (3) such case characteristics as the party initiating the action below, the characteristics of the parties, the kinds of issues raised, the kinds of rights sought protection on appeal, and the party appealing the ruling below; (4) such decision-related characteristics as the number of judges on the panel hearing the appeal, which Lord Justices participated on the panel, their votes expressed both in terms of the parties and in terms of the type of judgment-opinion produced by each participating Lord Justice; and (5) such post-decision variables as whether a litigant requested an appeal to the court of last resort in the House of Lords, whether it was granted, whether the case was in fact heard by the House of Lords and, if so, whether the Court of Appeal decision was affirmed or reversed. I also assembled data on whether the Court of Appeal decision was reported in any of the general or specialized reporting systems or in any of the "popular" outlets such as professional journals or newspapers.

[24] I must thank Mr. Stuart Cole, then Chief Librarian at the Supreme Court Library, for his advice in establishing these categories.

in terms of their broad interest and importance to the legal profession.[25]

PASSIVE CUES AND PUBLICATION RATES

Courts and Forums Below

The source of an appeal in England is a salient indicator of potential case importance. Generally, there are three sources of Court of Appeal cases. One represents appeals from the more than three hundred county courts in England and Wales. County courts have broad jurisdiction in a variety of tort, contract, family, and property claims. For our purposes, however, the important aspect of county courts is that they hear disputes in which relatively small sums of money are involved: no more than £5,000 for debts and damages in contract and tort claims; no more than £1,000 in actions dealing with the recovery of land; equity proceeding with a limit of £30,000; £5,000 in losses and damages concerning admiralty clauses; and probate disputes where the estate is no more than £30,000. County courts draw additional jurisdiction piecemeal from a variety of statutes.[26] Many Court of Appeal cases also come from the three divisions of the High Court (Chancery, Queen's Bench, and Family), which serves as the system's central court of civil jurisdiction usually sitting with the Court of Appeal at the Royal Courts of Justice in London. While the jurisdictional foundation of the High Court is complex, larger claims generally go to the High Court rather than to one of the several hundred county courts. Finally, appeals arise from a number of administrative tribunals. These tribunals, such as the Employment Appeal Tribunal, the Lands Tribunal, and the Social Security Commissioners, hear disputes relating to their specific substantive focus.

The type of forum from which an appeal arises thus offers a valuable clue about case importance, at least when assessed in terms of the stakes involved in a dispute and the level of the judiciary that first heard the case. For the purpose of this research forum below was treated as a dichotomous variable, distinguishing between cases appealed from county courts, on the one hand, and cases appealed from any one of the three divisions of the High Court or from a tribunal, on the other. To the extent that reporters equated higher status with greater importance, we predicted that cases originating in the High Court or administrative tribunal

[25] The very low rate of case reporting in the *All England Law Reports*, a publication readily available to judicial process and behavior scholars in the United States, should raise a caution flag regarding the utility of such a source for making reliable inferences regarding Court of Appeal activity.

[26] E.g., their power to hear matrimonial disputes is rooted in the Matrimonial Causes Act (1967) and their power to issue injunctions concerning domestic and matrimonial violence stems from authority granted by the Domestic Violence and Matrimonial Proceedings Act (1976). See the discussion in Walker and Walker (1985: 401–4).

should be more likely to be published than cases originating in county courts. The data in Table 1 show that this is indeed the case. About 40 percent of the cases appealed from either the High Court or from an administrative tribunal are published, while only 24 percent of the cases emerging from the county courts are published.

Appellant Type

An assumption found in much judicial process literature is that the government acts as an effective and efficient litigant, selecting carefully those cases it wishes to pursue on appeal and pursuing those it believes stand a reasonable probability of success. Those disputes that, in the government's estimation, raise questions with intrinsic import are likely to be pursued into the appellate courts when the government loses in lower forums. We can assume that the presence of the government as a litigant in a dispute, especially its presence as the petitioning party seeking reversal of the action below, signals to court reporters that the dispute warrants their close scrutiny. We hypothesize, therefore, that cases in which the government is the appellant are more likely to be published than are those cases in which some other type of litigant is the appealing party.

Although this hypothesis is proposed in terms of government appellants, it suggests a broader one warranting attention: that appellant type generally serves as a cue to court reporters about the significance of a particular case. Thus, we also consider cases involving corporate appellants who, like the government, are likely to be efficient litigants who utilize legal resources effectively. This entails the ability to negotiate weaker claims and to litigate stronger claims when negotiations fail. It is assumed that, when losing in trial courts, corporate litigants will expend the resources necessary for an appeal when they have a reasonable likelihood of success and when important issues can be raised on appeal, important either because large sums of money are involved in the litigation or because some issue is involved that the potential to affect future business relationships. By contrast, individuals, in the aggregate, tend to lack the efficiency characterized by government and corporate litigants. In addition, they tend to raise the kinds of private law questions relating to family law and torts that may have less broad implications, since they are typically decided on the particular facts on the case. Thus, I hypothesize that appeals brought by individual litigants, especially those in which individual litigants oppose each other, are less likely to be selected by law reporters for publication than appeals brought by the government or by corporations.

The bivariate relationships between appellant type and publication status reported in Table 1 support these hypotheses. About

Table 1. Publication Rates for Cases with Passive and Active Cues

	N	% Published*
All cases	3,167[a]	33.5
Passive cues		
Lower forum		
High Court and tribunals	1,928	39.6
County court	1,149	23.6
Appellant—government		
Yes	200	65.5
No	2,899	31.6
Appellant—corporate or business		
Yes	704	45.9
No	2,395	29.8
Appellant—individual		
Yes	2,088	26.0
No	1,011	49.2
Individuals in opposition		
Yes	1,214	21.6
No	1,870	41.2
Issue/public law		
Yes	203	70.4
No	2,893	30.8
Issue/industrial relations		
Yes	124	48.4
No	2,972	33.2
Issue/property		
Yes	358	46.2
No	2,738	32.1
Issue/personal injury		
Yes	254	20.5
No	2,844	35.0
Lower court decision		
Reversal	1,120	42.0
Affirmation	1,964	28.7
Dynamic cues		
Size of appellate panel		
Three-judge	1,253	50.9
Two-judge	1,871	21.9
Transcript length		
Above mean	1,214	58.0
Below mean	1,910	20.2
Consensual judgment		
Yes	2,100	25.4
No	1,024	49.7
Judgment of court		
Yes	116	76.7
No	3,003	31.4
Master of Rolls participates		
Yes	339	87.1
No	2,785	32.6

* Publication rates for all listed variables are significantly different, $p < .001$.
[a] *N* varies due to missing data.

https://doi.org/10.2307/3053665 Published online by Cambridge University Press

two-thirds of the cases in which the government was the appellant are reported, about twice rate for the entire sample. Cases in which corporate and business litigants are the appellants are also more likely to be published than are cases where they are absent, but the relationship is not nearly so strong as it is for government appellants. Finally, the data confirm the hypothesized negative relationship when individual appellants are present, with only about a quarter of such cases selected for publication, a rate of publication similar to the rate for cases in which individual litigants oppose each other.

Issues

The kinds of issues an appellate court with general jurisdiction over civil litigation hears show considerable range. Some issues, such as tort claims concerning liability and quantum of damages, are normally resolved on facts alone by applying existing general principles. Occasionally, of course, disputes arise that establish new policies to guide future disputes, but these are relatively uncommon in a court such as the Court of Appeal with a general jurisdiction and with relatively little control over its docket. Personal injury claims thus illustrate the kind of issues that we can hypothesize as being less likely to be selected for publication. Other issues, however, tend for a variety of reasons either to have broader appeal or are more likely to be regarded as important to the legal community. Public law questions, for example, tend to have wider significance, in part because the state is a party to the litigation, but also because such disputes often relate to matters of public policy. We thus hypothesize that the presence of a public law issue is associated with a greater likelihood of publication.

Other issues arise on appeal that relate to persistent sources of socioeconomic and political cleavage in the English context. Two such issues commonly found in Court of Appeal cases are industrial relations disputes raising such issues as pay and dismissal, worker injury, contract, and employment conditions claims; and such property claims as disputes relating to titles and contracts, boundary disputes, easements, property use, and especially issues arising from such landlord-tenant controversies as evictions, rent review appeals, claims concerning the nature and duration of tenancies, and lease constructions. I hypothesize that, like public law cases, industrial relations and property disputes are likely to be identified as important by law reporters and thus selected for publication.[27]

[27] See Griffith (1985) for a discussion of the links between persistent sources of socioeconomic cleavage in British society and some of the important problems that have emerged in the appellate courts especially in industrial relations. See Barnett (1969) for a discussion of landlord-tenant issues surrounding the Landlord and Tenant Act (1954).

The data reported in Table 1 indicate that cases involving a public law issue are much more likely to be published than cases raising other kinds of claims. Cases raising public law claims are reported 70 percent of the time as opposed to all other cases, which have a reporting rate of 30 percent. The relationships observed for the other issues are weaker but generally confirm our expectations. For example, 48 percent of industrial relations cases are reported as opposed to 33 percent for all others. Property cases are also reported at a higher rate (46 and 48 percent). By contrast, personal injury claims are much less likely than other cases to result in a published opinion.

Interventions and Affirmations

The final passive cue we examine is whether the Court of Appeal affirms the ruling below or reverses it in whole or in part. There is strong reason to believe that reversals, as opposed to affirmations, emit strong cues to the legal community and beyond. A reversal represents the primary commodity an appellate court offers litigants seeking to overturn unfavorable rulings below. A reversal is the most direct form of intervention by an appellate court into the distribution of resources provided by a judicial hierarchy. It is assumed in some literature that appellate courts are hesitant to disturb lower court rulings, that because reversals signal the fact that errors are likely to have occurred below, appellate judges are hesitant to intervene unless the circumstances dictate that they must. An appellate intervention is a relatively scarce commodity among those distributed by a judicial system. Most appellate courts, with the exception the U.S. Supreme Court, are much more likely to affirm than reverse cases brought on appeal.[28] The 36 percent reversal rate exhibited by the English Court of Appeal, based on the data in this study, conforms to this pattern, although the rate is somewhat higher than for most appellate courts. The important point, however, is that almost two-thirds of Court of Appeal judgments represent affirmations.

In this context, a reversal signals that some kind of error has occurred below, either in law or procedure or in the application of discretion. Of course, not all interventions are motivated by error correction, since a reversal may occur when an appellate court supervises a judicial hierarchy by setting new policy or by resolving inconsistencies among lower forums. Still, since reversals represent departures from the norm, we expect that they provide a cue to law reporters that the case warrants the closer attention of the legal community. The data in Table 1 support this hypothesis, demonstrating that whether the Court of Appeal affirms or

[28] For a more detailed review of this evidence and a discussion of the function of appeals in the American and English judicial systems, see Atkins (1990).

reverses the lower forum is positively associated with case publication status, with 42 percent of reversals being published, as compared with only 29 percent of affirmations.

DYNAMIC CUES AND PUBLICATION RATES

Size of Appellate Panel

Thus far we have examined the utility of passive cues for predicting to case publication status. In addition to such cues, the proposed model of case publication status identifies certain cues as dynamic, cues fashioned by the direct action of the Court of Appeal. Although both passive and dynamic cues serve as indicators of case importance embedded in appellate decisions, dynamic cues are especially salient to law reporters, and should be especially strong predictors of reporting status, since they signal most directly how the Court of Appeal has chosen to use its internal resources to fashion a context in which decisions are made.

One salient dynamic cue to case importance, and to the resources the Court of Appeal is willing to commit to a decision, is the size of the appellate panel to which a case is assigned. The rules governing the internal administration of the Court of Appeal specify that a sitting of the Court "must consist of an odd number of judges not less than three."[29] However, the rules of the court also allow for two-judge panels in certain kinds of cases. This procedure was adopted in 1982 in order to enhance the court's administrative efficiency, increasing as it does the number of panels that can be constructed from available personnel. Cases assigned to two-judge panels include appeals against interlocutory orders and judgments, appeals against county court orders whether final or interlocutory, a limited class of appeals from the High Court, appeals against decisions of a single Lord Justice of Appeal (e.g., leave to appeal requests), and appeals in which all parties have consented in writing prior to the appeal being heard that a two-judge court can be constituted.

In large measure, then, the type of claim raised and the source of the appeal affects the size of the panel to which the case is assigned. The distinction between panel size and whether interlocutory or final questions are presented is especially important because the former tend to deal with narrow jurisdictional and procedural questions, whereas the latter raise questions relating to substantive merits of litigation. Likewise, the source of the appeal provides an important clue to the magnitude of the financial stakes in litigation, since claims for under £5,000 are usually heard by county courts scattered around the country, while larger claims are entered in the High Court in London. Thus, litigation involving smaller sums of money are likely to be assigned to two-judge

[29] See *The 1981 Supreme Court Act* sec. 54/2.

panels and disputes with larger sums at stake tend to go to three-judge panels.

By using panels of different sizes, the Court of Appeal also inevitably makes some assumptions about whether cases are likely to prompt conflict among the judges. In particular, the procedure assumes that cases assigned to two-judge panels are unlikely to provoke overt disagreement on the bench, since a division between the judges would deadlock a decision. Should this occur, however, either party can obtain a rehearing before a three-judge court as a matter of right. In fact, if litigants can convince the court that their case is especially important or raises particularly difficult points of law, they can petition the registrar of the court to assign their case to a three-judge panel.[30]

Thus, the size of the panel to which a case is assigned says much about the stakes involved in litigation as well as the perceptions held by parties, and by the court itself, regarding the potential for conflict among the judges. We therefore hypothesize that panel size provides a strong cue regarding case importance and expect a positive association between the size of the panel to which a case is assigned and whether a Court of Appeal decision is published. The data reported in Table 1 offer strong support for this hypothesis, indicating that about 51 percent of the cases assigned to three-judge panels were reported, as compared with only 22 percent of the cases been assigned to two-judge panels.

Length of Transcript

The length of opinion issued by the Court of Appeal, measured in terms of the number of pages in the official transcript of the decision, is another salient cue to case importance and to the amount of resources that the court is willing to commit to an appeal. Transcript length is a useful reflection of whether a case meets the formal criteria for publication, in that cases which require lengthy discussion of precedents, statutes, or relevant documents to arrive at judgment may be viewed as more important than disputes which produce shorter transcripts because they are disposed of on facts alone and involve no new law or policy or any interpretation of statutes and precedents. Of course, some disputes decided strictly on the facts may require detailed and lengthy discussion of the background and circumstances of the controversy and, likewise, cases that set no new policy or precedent may still prompt a thorough analysis of the lower court ruling. Such cases

[30] The rules of the court provide that whenever "any party to an appeal considers that the appeal involves points of law of such difficulty or such importance to the general law as to require a hearing before three Lord Justices, a party concerned should apply to the Registrar for the appeal to be heard by a three-judge court" (Rules of the Supreme Court 59/3/8). Counsel may also seek hearing before a three-judge panel in cases "where points of real difficulty arise" (*ibid.*).

should be, however, the exception to the general pattern. We hypothesize, therefore, that the length of a transcript serves as a cue concerning case importance and that cases producing longer transcripts are more likely to be published than cases with shorter transcripts.

The data in Table 1 confirms this hypothesis. The length of a judgment, dichotomized as being above or below the mean page length for all transcripts (14), is a strong predictor of case publication status: 58 percent of those cases above the mean length were published as opposed to only 20 percent of cases below the mean.

Conflict and Consensus

The kinds of opinions produced by Lord Justices in rendering judgment provide additional cues about case importance. Court of Appeal judgments are usually delivered seriatim, beginning typically with the senior Lord Justice. This decision process provides the judges with a variety of opinion options. One option often taken in noncontroversial cases is for the second or third Lord Justice on the panel to state briefly that he agrees with what was stated in the first, or lead, judgment and that he, in effect, concurs in the result. When this occurs, no separate judgment as such is presented. Alternatively, the second or third Lord Justice may agree with the outcome but deliver a separate judgment. Occasionally, a Lord Justice may disagree with the outcome and dissent.

This process enables us to divide cases into two categories, consensual and nonconsensual. I have intentionally not designated the alternative category as "conflictual" because, while cases prompting dissent should provide a vivid cue to reporters that something significant is occurring in the case, few court decisions include a dissent.[31] By itself, then, dissent cannot serve as a particularly useful statistical predictor of publication status, although it may still serve as an important cue to law reporters. We can, however, view dissent as anchoring one end of a continuum representing consensual and conflictual decisions. Between the two poles of this continuum lie the nonconsensual cases, those in which separate concurring judgments are produced. I assume that cases raising important and difficult questions about law and policy are more likely to generate discussion and therefore raise the probability that multiple views will be expressed through the seriatim process, which would be manifested by the casting of separate judgments. We can assume therefore that the presence of a nonconsensual decision, containing either separate judgments or dis-

[31] The Court of Appeal's overall dissent rate is only about 1.5 percent. Of course, dissent is only meaningful in the context of three-judge, not two-judge, panels. Since about 40 percent of the cases in the data set were decided by three-judge panels, a measure of dissent activity is only relevant in that subset of decisions. In the context of three-judge panels, however, the Court of Appeal's dissent rate is still low, about 3.6 percent.

sent, or both, serve as a cue that a decision warrants close attention, and should result in publication, because it is more likely than consensual decisions to raise difficult and important problems.

Although this distinction between consensual and nonconsensual judgments is important, the Court of Appeal process of rendering decisions actually produces two kinds of consensual judgments. The kind I have discussed thus far occurs when the senior Lord Justice on the panel, or whomever he may designate, presents a lead, or first, judgment and the other panel members either simply express their agreement or offer a brief comment. In some cases, however, a Lord Justice states expressly that he is presenting a "judgment of the Court," one to which the other Lord Justices not only adhere but one in which they have also contributed. Among the kinds of judgments produced, a judgment of the court represents the clearest expression of collective unanimity.[32] Such judgments are generally reserved for important cases in which the Court of Appeal wishes to present the appearance of strong consensus. The fact that each Lord Justice has contributed to the judgment suggests also that the issue raised in the case warrants the fusion of the court's collective expertise. On the assumption that a judgment of the court is utilized when the court elects to mobilize its resources for the more significant appeals, the presence of such a judgment should serve as a powerful cue for law reporters regarding case importance. We thus expect that cases in which a judgment of the court is presented should be more likely to be selected for publication than other cases.

The data in Table 1 show that both these hypotheses relating to indicators of consensual decisionmaking are supported. About half of nonconsensual judgments are published, as opposed to about a quarter of the consensual ones. More strikingly, more than three-quarters of cases containing judgments of the Court are published as opposed to 31.4 percent of all other cases.

Master of the Rolls Participation

The literature on decisionmaking in the U.S. Supreme Court reveals that influence and power are distributed differentially among the justices.[33] Sometimes power is derived from substantive expertise, while at other times it is associated with task and social leadership skills performed by one or several of the justices. Much potential for power and influence within the Court is positional, deriving from the office of Chief Justice in particular, at least when the occupant is motivated to assume the leadership mantle

[32] Judgments of the Court are rare, occurring in only 4.2 percent of the cases in the data set.

[33] For excellent reviews of this literature, see Goldman and Jahnige (1985) and Baum (1989).

and possesses the skills necessary to exert actual influence. But apart from how much influence the Chief Justice may exert, certain attributes of his actions draw attention, such as assigning himself the task of writing the opinion in "hard" cases and mustering unanimity behind that opinion when the situation seems to so warrant.

There is nothing unique about this relationship between the Court's titular leader and the perception of influence and power. Rather, it reflects more general sources of power and influence that should appear in other judicial institutions as well. This suggests that the behavior of the head of the civil division of the Court of Appeal, the Master of the Rolls, deserves our attention as we build a model of how the court utilizes its resources and power. As the administrative head of the court, the Master of the Rolls is, in many respects, the functional equivalent of the Chief Justice or of a chief judge in an U.S. appellate circuit. As a Lord Justice of Appeal, the Master of the Rolls shares in the appellate deliberations with his colleagues as part of the routine rotation of panel assignments established by the court's administrative office. Yet there is evidence that power and influence gravitate toward the administrative head. For example, despite his administrative responsibilities, the Master of the Rolls is the second most frequent participant on hearing cases of the twenty-two Lord Justices on the court. Moreover, he ranks third in terms of the percentage of participation in which he gives the lead opinion in the seriatim judgment process.

These patterns suggest that the Master of the Rolls's participation may serve as a cue to law reporters that a case warrants their closer scrutiny. If true, we should observe that cases on which the Master of the Rolls has participated should be more likely to be selected for publication by law reporters than are other cases. The data in Table 1 offer strong support for this hypothesis: 87 percent of decisions in which the Master of the Rolls participated were selected for publication, as opposed to only 32 percent of all other cases.

A MULTIVARIATE CUE MODEL

These bivariate data show that the cues hypothesized as indicators of case importance are indeed related to whether cases are selected for publication. Moreover, as predicted, such dynamic cues as the presence of a judgment of the court, length of judgment, and panel size are strongly related to case publication status. To sort out the competing and overlapping explanatory effects of the proposed variables and to assess their combined explanatory power, we construct a multivariate model.

Table 2 indicates how the variables in the multivariate model were coded and reports the result of a logit analysis. Generally

Table 2. Logit Coefficients for the Case Publication Model

Variable	MLE	SE	*P*	Exp (*B*)
Passive cues				
Lower forum	−0.12	.122	.31	0.88
Appellant—government	0.23	.293	.41	1.26
Appellant—corporate	−0.19	.243	.41	0.82
Appellant—individual	−0.55	.242	.02	0.57
Individuals in opposition	−0.26	.123	.03	0.77
Issue/public law	1.04	.198	<.001	2.82
Issue/industrial relations	0.15	.227	.50	1.16
Issue/property	0.91	.138	<.001	2.49
Issue/personal injury	−0.77	.184	<.001	0.46
Action on lower forum	0.41	.093	<.001	1.50
Dynamic cues				
Size of appellate panel	0.67	.109	<.001	1.94
Transcript length	1.21	.100	<.001	3.37
Nonconsensual judgment	0.56	.100	<.001	1.74
Judgment of court	1.76	.249	<.001	5.81
Master of Rolls participation	0.92	.145	<.001	2.50
Constant	−1.57	.251	<.001	
76% correctly classified				

Variable Coding
Lower forum: High court or administrative board = 1; county court = 0
Panel size: Three-judge = 1; two-judge = 0
Appellant: Government appellant = 1; all others = 0
Corporate or business appellant = 1; all others = 0
Individual appellant = 1; all others = 0
Issues: Public law issue = 1; all others = 0
Industrial relations = 1; all others = 0
Personal injury = 1; all others = 0
Property = 1; all others = 0
Transcript length: Above mean = 1; below mean = 0
Nonconsensual decision: Present = 1; absent = 0
Judgment of court: Present = 1; absent = 0
Action on lower forum: Reverse = 1; affirm = 0
Master of Rolls participation: Present = 1; absent = 0
Individual litigant combination: Present = 1; absent = 0

speaking, the proposed model provides a good estimate of the characteristics hypothesized as distinguishing published from unpublished cases. In addition to the model being statistically significant ($p<.01$), the logit analysis correctly classifies 76 percent of the cases. The logit procedure offers a variety of data for interpreting the utility of the case publication model proposed here. First, the coefficients and statistical significance levels for each variable reported in the table indicate that all the dynamic cues and six of the passive cues are important in predicting case publication status. Among the passive cues, the issue variables, with the exception of industrial relations disputes, remain especially important predictors to publication status, as does the Court of Appeal's action on the lower forum. The MLE coefficients in conjunction with the exponential *B* values provide important evidence about the relative effects of the proposed passive and dynamic cues. As these coefficients show, each of the dynamic cues retains an independent effect in the multivariate model. The magnitude of the coefficients

indicate that certain dynamic cues are the best predictors of case publication status once the effects of all other variables are taken into account. For example, the strongest predictor of case publication status is whether an opinion was delivered as a judgment of the court. The exponential *B* value indicates that such judgments had almost a six times greater chance of being published than of not being published. Similarly, another dynamic cue, transcript length, is also a strong predictor of case publication status. Note in this regard that transcript length is not simply a function of the number of judges on a panel, since the panel size measure makes an independent contribution in the model.

Several other variables in the model, while having more modest effects, are nevertheless important for predicting case publication status. Two proposed passive cues characterizing the type of litigant raising the appeal, individual appellants and individuals in opposition, contribute significantly to the multivariate model. As expected, the coefficients show a bias against publishing cases brought by such litigants, particularly those cases in which individuals opposed each other. On the other hand, the presence of the government as the appellant does not retain an independent effect in favor of publication in the multivariate context. This suggest that law reporters view the outcomes of private law disputes as being less important than other kinds of problems to the legal community and therefore tend to report a smaller proportion of such cases. The fact that the presence of a public law issue has a strong and statistically significant effect in the multivariate model supports this inference.

CONCLUSION

The data reported here support the utility of a cue theory for understanding the process by which cases are selected for publication. The fact that, of the cues proposed, dynamic cues were the strongest and most consistent predictors of case publication status in the multivariate model suggests that we can envision the interaction between the Court of Appeal and the law-reporting community not simply as one in which passive cues are used to assess case importance, but as a communication network in which the way the court utilizes its internal resources shapes law reporters' decisions. These data thus indicate that the publication of appellate decisions may be a more complex process than one in which law reporters simply choose independently which cases shall be placed in the formal channels of legal communication. The importance of dynamic cues in the multivariate models suggests that the Court of Appeal itself contributes substantially to the publication process by defining the context in which the law reporters' decisions are made.

It is important, however, to acknowledge that the cues identi-

fied as predictors here may also simply reflect variations in case importance that by themselves can account for publication decisions. Nothing presented here refutes the proposition that law reporters do seek to identify important cases. Rather, we can view the cue model as a way of operationalizing some concepts associated with case importance. Indeed, whether the ruling was presented as a judgment of the court and the length of the Court of Appeal judgment are both strong predictors to publication status, which suggests strongly that traditional criteria embedded in decisions (and indicative of how the court uses its resources) capture the law reporters' attention. To determine with more precision whether case publication status is best explained by a decisionmaking theory rooted in heuristics, by the application of the traditional criteria, or by both, requires a more detailed study of law reporters and an appraisal of how they perceive their task of case selection.

Regardless, however, of which model best describes and explains the process by which law reporters choose cases, selective publication itself has important implications for understanding the structure of communication within a legal system and between a legal system and the broader sociopolitical context in which it is embedded. I noted earlier that nonpublication of appellate decisions may affect the distribution of resources within a judicial system. In any communication system, information is one of the primary resources to be distributed. In a legal system, information about the distribution of legal rights and responsibilities through court decisions is a valuable commodity. In broad terms, selective publication raises the problem of whether the resources distributed by courts are affected by barriers to both the quantity and content of the information that flows from courts to the broader legal and political system with which they interact. Thus, if the quality and character of bargaining that occurs in the shadow of the law is affected by the endowments bestowed by court decisions, whether or not the distribution of endowments is affected by publication status is an important question.[34] Similarly, if the decision to settle or litigate is affected by each side's assessment of a court ruling in its favor, thus in effect the assessment of endowments available to each side, the hierarchy of endowments perceived by parties contemplating litigation are not so much the ones produced in court decisions generally as much as the ones that are in fact communicated in published decisions.[35]

Whether different endowments exist in unpublished cases is the intriguing question left unanswered here. Indeed, we reach back to the central problem of political communications when we

[34] These concepts of bargaining in shadows and of endowments are from Mnookin and Kornhauser (1979).

[35] See Priest and Klein (1984) for a discussion of litigation models based on parties assessing their probability of success in court.

speculate about how the availability of information concerning endowments in unpublished cases is distributed to various participants in the process. If the selective publication process either skews the kind of information distributed, interferes with the ability of litigants, real and potential, to assess reliably how courts are likely to rule, or more significantly provides tactical advantage to certain parties over others, it suggests a need for some of the intriguing theories of the legal process now appearing in the literature to incorporate the implications of limited information flowing outward from courts.[36] Such problems await further investigation of case publication and communication patterns in legal and political systems.

REFERENCES

ATKINS, Burton M. (1991) "Party Capability Theory as an Explanation for Intervention Behavior in the English Court of Appeal," *American Journal of Political Science* (forthcoming).

——— (1990) "Interventions and Power in Judicial Hierarchies: Appellate Courts in England and the United States," 24 *Law & Society Review* 71.

——— (1988) "Integration and Control Functions in Judicial Hierarchies: The English Court of Appeal and the Context for the Use of Appellate Review Power." Delivered at the Annual Meeting of the American Political Science Association, Washington, DC, 31 Aug.–4 Sept.

BARNETT, M. J. (1969) *The Politics of Legislation—The Rent Act 1954.* London: Weidenfeld.

BAUM, Lawrence (1989) *The Supreme Court.* Washington, DC: Congressional Quarterly Press.

CALDEIRA, Gregory (1988) "Legal Precedent: Communication Between State Supreme Courts" 10 *Social Networks* 29.

——— (1985) "The Transmission of Legal Precedent: A Study of State Supreme Courts," 79 *American Political Science Review* 178.

——— (1983) "On the Reputation of State Supreme Courts," 5 *Political Behavior* 83.

CANON, Bradley C., and Lawrence BAUM (1981) "Patterns of Adoption of Tort Law Innovations: An Application of Diffusion Theory to Judicial Doctrines," 75 *American Political Science Review* 975.

CHERRY, Colin (1957) *On Human Communication.* New York: John Wiley.

DEVLIN, Patrick (1979) *The Judge.* Oxford: Oxford University Press.

EDDEY, Keith J. (1977) "The Law Reporting of the Court of Appeal (Civil Division)." Unpublished thesis, Oxford University.

EYESTONE, Robert (1977) "Confusion, Diffusion, and Innovation," 71 *American Political Science Review* 441.

FOA, Pamela (1977) "A Snake in the Path of the Law: The Seventh Circuit's Non-Publication Rule," 39 *University of Pittsburgh Law Review* 309.

GALANTER, Marc (1974a) "Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change," 9 *Law & Society Review* 95.

---

[36] The work by Galanter (1974a, 1974b), Landes and Posner (1976), and Mnookin and Kornhauser (1979) illustrates the kinds of theories and models that make assumptions about the flow of information from courts. I observed in note 9 that English courts do not normally allow counsel to cite unpublished cases in argument. One effect of such a rule may be to provide those counsel more familiar with unpublished decisions a better command of likely outcomes than counsel familiar with, and relying on, published decisions. See the related discussion in Robel (1989).

——— (1974b) "Afterword: Explaining Litigation," 9 *Law & Society Review* 347.
GEORGE, F. H. (1959) *Automation, Cybernetics and Society*. London: Leonard Hill.
GOLDMAN, Sheldon, and Thomas P. JAHNIGE (1985) *The Federal Courts as a Political System*. New York: Harper & Row.
GRAY, Virginia (1973) "Innovation in the States: A Diffusion Study," 67 *American Political Science Review* 1174.
GRIFFITH, J. A. G. (1985) *The Politics of the Judiciary*. 3d ed. Glasgow: Fontana Press.
HARRIS, Peter (1985) "Ecology and Culture in the Communication of Precedent Among State Supreme Courts, 1870–1970," 19 *Law & Society Review* 449.
HOFFMAN, Daniel N. (1981) "Non Publication of Federal Appellate Court Opinions," 6 *Justice System Journal* 405.
INBAN, Michael (1979) *Routine Decision-Making: The Future of Bureaucracy*. Beverly Hills, CA: Sage Publications.
LANDES, William M., & Richard A. POSNER (1976) "Legal Precedent: A Theoretical and Empirical Analysis," 19 *Journal of Law and Economics* 249.
LAW REPORTING COMMITTEE (1940) *Report of the Law Reporting Committee*. London: HMSO.
LINDLEY, Nathaniel (n.d.) "Paper on Legal Reports" (unpublished).
MNOOKIN, Robert H., and Lewis KORNHAUSER (1979) "Bargaining in the Shadow of the Law: The Case of Divorce," 88 *Yale Law Journal* 950.
MUNDAY, Roderick (1983) "The Limits of Citation Determined," 25 *Law Societies Gazette* 1337.
NEUBAUER, David (1985) "Published Opinions Versus Summary Affirmations: Criminal Appeals in Louisiana," 10 *Justice System Journal* 173.
POSNER, Richard A. (1985) *The Federal Courts: Crisis and Reform*. Cambridge, MA: Harvard University Press.
PRIEST, George L., and Benjamin KLEIN (1984) "The Selection of Disputes for Litigation," 13 *Journal of Legal Studies* 1.
PROVINE, Doris Marie (1980) *Case Selection in the United States Supreme Court*. Chicago: University of Chicago Press.
REYNOLDS, William L., & William M. RICHMAN (1981) "An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform," 48 *University of Chicago Law Review* 573.
——— (1978) "The Non-precedential Precedent—Limited Publication and No-Citation Rules in the United States Courts of Appeals," 78 *Columbia Law Review* 1167.
ROBEL, Lauren K. (1989) "The Myth of the Disposable Opinion: Unpublished Opinions and Government Litigants in the United States Courts of Appeals," 87 *Michigan Law Review* 940.
SMITH, P. F., and S. H. BAILEY (1984) *The Modern English Legal System*. London: Sweet & Maxwell.
SONGER, Donald (1988) "Nonpublication in the United States District Courts: Official Criteria Versus Influences from Appellate Review," 50 *Journal of Politics* 206.
STEINSTRA, Donna (1985) *Unpublished Dispositions: Problems of Access and Use in the Courts of Appeals*. Washington, DC: Federal Judicial Center.
TANENHAUS, Joseph, Marvin SCHICK, Matthew MURASKIN, and Daniel ROSEN (1963) "The Supreme Court's Certiorari Jurisdiction: Cue Theory," *in* G. Schubert (ed.), *Judicial Decision Making*. Glencoe, IL: Free Press.
TEGER, Stuart, and Douglas KOSINSKI (1980) "The Cue Theory of Supreme Court Certiorari Jurisdiction: A Reconsideration," 42 *Journal of Politics* 834.
TUNKEL, Victor (1986) "The Court of Appeal Transcripts 1951–1980: The Microfiche Edition (An Introduction)." London: HMSO Books.
ULMER, S. Sidney (1984) "The Supreme Court's Certiorari Decisions: Conflict as a Predictive Variable," 78 *American Political Science Review* 901.
ULMER, S. Sidney, William HINTZE, and Louise KIRKLOSKY (1972) "The

Decision to Grant or Deny Certiorari: Further Consideration of Cue Theory," 6 *Law & Society Review* 637.
VAN KOPPEN, Peter J., and Rob J. P. KOTTENHAGEN (1990) "How Decisions Reach the Market: Publication of the Decisions of the Dutch Supreme Court." Presented at the Special Interim Meeting of the Research Committee on Comparative Judicial Studies of the International Political Science Association, London, 20–22 August.
WALKER, Jack L. (1969) "The Diffusion of Innovation Among the American States," 63 *American Political Science Review* 880.
WALKER, Ronald J., and M. G. WALKER (1985) *The English Legal System.* 6th ed. London: Butterworths.
WASBY, Stephen L. (1976) *Small Town Police and the Supreme Court: Hearing the Word.* Lexington, MA: Lexington Books.

CASES CITED

Bowmaker Ltd. v. Britania Arrow Holding, PLC, 3 *All England* 178 (1988).
Brinks Mat Ltd. v. Elcombe, 3 *All England* 188 (1988).
Dormeuil Freres SA v. Nicolian International (Textiles) Ltd., 3 *All England* 197 (1988).
Gibson v. South American Stores, 177 *Ch.* 195 (1950).
In re Laidlaw (unreported) (1935).
Roberts Petroleum Ltd. v. Kenny Ltd., 1 *All England* 564 (1983).
Stanley v. International Harvester Co. of Great Britain Ltd., 2 Feb. (unreported) (1983).
Yardley & Co. Ltd. v. Higson, 1984 *Fleet Street Reports* 314.

STATUTES CITED

Domestic Violence and Matrimonial Proceedings Act, 46 *Statutes* 713 (1976).
Landlord and Tenant Act, 18 *Statutes* 553 (1954).
Matrimonial Causes Act, 17 *Statutes* 225 (1967).
Supreme Court Act, 51 *Statutes* 590 (1981).