PART II. THE IMPACT OF SUPREME COURT DECISIONS

CHAPTER 4. THE SUPREME COURT SPEAKS . . . AND WHAT HAPPENS? †

THE IMPACT OF THE SUPREME COURT

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I. INTRODUCTION

At least within political science "impact" or "impact studies", has become a term of art referring to a body of literature reporting on the compliance of public officials to specific Supreme Court mandates. Just as so often in law, the meaning of the term is derived largely from what has in fact been done—what issues have most pressed the practitioner—rather than from a theoretical statement of principles. Yet I do not choose to adopt the common law method and simply report the content of what has been done as defining the substance of the problem, for the impact of the Supreme Court on American life goes far beyond the "impact studies." Indeed, the limits of those studies have not been set by a concern for the Supreme Court as a political institution but by certain problems of social science methodology to which I will turn in a moment.

It would seem preferable, then, to begin by establishing a brief typology of the varieties of impact studies that ought to be undertaken and then indicate what has in fact been done in each area and the methodological problems inherent to each. First, and most obvious, is the impact study based on a single Supreme Court decision, in the sense of a single clear-cut command issued by the Court, and the extent to which it is obeyed. As I have already indicated, such compliance studies have formed the bulk of the "impact" literature. Second, and at the opposite extreme, is impact in the sense of the whole institutional role of the Supreme Court and its whole pattern of commands and statements. How has the quality of American political life been affected by the existence of the Supreme Court? We are surely not without conventional studies of the Supreme Court which take a wholistic view. Thirdly, we might study the impact of Supreme Court opinions in terms of the words it has spoken rather than the commands that it has issued. Here our concern would be with legal doctrine and its effects on the behavior of those to whom doctrinal pronouncements are directed. In this area there is, of course, a vast body of conventional legal literature directed at analyzing the doctrinal stance of the Court. But just as little of our traditional wholistic analysis has really directed itself to the question of what difference the Court has made—of what American life would have been like without it—so

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too, has little of our doctrinal analysis been directed at tracing the actual behavioral consequences of doctrinal pronouncements, of whether the actions of administrations, entrepreneurs and other judges are affected one way or another, or at all, by what the Supreme Court says.

Obviously, there are many intermediate categories, but these three—command, Court, and doctrine—are useful ideal types indicating that when we speak of the impact of the Supreme Court, we are actually talking about many different problems, some of which yield fairly well to the methods of social science, some of which require considerable traditional legal analysis supplemented by behavioral research, and some of which are either not amenable to solution at all or require a method of historical (and thus speculative) sociology of law which has been little practiced in recent years.

II. THE IMPACT OF A SINGLE SUPREME COURT DECISION ISSUING A CLEAR AND UNEQUIVOCAL COMMAND TO PUBLIC AUTHORITIES TO DO OR NOT DO SOME DEFINITE THING

The pioneering impact studies were done on compliance to single clear-cut Supreme Court commands. This is the easiest problem for the social scientist because it provides the easiest observation and measurement, the fewest number of variables, the least chance of spurious correlations and the best possibilities of employing real time as experimental time. If a Supreme Court order is directed at a large number of administrative units, and we can obtain a record of the official behavior of those units before the order $T_1$ and then again after the order $T_2$, it is possible to impute changes in behavior between $T_1$ and $T_2$ to the order, and the level of change will give us a quantified measure of compliance, so long as no salient event other than the Supreme Court order has occurred between $T_1$ and $T_2$. The greater the chance of such an event, the higher the probability that the observed correlation between order and change in administrative behavior is spurious.

Given these considerations, it is no surprise that the bulk of the classic impact studies have concerned themselves with the response of school authorities to Supreme Court decisions on religious instruction, prayers and bible reading in the schools. It is easy to get data on what the school districts were doing at $T_1$ and $T_2$; one knows exactly what practice the Supreme Court was requiring before and after the order.


Court has ordered out,\(^3\) and the order requires that the practices stop immediately. The probability of intervention from independent variables other than the Court order is reduced (1) by the very short time span between \(T_1\) and \(T_2\)—since the order required immediate implementation, compliance can be measured at the beginning of the next school term; (2) comparative analysis of data from hundreds of local districts which should "wash out" the presumably random district by district intervention of local events other than the Court order.\(^4\)

Precisely because it seemed relatively easy to measure impact (in terms of degrees of compliance) in the religion in the schools cases, more ambitious studies soon turned to the question of why the observed degree of compliance had occurred, canvassing such variables as local public attitudes, political and administrative structure of local government and school districts, intervention by state authorities, pressure group activities and the personalities of key political and administrative actors.\(^5\) At this point these studies blend into the classic concerns of legal philosophy and sociology of law: Why (or more precisely, when) do men obey the law?

The major variant on the classic impact study is provided by those studies which take up a series of not quite absolutely clear and unequivocal commands. Desegregation, reapportionment, and obscenity \(^6\) are the most obvious examples. Here again it is relatively easy to measure relevant conditions at \(T_1\), since they are set down in clear and official directives. But no clear and definite \(T_2\) emerges at which to take our second measurement either because the Court itself has not provided such a time ("all deliberate speed") or because in the nature of things the authorities to whom the order

\(^3\) This first stage in which the Court has ordered specific existing practices ended is, of course, much easier to "count" than the second in which some authorities have introduced new practices which seek to skirt the order.

\(^4\) See Lempert, op. cit. supra note 1.

\(^5\) R. Johnson, *The Dynamics of Compliance* (1967); W. Muir, *Prayer in the Public Schools* (1967). Both are in-depth studies of specific communities. Johnson relies more heavily on sociological analysis of the structure of the community, Muir more heavily on psychological analysis of the personalities of individual participants. Both seek to go beyond the level of measuring the level of compliance to explaining why that level occurred.

\(^6\) Obscenity might well be considered under my third type—the impact of opinions rather than commands, but I think it preferable to deal with this area as one marked by commands which have not attained an ideal level of clarity. Indeed, the impact studies here are largely shaped in terms of legislative, police and business responses to commands that purport to be clear-cut but are not. See Levine, "Constitutional Law and Obscene Literature: An Investigation of Bookseller Censorship Practices" in T. Becker, *The Impact of Supreme Court Decisions* (1969); Carmen, "State and Local Motion Picture Censorship and Constitutional Liberties with Special Emphasis on the Communal Acceptance of Supreme Court Decision Making," (Ph.D. Dissertation, U. of Michigan, 1964); Washy, "Public Law, Politics and the Local Courts: Obscene Literature in Portland," 14 J.Pub.L. 105 (1965); Washy, "The Pure and the Prurient: The Supreme Court, Obscenity and Oregon Policy," in D. Everson, supra note 2; Barth, "Perception and Acceptance of Supreme Court Decisions at the State and Local Level," 17 J.Pub.L. 508 (1969).
is directed could not respond immediately even if they wished to. Of course the problem can be cured by setting $T_2$ very late, thus leaving the fullest time for compliance to occur. But, of course, the further $T_2$ gets from $T_1$, the less sure we are that we are measuring the impact of the Supreme Court command rather than some intervening variable. Particularly in the desegregation area, impact studies have been less concerned with quantitative measures of compliance than with the political sequences unleashed by Brown v. Board of Education and thus have moved far from clear and controllable impact studies into general analysis of contemporary politics and the adjustment of various categories of persons (state attorney generals, federal district judges) to political life.

Impact studies of the first major type I have been discussing encounter a classic paradox of social science research. We are surest that we are establishing a causal connection between court order and subsequent behavior when we confine ourselves to behavior immediately following the decision. If legal systems operated so mechanically that a legal order was instantaneously succeeded by obedience—or to put it another way—if we could reasonably expect that by a few months after the time a legal order was issued, the full, final and unalterable degree of compliance would be reached—then experimental needs would correspond with social reality. In fact, we suspect that compliance to many court orders takes a long time and may be mediated by many social learning phenomena. Many court "orders" probably receive their final incremental degrees of compliance only when they have ceased to be remembered as specific court decisions and have passed into the folklore of "obviously correct," "professional" conduct. At the very least, new court "orders," even when very explicit and demanding immediate compliance, are likely to create periods of confusion and disequilibrium in complex social systems, even when such systems are highly legalized. Thus the more "scientific" the impact study, the more likely it is to describe the inevitable period of disequilibrium rather than the eventual state of compliance. The early, and frequently admirable, studies of the evidence decisions and of Miranda v. Arizona are good illustrations of the paradox. They do give us a good

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10 Kuhl, "The Mapp Case One Year After: An Appraisal of its Impact in New York," N.Y.L.Journ., Sept. 18, 1962; Manwaring "The Impact of Mapp v. Ohio", in D. Everson, supra note 2; Eisen, "Protection Under Miranda," 67 Colum.L.Rev. 646 (1967); Seeburger and Wettick, "Miranda In Pittsburgh," 29 U.Pitt.L.Rev. 1 (1967); Medalie, Zeltz and Alexander, "Custodial Police Interrogation in Our Nation's Capitol: The Attempt to Implement Miranda," 66 Mich.L.Rev. 1347 (1968) (and see the studies cited there at note 12); "Interrogation in New Haven: The Impact of Miranda," 76 Yale L.J. 1519 (1967); Nagel, "Testing the Effects of Excluding Illegally Seized Evidence," 185 Wis.L.R. 283; Souris, "Stop and Frisk or Arrest and Search—The Use and Misuse of Euphemisms," 67 J.Crim.L., Criminology and Police Sci. 254 (1966). Since a number of studies of local police practices, for instance that of Professor Michael Ban of Purdue on the Boston police, were in the works at the time of Miranda and are not yet completed, we are likely to have
picture of what happened in the station house immediately after Miranda, and thus reasonably certain findings on the impact of the decision itself. But they tell us little about what is important to many of us, what, if any, permanent changes in confession rates, conviction rates and police routines will follow from Miranda. Later studies which will tell us about the final shape of these things will be unable, however, to clearly attribute them to Miranda since a number of other major variables will have intervened by then.

This paradox is encountered on an even grander scale when we introduce the policy dimension. The question of whether a given Supreme Court “order” is “obeyed” is of more than passing interest, but the crucial question for many of us will be less that than whether the policy goals behind the order were achieved at all, and if they were, did the order contribute to their achievement. For instance, we know something of the rate of technical compliance to the reapportionment decisions, but little about the extent to which there has been a shift in the policy outputs of state legislatures. If the Supreme Court has not contributed to such a change in outputs, then the “impact” of its reapportionment decisions will have been simply at the level of strengthening certain elements of the American ideology (“one man, one vote,” goes well on the 4th of July). But to the extent that we do begin to notice changes in legislative output, it will be difficult for special scientists to attribute any very exact share of the responsibility for these changes to the Supreme Court. A similar problem arises in the area of obscenity, where impact is finally a question of changes in the reading habits of the public, but where many variables other than the Court’s opinions are at play.

Ideally, then, impact studies even of the simplest, narrowest sort should be time-staged, comparative studies which identify and work with some intervening variables while controlling the rest by time and comparative manipulation. They should concentrate on the policy content of the order and whether that policy is achieved over time, viewing compliance as the degree of policy accomplishment rather than the degree of formal compliance or the rate of change in the intermediate behavior of certain classes of actors. Such efforts will remain the most “scientific” of the impact studies, but will necessarily be compelled to sacrifice a certain degree of certainty in order to achieve non-trivial findings.

III. THE IMPACT OF THE SUPREME COURT

The question most relevant to lawyers and social scientists, and least amenable to science, may well be, what is the impact of the whole pattern of Supreme Court decisions and the existence of the institution itself on the American political ideology and the whole of American political life. Here still more “before and after” data. (See Milner, The Impact of the Miranda Decision in Four Wisconsin Cities. (unpublished Ph.D. Dissertation, U. of Wis. 1968.) These studies introduced still another range of methodologies. Some are concerned with lower court application of evidentiary rules and so run to traditional case analysis. Others seek to trace the impact of decisions concerning police practice from statistical measures of arrest, conviction, and confession rates. Still others attempt direct station-house observation. On this latter technique, see especially J. Skolnick, Justice Without Trial (1966).

Professor Miller has made the point that few of the initial studies of the reapportionment cases concerned themselves with even the preliminary question of the effect on the composition of the legislative bodies.
we are not transposing "impact" into compliance to specific orders, but instead asking in the broadest sense, what difference does the Court make?

To make the contrast clear let us return to the desegregation decisions. At their narrowest, impact studies could determine the number of children actually “integrated” each year. Even here, of course, the level of integration could not be solely attributed to the Supreme Court command and the influence of such intervening variables as Presidential action would have to be assessed. Taking one step on to policy would immensely complicate the task. For if the policy goal behind Brown, education and/or improved social status for Negroes improved, it is not easy to assess how much the limited compliance with the order in Brown has contributed to those goals. All of this, none-the-less, falls within my first ideal type of impact study. Let me now use the Brown decision as the starting point in a hypothetical—but not improbable—argument that could serve as the framework for impact studies of the second sort.

The Supreme Court’s decision in Brown created a situation in which a major feature of the legal systems of many states, backed by years of enforcement and strong social support, was suddenly declared “illegal.” To declare a central feature of a legal system illegal, in and of itself undermines respect for law, for the legitimacy of a legal system is a seamless web and you cannot call a part of it into question without engendering attitudes that undermine the whole. More specifically, it could hardly be expected that southern authorities would grant full and immediate compliance. (Indeed, the Court admitted this.) At the same time those liberal forces which disapproved of segregation had now been told that the laws they wished to disobey were illegal. How can a court deliver the message that illegal laws must be done away with at all deliberate speed—i.e., that some illegal laws shall be enforced for the present—and that men should obey the illegal laws until the legal authorities have stopped acting illegally by enforcing them? The social consequences of Brown was an extended period in which a whole generation of liberal youths were taught (by headlines in the papers, and demonstrations in the streets) that some laws were legal, that some were not, and that it was moral, good and constitutional to break some of the laws of some of the states. Moreover, the laws that were illegal were the laws they didn’t like—ones they thought morally indefensible.

The aftermath of Brown was a period of lawlessness on both sides—the authorities acting illegally in enforcing unconstitutional laws—the demonstrators acting illegally in violating those laws or the police orders designed to maintain them.

In a very real sense, the Supreme Court was responsible for creating a situation which in turn generated a very loud and persuasive message to our society—it is morally admirable to violate laws you don’t like—or even laws you do—when the violation is for a good purpose. We cannot turn the canons of moral outrage against one set of laws and expect the untutored to make the crucial but sophisticated distinction between disobeying “bad,” in the sense of unconstitutional, laws and “bad” period laws. Nor can you socialize the young into obedience to law by encouraging them to go South, tangle with the southern police and end up in jail. The Supreme Court and the southern authorities combined to create a gigantic social experience fostering disobedience to law as a moral crusade and an appropriate and fre-
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quently legally sanctioned form of political behavior. Thus it might well be argued that the principal impact of the Warren Court has been to reduce the quantum of fidelity to law present in our society. The fashion of law breaking in a good (constitutional) cause, created in the fifties has only been slightly shifted to the fashion of law breaking in a good (moral) cause of the sixties. Would we wish to deny that the Supreme Court was one of the principal collaborators in the creation of that fashion?

On an even broader front the current fire of egalitarianism sweeping the nation, a fire which is in many ways identical to the spread of disorder, has been more heavily fueled by the Supreme Court than by any other agency of government. Here, of course, we have the usual chicken and egg problem of social causation, and it may be argued that the Court simply reflected the wave of egalitarianism that was an almost inevitable consequence of the victory over fascism in World War II and other factors inherent in modern industrialized societies and their underdeveloped imitators. Nevertheless, the Court has been a principal American spokesman of equality, and the demand for equality, often transposed wrongly but easily into demands for the “people’s” this and that, equality of Negro with white, of student with teacher, of poor with rich, of ignorant with educated, is at the root of much of our current social unrest.

I am not brave enough to attempt to assign a degree of responsibility, let alone credit or blame, to the Supreme Court for the current level of disrespect for law in our society (nor would I wish to overestimate the quantity of disrespect), but I do wish to point out that a body of “impact” studies that disregarded these fundamental questions in favor of an exclusive devotion to small, neat, nicely scientific studies of which school superintendents of what personality types complied with Engel v. Vitale would present a very strange and irrelevant picture of impact indeed.

When such global questions of the role of major social institutions are introduced, the first social science attack is likely to be on that portion of the problem that will yield some relatively precise, quantitative data. And in the field traditionally known as public law—as in foreign policy and a number of other public policy areas—public opinion studies have seemed a fruitful beginning to research on the evolution and impact of major policies and policy-makers. We have now had the advantage of the first findings from public opinion surveys containing questions about the Court. The results are typical of findings in other areas—very low levels of specific knowledge, moderate although vague awareness of major phenomena, conventional attitudes weakly held on major policies and institutions and a “public” frag-

mented into a number of small "issue publics," each highly knowledgeable or with strong opinions or both about a single issue, a vast residual who belong to no issue public and little congruence between an individual's opinions on the issue (if any) with which he is concerned and his more general attitudes toward the institutions involved. While it is fairly clear which Supreme Court actions have had an impact on the relatively well formed and/or highly opinionated members of the issue publics, the low levels of knowledge and amorphous attitudes of most of the public make it difficult to trace any connection between specific Court behavior and what little opinion or non-opinion they have.

Public opinion studies have not proved the ultimate key to understanding democratic politics, but if I may anticipate from what has happened in other political areas, public opinion studies of the Court are likely to conclude that (1) the public responds to major changes in the environment rather than specific Court decisions (2) for many purposes there is a two-stage process of public opinion formation in which opinion leaders transmit facts and evaluations to an attentive public (3) the fragmented issue publics do not form consistent alliances and (4) the "public opinion" that seems to actually affect politics is some as yet not understood mixture of general public mood, the activities of issue publics and the selective perceptions and attitudes of political actors which they themselves label public opinion but have only a partial and confused relation to actual public opinion as revealed in the polls. As a result we will always experience a great deal of difficulty in assessing the impact of the Supreme Court on public opinions and attitudes because public opinion is itself so fragmented, amorphous and generally non-opinionated.

Lawyers and political scientists have paid a great deal of attention to several areas of impact connected with the Court's power to declare statutes unconstitutional. Thus the question of whether the Court has been undermining the federal system has been raised frequently. For instance, the major long run impact of the rights-of-accused-persons decisions may not be on crime, conviction, or confession rates but in the creation of a relatively uniform national canon of police practices. There has also been a traditional concern with whether the existence of the Court's power of judicial review made for less constitutional responsibility in the other great branches—a sort of negative impact of the Court's existence. This problem has been a mainstay in the debate over the Court's First Amendment role, and we have had one recent study of whether Congress has reacted negatively in the constitutional sphere because of the existence of the Court.

More manageable are certain moderately global impact problems. What differences in the acceptance and implementation of a specific government program or policy result from initiation by the Supreme Court rather than some other political agency? In other words, what effect does the institu-

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16 See Levine and Becker, "Toward and Beyond a Theory of Supreme Court Impact," (Paper presented at the APSA Meetings, Sept. 2-6, 1969); Stumpf, infra note 21. Both pieces suggest the Court as symbol maker in shaping public and official responses.
tional status of the Court as a whole have on the recipients of its individual
decisions? Or taking another kind of problem, what has been the impact
of the Supreme Court's whole body of obscenity decisions on public taste?
Could we argue that if the Supreme Court armed with constitutional powers
had not existed or not exercised those powers, there would be a lower quan-
tum or a different quality of erotic stimulation in American arts and enter-
tainment? Has the Court shaped the tastes of the nation?

What has been the impact of the Supreme Court's whole body of antitrust
decisions and pronouncements on the actual shape of business organization
in the United States? Similarly, we might look at the impact of the exist-
ence of the Court on the political tactics of various government agencies and
interest groups. We have usually looked at this matter the other way round,
and there are a number of studies of how interest groups and government
agencies have "lobbied" the Supreme Court. Within these studies, however,
there is a mine of materials on how the existence of the Court has effected
the actions of the interest groups.17

IV. THE IMPACT OF SUPREME COURT OPINIONS

Arthur Miller's "On the Need for Impact Analysis of Supreme Court
Decisions" is so closely identified with the whole field of impact studies, and
Miller is in turn so vigorous a spokesman for result-oriented jurisprudence
that before turning to my third ideal type, I want to make a few simplifying
disclaimers. It is not necessary to resolve the question of whether judges do
or ought to pay attention to probable results in deciding cases, or even wheth-
er their efforts should be criticized in terms of results, nor is it necessary to
strike precisely the right balances between the ideal and the pragmatic, stabili-
ity and change, stare decisions and development, or what have you, in order
to justify impact studies. The actual impact of courts and court actions is
of interest to society, and to those who are interested in courts, no matter
what jurisprudential stance one adopts. Those among us who reject result-
oriented jurisprudence need not, as students of society, reject the study of re-
sults.

However, impact studies inevitably do lead us to a reconsideration of the
nature of judicial decisions themselves. The main thrust of judicial realism
was to challenge the position that judicial opinions were explanations of how
the judge had arrived at his choice between the parties. The opponents of
realism either sought to defend opinions as explanations or, shifting their
ground slightly, began to deal with opinions as justifications of (giving le-
gitimate reasons for) the choices. In short, the realists set the terms of the
whole modern debate about opinions and in doing so made us concentrate ex-
clusively on the relationship of the opinion to the judicial choice of winner
and loser in a particular case. A combination of realism and positivism
then led us to believe that to the extent that the realist had uncovered judicial
law-making (as opposed to law discovery) the law-making took place by way

17 The literature on interest group lobbying of the Supreme Court is extensive and
well known. Two extended studies which clearly indicate how the political activities
of groups have been influenced by the availability of Supreme Court remedies are C.
Vose, Caucasians Only (1959) and D. Manwaring, Render Unto Caesar (1962).
of command or fiat by the judge. We have tended to neglect the most characteristic phenomenon of judge-made law—that the judicial opinion—i.e., the judge's explanation or justification of his decision—serves not only as an "internal" defense related to his craftsmanship, wisdom, etc., but an "external" communication to others (particularly judges, administrators and counselors) as to how they should act in the future. The impact of most of the impact studies has been to keep this phenomenon obscure because most are directed to a court decision (not opinion) viewed as a simple command (de-segregate the schools, don't read the Bible, say certain words to the suspect), and the research task has been to discover the extent to which the command was obeyed and more ambitiously the variables contributing to greater or lesser obedience. Yet in many areas of law, single, simple, clear commands are not issued by the Supreme Court and the crucial question becomes, what messages does the Court's opinion deliver to whom (sometimes different messages are delivered to different audiences or at least different audiences hear the message differently) and how do the audiences modify their behavior as the result of hearing the messages?

It might be added that the less clear the messages of the opinions, the more important become, not single win-loss decisions, but the patterns of win-loss decisions, for these patterns become additional messages clarifying the Court's relatively vague pronouncements. Thus we might combine the study of opinion impact with the impact of win-loss patterns of the sort that have so interested the Schubert school for quite different reasons.

In dealing with the impact of opinions, we are asking about problems less grandiose than the impact of the Court on American life and more subtle than the impact of a no-Bible-reading command on a school district. Basically we are asking questions like: (1) What effect will the last three anti-trust decisions have on the Justice Department's calculation of which prospective prosecution it is most likely to win? (2) What effect will the Court's current doctrines on design patents have on a lawyer's advice to his client on whether to fight it out or settle for the $10,000? (3) What effect will the Court's last three pronouncements on the factors to be considered in permitting rail service curtailments have on the opinion writing section of the I.C. C. and/or the Commissioners themselves? And does the effect on one have anything at all to do with the effect on the other?

Kenneth Culp Davis once wrote a piece in which he found nothing of much use to law in the behavioral sciences and ended by saying he was off to Washington to ask administrators what they really did. More generally, see K. Davis, Discretionary Justice (1969). It is precisely because legal research is so rarely behavioral, that it so rarely deals in the interview and the review of office files, that we know so little of the actual behavior of counselors, clients and administrators. Yet the impact on opinions or doctrines is quite centrally the influence of legal communications on lawyers and, in turn, the influence of lawyers on those they advise. Thus this variety of impact study would seem peculiarly appropriate for behavioral research by lawyers themselves. We know less today about the impact of Supreme Court doctrinal pronouncements on the behavior of those to whom such pronouncements are directed (i.e., about the central stuff of legal activ-
ity) than about the impact of single, very atypical Supreme Court commands on particular school boards, police departments, etc.

One major branch of this area of impact study would be the effect of a given doctrinal pronouncement on the work of the Supreme Court itself and lower courts in terms of what kind and how many cases flow into the courts. For instance, does the fair trial rule or selective incorporation (particularly once it is finally established as all but complete incorporation) lead to a higher or lower volume of rights-of-accused cases and at what levels? Not only questions of sheer volume, but of reversal rates, shifts in proportions of court business, and entry into new areas would be of interest here in terms of impact. Here again, we touch on a traditional area of lawyer’s concern, but it has usually been pursued as an abstract jurisprudential concern over the value of certainty in law rather than concrete research linking leading opinions to the generation rate of litigation.

This impact of opinions area is, of course, most crucial in the non-constitutional areas of the Supreme Court’s business, particularly its relations to the regulatory commissions and other administrative agencies. Very little work has been done on these areas recently, largely, I think, because it is assumed that the Court actually has very little impact on agency practice. Perhaps it is time to re-examine that assumption.

I would like to re-emphasize that we are speaking here largely about office practice (what do lawyers write and say to one another and their clients) and lawyer-client relationships (what do clients do as a result of what they hear from their attorneys). Almost all of the study of the Supreme Court has been aimed at its transmission of messages and almost none at the receipt, translation and action in response to those messages by others (lawyers and clients). This impact area is not readily amenable to “outside” observation (e.g., the manipulation of gross statistics like arrest rates) although some fruitful research could be done by survey methods. It is amenable to interview techniques and particularly to reconstructive research in office files parallel to typical historical and biographical research in “papers.” And it is research that asks the lawyer-researcher to find out what lawyers do—a not inappropriate task.

V. Resistance

To avoid needless complication earlier in this presentation I have left aside one major form of impact study, that of resistance to Supreme Court directives. Of course, the compliance studies are reciprocally non-compliance studies—and frequently uncover quite conscious resistance to the Court, generally speaking, by failure to change existing practices. There are, of course, much more active forms of resistance and in a very real sense such behavior is “caused” by the Court itself. Here again, we can divide the work into the three types previously employed.

There have been a number of studies of the resistance of lower courts—particularly state courts—to particular mandates of the Supreme Court.\(^{20}\)

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We have also had studies of Congressional attempts to reverse particular Court holdings.\textsuperscript{21}

When the studies of lower court resistance to particular mandates and Congressional attempts at reversal are taken in toto, they provide a fairly good summary of the ability of other courts and legislative bodies to check the Court as a whole. The attempts by President and Congress to reverse the Court on particular issues gradually blend into the various Court curbing schemes which are attacks on the Court itself,\textsuperscript{22} just as nullification and interposition movements have sprung from particular issues but grown into general attacks on the Court or the central government as a whole.

Here again, some of the most interesting (at least to me) and largely undone work lies in the area of agency and business resistance to Supreme Court doctrinal stances.\textsuperscript{23} This resistance must be ferreted out of the actual practice of the organizations involved and a good index to some of it might be found in the resistance of decision-makers to legal advice. (One of the greatest problems in this field is that of anticipated reaction. To what extent do lawyers give their clients the advice they want and thus reduce the felt conflict between executives and courts by allowing the executive to think that the courts are not really opposed to what he wants?) It is also possible to discover areas in which segments of business, labor, and government have persisted for many years in their opposition to the Court's position.

\textbf{VI. IMPACT STUDIES AND PUBLIC POLICY}

Impact studies began in political science in the context of process-oriented research. If one were interested in the political process, attention naturally turned to how some political actors affected the behavior of others—process, after all, is interaction. Political science is now turning increasingly to policy—to what comes out of the political process as well as the process itself. This concentration on outputs promises even more attention to impact since it directs attention toward what real effect the Court has on public policy rather than concentrating exclusively on internal decision-making and decision-justifying mechanisms.

This paper has not been structured basically on output lines, but such a structure has been inferred throughout and ought to be more formally presented. Here again, three basic categories can be established for convenience, and those so inclined can draw their nine-place table with single command, doctrinal stance, whole court along one axis and the three categories to follow along the other.

In output terms, the simplest problem to study is the specific actions of decision-making elites in response to Court action.\textsuperscript{24} Moving to the opposite


\textsuperscript{22} See W. Murphy, supra note 21; C. Pritchott, supra note 21; R. Jackson, The Struggle For Judicial Supremacy (1941).

\textsuperscript{23} M. Shapiro, Supreme Court and Administrative Agencies, ch. 3 (1968).

\textsuperscript{24} See the studies cited in note 5 infra.