COMMENT ON DANIELS

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Stephen Daniels' essay examines the series of studies of state supreme courts by Bliss Cartwright, Lawrence M. Friedman, Robert A. Kagan, and Stanton Wheeler, studies that report the results of what I will call the State Supreme Court Project. In this comment, I will not focus on the critique that Daniels makes of these studies; rather, I will consider a broader set of issues that his essay and the articles that he discusses raised for me.

There is a long tradition of research that probes the activities and roles of courts through quantitative analysis of data on the cases that they receive and decide. But the work of the State Supreme Court Project is part of a burgeoning of such research in recent years. That work also exemplifies the breadth and depth of many recent studies that deal with a wide range of variables and that often compare courts and analyze changes over time. Other examples include Daniels' own research (1985), along with that of Munger (1986), McIntosh (1983), and Howard (1981).

This growing body of scholarship has contributed enormously to our understanding of courts. While much of this contribution is self-evident, in one important respect this scholarship makes a more subtle contribution by departing from past patterns in court research. Traditionally, there has been a considerable gulf between research on trial courts and that on appellate courts; the two have been studied in quite different ways by scholars with different interests. We know a great deal about both the United States Supreme Court and state trial courts of general jurisdiction, but our knowledge about the two is comparable only to a very limited degree.

In contrast, the type of research represented by the work of the State Supreme Court Project, although most abundant at the trial level, includes several appellate court studies as well. And within a subset of this work considerable similarity exists in the kinds of data gathered and the issues addressed at different court levels, largely because scholars in this area have influenced each other's work. In light of the gulf between appellate and trial court research in the past, this is a very welcome development. Certainly it advances our understanding of the ways that the various levels of a court system fit together as adjudicators and policy makers. Where single studies systematically compare different levels of a court system, as in the research that Daniels proposes in

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his essay, this payoff is enhanced. This kind of study can be particularly helpful in illuminating such issues as the division of functions among courts and the survival patterns of different kinds of cases.

Yet we should keep in mind that the gulf between research at the trial and appellate levels is not entirely a result of scholars' insularity. Trial courts and appellate courts, especially supreme courts, are quite different institutions in important respects. Indeed, it can be argued that a state trial court resembles a grass roots-level administrative agency and a supreme court a legislature more than either court resembles the other. While such differences help to make comparison across levels attractive, they also can create difficulties for research. More specifically, the systematic analysis of case characteristics involves some complications at the supreme court level that do not exist to the same degree for trial courts.

One of these complications concerns the relative importance of cases. In most systematic studies of court cases, little attention is given to variation in the significance of individual cases. The absence of such attention creates few problems at the trial level. In trial courts, engaged primarily in the processing of large numbers of "ordinary" cases, the great majority of cases within any subject-matter category probably differ little in significance, from the perspective of either the court or the larger political system and society. Further, if it seems appropriate to take case importance into account, the stakes for the parties provide an indicator of importance that is imperfect but very good and easily obtained. Civil cases of most types can be differentiated according to the monetary stakes, and criminal cases can be and often are separated according to the seriousness of the charges.

In the highest appellate court of a jurisdiction, the picture is quite different. Arguably, variation in the importance of cases is much greater at this level. More fundamentally, importance is more ambiguous and more difficult to measure. The stakes for the parties are not a good indicator of the significance of a supreme court case; if they were, the Texaco-Pennzoil case of 1987 would be the most important civil case ever decided by the U.S. Supreme Court. Rather, importance derives primarily from the breadth and potential impact of the legal issues in a case, which certainly are not susceptible to precise measurement.

Yet case importance in supreme courts merits attention, chiefly because it may be intertwined with other variables. For instance, a census of changes in the mix of a court's cases by subject matter over time offers important information about the court's changing role in developing the law and making public policy. But if cases in certain fields become more important vehicles for judicial policy making over the period studied, while those in other

fields decline in importance, this kind of census will provide only a partial picture of the court's changing role.

Moreover, the difficulties in measuring case importance are not so great as to rule out meaningful measures. Indeed, in their article on state supreme court opinions, Friedman *et al.* (1981: 779–780) offer one very good indicator of case importance: subsequent citations of the court's decision. Other useful indicators can be developed or gleaned from existing studies.

A second complication concerns differences between levels of courts in the form of their policies. The policies of trial courts, as most scholars would conceive of them, consist chiefly of the aggregate of outcomes in individual cases. Where adequate data exist, these outcomes are easy to measure. At the supreme court level, in contrast, the most significant aspect of judicial policy ordinarily is doctrinal pronouncements rather than case outcomes. As Kagan *et al.* (1977: 123 n. 6) note, doctrine is not easily incorporated into research that analyzes a large set of cases quantitatively.

This difference affects the capacity of such studies to examine the policies of supreme courts. These studies can probe case outcomes for parties and by subject matter, which are important aspects of supreme court policies. But data on doctrines are necessary to provide a complete sense of the policy outputs that state supreme courts produce. Wheeler *et al.* (1987) skillfully employ their data on state supreme court decisions to analyze the success rates of "have" and "have not" litigants. Among other benefits, their findings provide significant evidence on the issue of ideological change in state supreme court policies over the past century. But this issue, and other issues concerning the content of policy, cannot be addressed fully in the absence of information on doctrinal positions. And measurement difficulties and problems involved in tracing doctrinal development from a sample of cases may mean that a different kind of study is required to tackle such issues.

No matter how one assesses them, these complications do not detract from the considerable value of employing similar perspectives and methods in the study of trial and appellate courts. One fortunate result of the diffusion of the form of research that I have discussed is a growing potential for comparisons of courts across levels. This potential can be maximized through studies of courts at single levels that are designed to produce findings and analyses parallel to those of studies at other levels and by studies that themselves cross levels. Such studies can accelerate the growth in our understanding of courts and court systems that broad-gauged quantitative research on courts and their cases already has brought about.

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