INTERVENTIONS AND POWER IN JUDICIAL HIERARCHIES: APPELLATE COURTS IN ENGLAND AND THE UNITED STATES

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Despite the advances made in the study of appellate courts in the past several decades, little attention has been devoted to evaluating the role of appellate courts cross-nationally. This article examines appellate courts in England and in America, particularly the English Court of Appeal and the U.S. Circuit Courts of Appeals. The American and English systems are proposed as alternative models of the relationship between courts and their respective political systems in Western common law regimes. Focusing on the intervention behavior of the intermediate appellate courts and their interaction with their respective courts of last resort, the data presented reveal more commonality than divergence in the behavior of the two judicial hierarchies.

Over the past two decades, social scientists have made great theoretical strides in the study of appellate courts, especially those at the intermediate level, increasing our understanding of how courts contribute to the overall performance of political systems (e.g., Atkins, 1972; Shapiro, 1980; Howard, 1981; Wasby, 1979, 1980–81, 1988). The research reported here extends that exploration, providing a cross-national comparison of the extent to which appellate courts in the United States and Great Britain reverse, modify, or remand actions reached in lower forums. The study fo-

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cuses on the activities of intermediate appellate courts because the effects of these courts radiate throughout the judicial hierarchy. Not only do intermediate appellate courts distribute resources, impose burdens, and allocate benefits across a variety of individuals and groups competing for scarce resources; they also centralize, integrate, and supervise activities of trial courts.

Studies of litigation and appeals in America recognize implicitly that American courts are political institutions and that judicial outcomes are political allocations.[1] These recognitions and assumptions reflect the impact of legal realism and sociological jurisprudence that long ago cast doubt on the formal models of law and precedent under which decisions are seen as inevitable deductions arrived at in closed, analytic systems.[2] Because courts perform a highly visible role in the American political system, these assumptions are rarely explicitly acknowledged in contemporary research. In studies on systems outside the United States and in the writings of non-American scholars conducting research on their own systems, however, the nexus between disputes, litigation, appeals, law, and the distribution of political power is, with a few exceptions, all but ignored.[3] We therefore cannot tell whether the relationships observed in American courts arise in judicial systems generally, or whether the American model from which so much of our understanding derives is in fact an exception.[4]

This article examines whether the American judiciary is exceptional by considering the behavior of the civil division of England's intermediate appellate court, the Court of Appeal.[5] I focus on two important appellate court activities. The first is what I

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[1] An excellent compendium of this research is found in Goldman and Sarat (1989).

[2] The fact that sociological jurisprudence and especially legal realism never took root in England suggests some of the contextual differences between Britain and the United States. These differences, combined with certain structural distinctions between the American and English political systems, discussed in Section II, make the English context a useful one in which to examine the role of appeals comparatively.

[3] For an excellent discussion of how courts are treated in the comparative politics literature see Tate (1987). Two useful compendiums of research on non-American settings are Schubert and Danelski (1969) and Schmidhauser (1987).

[4] The exceptionalist issue permeates a diverse literature. See, for example, Hartz (1955) and Aberbach *et al.* (1981). The topic of American exceptionalism served as the basis for an interdisciplinary conference at Nuffield College, Oxford (Conference on American Exceptionalism, 14–16 April 1988). See also Shafer (1989).

[5] The data for this study were assembled from a variety of original and secondary sources. The primary original source is a universe of judgments (N=3,167) handed down by the English Court of Appeal during a three-year period from 1983 to 1985. I assembled these data in 1986–87 at the Supreme Court Library in the Royal Courts of Justice. London. The library contains transcripts of all judgments handed down by the Court, be they judgments of two- or three-judge panels or interlocutory or final appeals. These transcripts were an essential data source since approximately 80 percent of the judgments

shall refer to as the "intervention."[6] An intervention occurs when an appellate court alters, reshapes, or entirely reverses the decision made by a lower forum.[7] Interventions are the most visible means by which an appellate court distributes and redistributes resources within a political system. The second activity emerges from the hierarchical interactions that exist between the Court of Appeal at the intermediate level of the English judicial hierarchy and the Judicial Committee in the House of Lords, the court of last resort in the English system. As Howard's (1981) analysis of American courts of appeals made clear, much of the power in a judicial hierarchy is drawn from the degree of finality that exists for decisions by intermediate level courts. The interinstitutional dynamic between the intermediate and final levels of the judicial hierarchy, examined through the prism of intervention activity, thus yield important clues concerning the roles played by appellate courts.

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are *not* published by the general reporting series, for example, *All England Law Reports*.

Data on 141 variables were coded. 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 from which the appeal emerged; (3) such case characteristics as party initiating the action below, party characteristics, kinds of issues raised, kinds of rights sought protection on appeal, and party appealing the ruling below; (4) such case decision characteristics as number of judges on a panel, which Lord Justices were on the panel, and their votes expressed in terms of both the parties and the type of judgment-opinion produced by each Lord Justice; (5) such postdecision 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 was affirmed or reversed. Data were also assembled 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.

For comparative purposes, data on American courts of appeals were drawn from two sources. The primary one is a data set containing all published decisions handed down between 1966 and 1970 for all circuits (N=19,183). These were compiled by the author and by Professor Justin Green. The data file contains thirty-one variables including case, issue, litigant, and decision-related characteristics, such as the votes of the judges on the panel and the presence (or absence) of concurring and dissenting votes. Some secondary data on appellate litigation in America were drawn from the *Annual Reports of the Director of the Administrative Office of the United States Courts* (United States Administrative Office (yearly)). Additional aggregate data on the English system were compiled from *Judicial Statistics* published annually by the Lord Chancellor's office.

[6] Howard (1981) uses this term to describe actions by the United States Courts of Appeals upon lower forums. Since the concept denotes more about power and control in a judicial hierarchy than, for example, do such terms as reversal and remand, I shall adopt it here as well. As used throughout this article, an intervention is any decision on the merits that is not an affirmation of the lower court ruling.

[7] We should not, however, confuse the process by which an appellate court reverses, remands, or modifies the judgment of a lower forum with the scope of what the intervention may accomplish. Obviously, what may be accomplished by an intervention by the U.S. Supreme Court in terms of policymaking may be quite different from what occurs in other courts of last resort and in intermediate appellate courts.

The first section of the article considers how the concept of the appeal can be used to illuminate patterns of interactions in judicial hierarchies. Particular attention is devoted to the process by which appeals equip appellate courts with the power to intervene in, and thus disturb and alter, results reached in lower forums. The second section outlines the general features of the English and American judiciaries in terms of alternative models that suggest why the two systems may produce different patterns of appellate behavior. The following sections examine the use of appellate power in England, that is, the extent to which the courts of appeal use their appellate power to intervene in, and thus disturb, outcomes reached below. Finally, the article explores how appeals and interventions establish the boundaries of effective power between England's Court of Appeal and the court of last resort in the House of Lords and, more precisely, whether or not we can detect commonalities between the United States and England in terms of the dynamic relationship among appellate courts in two purportedly different systems.

I. FUNCTIONS OF APPEALS

Unresolved conflict fuels the participation of appellate courts in broader efforts at sociopolitical and judicial integration. If we start from this premise, rather than from one rooted in what constitutional formalities dictate, we are better able to conceptualize the commonalities in the roles that appellate courts perform across diverse political systems. An appellate court's basic contribution is error correction, that is, ensuring that forums below the appellate level, both judicial and quasi-judicial, perform their tasks in conformity with rules and policies established by the various authorities in the legal and political system. Error correction is focused appellate activity. It occurs when litigants dissatisfied with a decision reached by one level of the judicial system invoke the authority of a higher level.[8] The goal in such actions, at least for the party bringing the appeal, is to alter results within the confines of existing rules. With error correction, the appellate court decision directly affects only the parties in the immediate lawsuit. But because judicial hierarchies are pyramidal in structure, appellate courts also integrate and harmonize conflicting decisions reached in lower forums and thus move beyond case-specific duties associated with error correction to synthesize outcomes and policy for the system as a whole.[9]

[8] In some systems, however, e.g., those of the U.S. military and traditional China and Japan, appeals are mandatory.

[9] In some respects, supervision is an extension of error correction. Like error correction, supervision regulates the system through vertical control, although the process and structure of appellate review make the control imperfect. But whereas error correction targets one forum below, supervision targets a number of forums within the judicial hierarchy. Thus, error correc-

Appeals as Politics

Error correction and supervision functions of appellate courts are rooted in familiar models of hierarchical management and policymaking. Although useful for understanding relationships among courts within a judicial system, such models provide little insight into what courts actually do when they exercise power. To see these more subtle uses of judicial power we must think about courts less as management hierarchies, although they undoubtedly share some of those characteristics, and more as political institutions that contribute to the maintenance of political regimes. Although American models routinely recognize judicial processes as political action, it is less obvious how in other systems political and judicial functions overlap and integrate.

Shapiro (1980) has provided useful guidance for cross-national thinking about courts by proposing that appeals be conceptualized as a mechanism through which centralized governmental institutions foster regime loyalty by dispensing "patronage" and by "doing favors" when citizens challenge the validity of actions taken by lower courts. According to Shapiro, appeals dispense two types of political resources. The first are divisible benefits, the tangible and intangible rewards obtained by parties who, to gain some immediate advantage, have sought to have the state intervene. The second are public, or nondivisible goods, the systemwide benefits distributed when courts, as agents of the state, dispense justice, correct errors, and encourage legitimacy for the central regime. Shapiro suggests that appeals are intrinsic to basic system functions inasmuch as most regimes, of whatever stripe, provide a mechanism for centralized, hierarchical review of judicial decisions.

Viewed in this context, the appellate process itself, and the outcomes of the process, are seen to be compatible with traditional views of what political systems do and how they are maintained. Thus, the dispensing of divisible benefits through appeals is part of a distribution network in which the state authoritatively allocates a variety of values, tangible and intangible (Easton, 1953). Moreover, the process of determining who gets what, when, and how, as individuals and groups compete over scarce societal resources, is essentially political (Lasswell, 1958). But the appellate process does more than dispense benefits and burdens, although this process is undoubtedly central to its mission. Viewed more broadly, appeals, like litigation generally, serve as a highly individualistic, or micro-oriented, form of political participation since they represent an extension up the hierarchical chain of a process in which

tion entails a narrow use of vertical power, whereas supervision combines vertical and horizontal influence. But supervision can also encompass more complex forms of error correction, as when the appeal triggers changes in precedent, procedures, law, and policy. This moves us closer to the creative power sometimes exercised by appellate courts.

conflicts that might otherwise remain private move to a public forum (Zemans, 1983) and where the state becomes a party in resolving the conflict. As a form of participation, litigation generally, and appeals particularly, involve situations in which the state is called to manage conflict according to rules deemed desirable to the public order. In fact, litigation and appeals provide an intersection of activities that are viewed by citizens and groups, on the one hand, and the state, on the other, as desirable to their own needs. The state, of course, has a stake in managing societal conflict and, in Shapiro's terms, dispensing divisible and nondivisible goods. On the other hand, citizens and groups have, through litigation, a relatively low cost form of action for drawing the state into private conflicts for the benefit of one side or the other. Thus litigation is a variant of the larger political game but played out in microcosm and made easier because the participant need not assemble the power of collective action that is essential to more traditional types of political activity. Appeals, as a specialized subset of litigation, therefore represents a confluence of citizen and group participation, on the one hand, and activity by the state, on the other, played out one step higher up the judicial hierarchy.

Appeals and Interventions

Within this context, one in which appeals serve a variety of functions for the judicial hierarchy specifically and for the political regime generally, it is an appellate court intervention that draws our closer attention. In some respects, of course, an affirmation is also an intervention, though one decidedly more benign than a reversal or even remands and modifications. Like interventions, affirmations require dissatisfied parties to have sought appellate review in the first place, and thus to have initiated the kind of action necessary to prompt review from above. Moreover, like interventions, affirmations present opportunities to an appellate court to fashion new policy, alter precedent, and interpret statutes while maintaining the ruling reached in a lower forum. Yet, the outcome of an affirmation does not, by definition, establish conflict between different tiers of the judicial hierarchy. Thus, interventions by intermediate appellate courts are decidedly more interesting because, by injecting overt, visible conflict into the judicial hierarchy, they alert us to a variety of dynamic intercourt transactions involving, for example, the kind of issue raised, the kind of parties involved in the litigation, and especially the characteristics of the appellant who seeks to overturn the ruling below and the amount of conflict between forums when a case has been heard by more than one court.

We can also examine the consequences that flow from an intermediate appellate court having disturbed a ruling below. Some of these affect the court itself. For example, studies show that in-

tervention behavior is correlated with dissent within the appellate court (Richardson and Vines, 1970; Songer, 1986). However, the decision to reverse may be related also to more subtle forms of conflict, such as the casting of concurring votes or writing of concurring opinions, in which judges distance themselves from the view expressed by the majority. In addition, intermediate appellate courts sometimes produce "dissensus," that is, divergent results across panels (Atkins and Green, 1976), although whether intervention activity encourages dissensus remains, at this point, an open question. Intervention may also affect relations higher up the appellate hierarchy by encouraging the court of last resort to review the intermediate appellate court's decisions. The process of final review may, in fact, inject additional conflict if a reversal of the intermediate appellate court by the court of last resort reinstates a lower court decision that the intermediate appellate court reversed, or if higher rates of dissenting and concurring behavior occur on the final appellate court when intervention decisions are made.

Assessing Interventions

By viewing these transactions within and among courts as a network of hierarchical relationships, we see how a reversal by an appellate court, especially one made at the intermediate level, is a catalyst for a variety of actions within the judicial system. But an intervention is also a specialized type of judicial allocative resource since the action imposes burdens and benefits on parties and, more precisely, redistributes whatever burdens and benefits the lower forum had allocated.[10] Assuming, thus, that appeals, and espe-

[10] Parties who win as a result of the reversal, and especially those who seek the appellate intervention, benefit in a variety of ways. They benefit monetarily through contract enforcement, through damage awards, and through property distributions, both real and tangible; they benefit in their freedom and security if the appeal is raised by a criminal defendant; or they benefit from love and affection in child custody and visitation disputes. Conversely, losing parties often give up such benefits and resources; thus appellate decisions not only allocate things of value, they also redistribute the resources being contested. In terms of extending our understanding of appellate courts cross-nationally, the important question may not be whether courts distribute such benefits, but whether a pattern exists to the distribution observed.

A reversal, moreover, is also an indirect or secondary allocation from the perspective of potential appellants who may, in turn, seek the allocation of appellate benefits if they perceive a reasonable likelihood that a court will in fact intervene in the distribution of resources already allocated by the trial court. A frequent reversal rate may thus be an inducement to future appeals because it suggests that some undefined point exists at which the probability of success is high enough to warrant the expenditure of further resources by the litigant. Conversely, a low reversal rate may inhibit appeals by encouraging only those few litigants with the strongest cases to spend the necessary resources to obtain the benefit distributed by the appellate court. Finally, parties whose cases are already on the court's calendar may respond to short-term changes in the distribution of appellate resources by negotiating settlements in civil cases or by withdrawing appeals already filed. Interventions can thus be viewed as a benefit being sought by parties for their own advantage and as a resource dis-

cially interventions, serve important functions for judicial and political systems, we can examine intervention rates to assess the extent to which formal rules and the legal culture permit the appellate court to reshape and refashion outcomes through interventions. Appellate courts that rarely or never intervene engage in an entirely ritualistic and symbolic review process. They do not have the power to affect judicial outcomes, nor can they produce divisible benefits for the broader political system. With the real control of the contours of the conflict management remaining with the judiciary at the trial level, no regulatory error correction occurs from above (either because it is unnecessary or because errors are not corrected), and there is no supervision to either coordinate lower court activities or establish new policies.

Appellate courts with very high intervention rates routinely participate in the judicial process and are active in determining the burdens and benefits being distributed in the system. This suggests a very different model of the appellate process, one in which appellate courts can wield significant power. A relatively high intervention rate alerts us that an appellate court is engaged actively in restructuring the burdens and benefits in the judicial system. How we interpret such activity depends, in large measure, on the context in which it occurs. For example, a particularistic appeal in an appeal de novo system provides ample opportunity for the appellate court to shape the parameters of outcomes in the system, although the narrow limit to the review process does not readily encourage the court to set systemwide substantive policy. Alternatively, a court with general scope over lawmaking functions, such as the U.S. Supreme Court, is well positioned to establish broad policy for the judicial and political systems in which it is embedded. Thus, the frequency of intervention, taken by itself, does not provide a complete picture of how the appellate power is put to use because frequency per se says little about the scope and intensity of the review process. Yet intervention rates provide the initial clue to role of an appellate court in the larger system. Thus, in considering the role played by appellate courts in these two judicial systems, we compare here the intervention rates in English and U.S. courts of appeal.

II. APPEALS AND POLITICS IN ENGLAND

English and U.S. federal appellate courts and their respective political and judicial systems represent virtually alternative types, or models, in common law systems. U.S. appellate courts are, by most reckonings, highly integrated into the political process. A generation of scholars has now made it part of the conventional wisdom that factors such as the process by which judges are re-

tributed by public institutions, the flow of which can be regulated like any other commodity to structure the process of litigation.

cruited and what influences their decisions, the issues raised in litigation, the scope of the judiciary's actions, and the ways in which the judiciary serves as an alternative forum for individuals and groups to seek political objectives keep the U.S. judiciary highly politicized.[11] It is, unclear, however, whether the close connection between judicial and political activity, characterized as "the U.S." model, applies to other systems as well.

English courts, for example, are said not to serve political functions or are viewed, at best, as marginally relevant to the political system.[12] Those who write extensively about the judiciary argue that English courts in contrast to those in the United States are not involved in making public policy and thus generally do not contribute to the allocation of political resources. For example, Stevens (1978: xvi) observed that English courts do not assume the creative role out of the tradition of Holmes and Cardozo. One American legal scholar, comparing the two judicial systems, argued that "judge made law plays a much greater part in the government of the American people than of the British;" that judges in America are "less attentive to the letter of the law or to precedent;" and that American judges "move freely in wider orbits" (Cox, 1976: 1).

Differences in the relationships between the U.S. and English judiciaries and their respective sociopolitical systems and cultures are usually explained by differences in the structural characteristics of the two systems that are said to produce divergent orientations of the judiciary. For example, since England is governed by a parliament, which fuses the executive and legislative functions in parliamentary majorities, a prime minister, and a cabinet, its political system lacks a separation of powers principle through which

[11] See the research compiled in Goldman and Sarat (1989).

[12] That this assumption is *de rigueur* among those who write on English politics is apparent from how the judiciary is treated in most general texts. For example, in the preface to the first edition of one text, Punnett (1969) claims to "give a detailed and all-embracing account of government and politics in . . . all material . . . that helps towards an understanding of the British political system as it operates today." Through its fifth edition (1986) the book fails still to include a chapter on courts and judges. In fact, the term "judges" is not contained in the index, and the term "courts" is referenced in only ten pages of the book, six of which are passing references within nonadjacent pages. Likewise, Anthony Birch's (1983) text ignores courts and judges, although he devotes some attention to civil liberties in Britain (pp. 235–53). Both Beloff and Peele (1985) and Carter (1972) have chapters on the structure of the English judiciary, but neither addresses whether, or to what extent, courts and judges participate in the political process. Rose (1985: 136–38) offers a brief discussion of courts designed only to argue that the judiciary is marginally relevant for the maintenance of political authority in England. To a large extent, the content of texts reflects the interests of scholars in the field. It is not surprising, then, that mainline political science journals published in Britain are devoid of research that treats the judicial system as part of the political process, that places judges among the network of institutional elites, or that interprets law as a subset of political activity. As one political scientist observed, "In studies of British politics the judiciary constitutes but marginal consideration" (Norton, 1984: 309).

judicial power could develop strong independent roots (Jackson, 1977). Thus, unlike the U.S. judiciary which participates actively in policymaking, because of the doctrine of parliamentary supremacy and the development of the administrative-welfare state, English appellate courts exist on the periphery of political responsibility (Shapiro, 1981). In addition, England has no written constitution that recognizes an independent judiciary with a status coequal with executive and legislative functions. Finally, English courts lack the power of judicial review and thus cannot act politically by negating on constitutional grounds the policies made by the legislature. In short, then, the structures that encourage, the tools that equip, and the legal-political culture that anticipates that the U.S. Supreme Court (and the judiciary generally) will be politically active are lacking in the English system.

Contextual Determinants of Interventions

How should these differences affect the use of appellate review power? The answer to this question depends largely on which facets of the English legal and political system we focus our attention. One is that the context of judicial decisionmaking in England dissuades appellate judges from exercising the kind of power that injects much conflict into the judicial hierarchy. For example, the English judiciary is small in absolute and relative terms, when compared to the American, and it is embedded in a country with about the same land area as New York State.[13] Much of the sociocultural and economic diversity in the United States that encourages institutional fragmentation and decentralization is missing in England. Where America is heterogeneous, England is relatively homogeneous; where a common thread to American political history is the countervailing effects of centralization and decentralization, in England centralization is taken as a way of life with occasional concessions made to local necessities; where Washington is but one city competing for power with New York, Houston, Dallas, Chicago, and Los Angeles, not to mention fifty state capitals, London dominates England politically, culturally, and economically as no U.S. city probably ever has.

To some extent, the contrasting features of centralization and diversity are reflected in the structure of the intermediate appellate courts in each country. In the United States, for example, the intermediate federal appellate function is carried out by 155 judges in twelve regionally based circuits, a structure created in 1891 to accommodate competing national and state interests. These federal appeals court judges, while hardly a cross-section of American society, are to some extent diverse in political backgrounds and gender, race, and religion, and exhibit a variety of occupational

[13] England and Wales contains 50,332 square miles. By contrast, the state of New York contains 49,576.

paths and career socialization experiences. They are bound together rather loosely by all having been attorneys (though not necessarily practicing ones), but not all have been judges prior to appointment to the appellate bench (Goldman, 1987). By contrast, the English intermediate appellate function is both highly centralized and integrated. A single Court of Appeal with twenty-two Lord Justices of Appeal sits, along with the central civil trial courts constituting the High Court, in the Royal Courts of Justice in London.[14] Lord Justices of Appeals do not show the diversity of their counterparts in America. They are all male and all white; all have come to their position from the High Court below, all have been career barristers, and virtually all went to Oxford or Cambridge. In addition, most went to exclusive private schools, and all were professionally socialized by attendance at one of the four Inns of Court, which are located within a few blocks of the Royal Courts of Justice, where they remain members and where most remain active.[15]

These differences in court structure and composition suggest that the need for error correction, integration, and supervision in the two systems may be different. We may assume, for example, that the pluralism and fragmentation intrinsic to the U.S. system, embedded formally by the constitutional architecture and supported informally by political diversity, generate a vertical and horizontal disaggregation that encourages appellate intervention. By contrast, we may assume that the compact, homogeneous, and centralized English judicial system generates less diversity in trial court outcomes and thus requires less appellate intervention. In short, the context in which each judicial system operates suggests that the structure of English law, politics, and geography minimizes the need for frequent interventions, at least in comparison with what is observed in the United States.[16]

Yet some contextual features of the English legal culture suggest that the intervention rates in English appellate courts should be high notwithstanding the distinguishing systemic features just noted. For example, the strategies and tactics of litigation in England affect the kinds of disputes that reach the Court of Appeal. This is not so much a question of jurisdiction, since large numbers

[14] For a more detailed discussion of the Court of Appeal and its role in the English judicial system see Atkins (1988).

[15] Information about the social background of Court of Appeal Lord Justices was assembled by the author from *Who's Who in Great Britain*. For a discussion of judicial recruitment in England and a comparison with recruitment of American appellate judges, see Atkins (1988–89). An excellent discussion can also be found in Tate (1975).

[16] This is not to say, of course, that the English system is so well integrated that the need for error correction and supervision all but disappears. There is, in fact, diversity in England as there is in any political regime, and not all judicial functions take place at the central law courts in London. But in a comparative sense, the necessity for intervention should, according to this model, be relatively low.

of cases go to the Court of Appeal as a matter of right,[17] as much as one of how the English system of allocating costs in litigation can affect the kinds of disputes raised on appeal. For example, in America, appeals may be worth pursuing because of the contingency fee system. In addition, the actual direct costs of the litigation (fees to the court and to attorneys, for example) are paid by each party. In England, with no contingency fee system, appeals are never "free." More importantly, losing parties must pay both their own costs and those of the winning party. Litigants must thus analyze carefully the likelihood of success because a frivolous appeal with little probability of success can be quite costly. Thus, only those appeals with a strong substantive or procedural claim are likely to be pressed in the Court of Appeal. At the same time, if one side is pressing an appeal, the other side may be more willing to settle because the appeal signals that the appellant is willing to press a claim despite the threat of costs if he loses. Thus, litigation that moves to the Court of Appeal goes through a series of filters that alters the distribution of the kinds of disputes heard as a matter of right by an appellate court hearing large numbers of appeals. The most important effect in terms of appellate outcomes is that large numbers of otherwise trivial appeals that are likely to be affirmed are diverted from the system. The appeals that survive are more likely to present the Court of Appeal with a distribution of disputes where both sides have reasonably strong claims. These processes thus establish a context where the court is more likely to alter the decision reached in the lower forum.[18]

If the distribution of appeals raised establishes a context encouraging intervention, the Court of Appeal is also likely to alter the lower court's judgment because of its considerable review powers. Once litigation moves to the appellate level, and both sides are willing to risk having to pay the other side's costs, the Court of Appeal has wide powers to determine outcome, including the power to "rehear."[19] In a rehearing the Court of Appeal can enter any order that was within the scope of the court below, be it on a principle of law or of fact, and can address questions relating to the use of the discretion exercised below regardless of whether correct principles of law were applied and facts were correctly employed.[20] The court's scope of review is thus considerably greater than that of its U.S. counterpart. The Court of Appeal can, like a

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[17] Some appeals require permission of the trial court, or leave to appeal, but most cases move to the Court of Appeal as a matter of right.

[18] For a discussion of factors affecting litigation strategy and the characteristics of settled versus unsettled disputes, see Priest and Klein (1984).

[19] Rules of the Supreme Court, 1965 (Order 59, Rule 3). This and later references to the rules governing the operation of the Court of Appeal are drawn from *The Supreme Court Practice*, 1982 and its annual appendices published by Sweet and Maxwell, London.

[20] Rules of the Supreme Court, 1965, 59/1/13.

U.S. federal circuit court, set aside awards in tort claims because of procedural error. But the court can also increase or decrease the size of the award when it is claimed that an award is excessively high or unreasonably low. Likewise, in domestic disputes the Court of Appeal can reverse a finding because a wrong principle of law was applied or the correct principle was wrongly applied. It can also go far beyond this basic power and reallocate personal property in marriage dissolutions, rework item by item child support, alimony, and maintenance awards and change a parent's visitation conditions after a separation has been decreed.

III. THE EMPIRICAL CONTEXT OF INTERVENTION ACTIVITY

If we base our predictions about interventions on the open-textured structure of appellate authority, we would expect the English Court of Appeal to intervene more often than would a U.S. federal court of appeal. Rather than expecting the English context to constrain the use of intervention power and to reinforce the court's posture at the periphery of a resource allocation function, we can hypothesize that the tactics peculiar to litigation activity in England, as well as the wide latitude on which the Court of Appeal can act, interact to establish ample opportunities for the exercise of its intervention power.

To what extent does the civil division of the Court of Appeal use its intervention power? And more important, what inferences can we draw from the observed levels? Figure 1 shows the intervention activity for the Court of Appeal from 1952 to 1983. These data reveal a moderate intervention rate, averaging around 35 percent across the thirty-one year period and a remarkable degree of consistency through the three decades.[21] How we interpret this rate depends, of course, on what we observe in other appellate courts. If we use the U.S. federal appeals courts as the base for comparison, the intervention rate observed in the English Court of Appeal is relatively high. The reversal rates for the federal appeals courts over the eleven-year period from 1977 to 1987, presented in Table 1, average 16 percent. As in the English context, intervention rates in U.S. appeals courts are quite stable over time. Of course, these aggregate statistics do not indicate the amount of variation in intervention activity across the circuits. To examine this dimension, Table 2 arrays reversal rates by circuit in fiscal years 1984 to 1987. These data show relatively little variation

[21] Of course, there are problems in drawing inferences about the role of the English Court of Appeal on the basis of such aggregate data, which are sometimes subject to the vagaries associated with large-scale collection of governmental statistics. For this reason I compare the intervention rates as portrayed by the aggregate statistics with the transcript data for the three-year period from 1983 to 1985. These data show an intervention rate of 36.1 percent, or virtually the same rate as that indicated in the aggregate statistics.

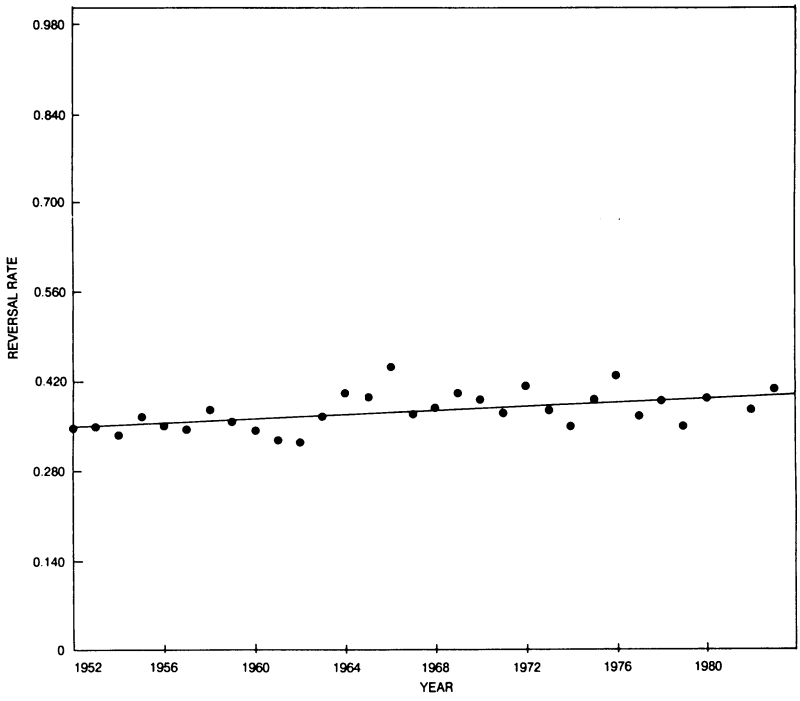

Figure 1. Reversal rates for Court of Appeal. United Kingdom. 1952–1983. (Data assembled by Atkins from *Judicial Statistics,* published annually by the Lord Chancellor's office.)

across the twelve federal circuits, although some appeals courts show a consistently high rate of reversal across the four-year period. No circuit shows an exceptionally low rate of intervention, at least in comparative terms, the lowest figure being 11.9 percent for the Second in 1986 and 1987.[22]

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[22] As we did for the English appeals court, it is useful to assess the intervention activity in the U.S. circuits from more than one vantage point. The data published in the annual review of federal judicial activity have indicated that American appeals courts seldom intervene. Yet other data show somewhat higher rates of intervention. For example, Howard's (1981) study of the Second, Fifth, and District of Columbia circuits shows an overall reversal rate of 21 percent across the three courts. If we take the broader perspective on intervention behavior and include (as we should) "mixed" decisions, the rate climbs to 26 percent (p. 38). Yet this broad picture still loses much information since Howard discovered considerable variation across the circuits and across the kind of forum which was the subject of appellate review. Examining circuit behavior in a more detailed way, Howard found that the Fifth Circuit "disturbed" district court rulings at a rate of almost 30 percent, and that each of the three circuits disturbed the appeals raised from various boards and commissions at a uniformly higher rate than district courts—30, 31, and 39 percent for the District of Columbia, Second, and Fifth circuits respectively (Howard, 1981: 44–46). The data compiled by Atkins and Green (1976) for all federal appeals courts show a similar pattern. They indicate that appeals courts reversed courts in 25 percent of the cases decided on the merits, a rate considerably higher than what the aggregate data published by the Administrative Office's annual reports show, but more important, they indicate that interven-

Table 1. Reversal Rates in Cases Decided on Merits (After Oral Hearings on Summation or Briefs) in United States Court of Appeals, 1977–1987

Year	*N* Disposed	Reversal Rate (%)
1987	18,502	13.5
1986	18,199	15.5
1985	16,369	15.9
1984	14,327	16.3
1983	13,217	15.9
1982	12.720	16.1
1981	12,168	17.7
1980	10,608	17.4
1979	9,361	16.5
1978	8,550	17.3
1977	11,400	14.6

NOTE: 1984 (period ending 30 June 1984) shows reversals for federal circuit only. Comparable data for the circuits not presented.

SOURCE: United States Administrative Office, *Annual Reports of the Director of the Administrative Office of the United States Courts.*

Table 2. Reversal Rates by Circuit (After Hearing or Submission)[a] in United States Courts of Appeals (in Percent)

Circuit	Percent Reversed in 12 Months Ending June			
	1984	1985	1986	1987
D.C.	15.9	14.1	16.1	14.2
First	20.6	29.4	20.0	23.1
Second	16.4	13.9	11.9	11.9
Third	13.3	18.1	15.0	15.0
Fourth	22.2	13.9	12.2	10.7
Fifth	18.9	17.2	17.8	14.3
Sixth	17.4	17.7	17.1	13.3
Seventh	12.4	12.4	12.7	12.1
Eighth	16.5	12.5	14.0	12.5
Ninth	16.5	18.2	15.6	13.7
Tenth	16.3	14.0	15.0	13.1
Eleventh	13.0	13.4	18.1	13.4
All circuits	16.3	15.9	15.5	13.5

SOURCE: United States Administrative Office, *Annual Reports of the Director of the Administrative Office of the United States Courts.*

[a] Terminations on the merit

On the basis of these intervention data, the English Court of Appeal appears relatively active in restructuring outcomes. Yet our interpretation may still be misleading because it does not take into account how the different array of issues addressed by the appeals courts in each system may contribute to greater and lesser propensity to intervene. To some extent, the jurisdictional standing of each court in its respective system, one federal and the other unitary, makes complete control over issue distribution difficult. It is possible, however, to sort criminal from noncriminal appeals in the U.S. circuits and thus take into account whether the lower intervention rate by the U.S. courts is, in any appreciable way, a function of their criminal jurisdiction.

Table 3 addresses this issue by displaying reversal rates obtained from the administrative office data for each of the U.S. circuits in civil and criminal cases that were decided with hearing. As these data show, the reversal rate for the courts' civil work (19.4 percent) is considerably higher than for their criminal work (8.5 percent). In addition, civil cases show a broader array of reversal rates, ranging from a high of 33.4 percent for the First Circuit to a low of 14.9 percent in the District of Columbia and Tenth circuits. In fact, the lowest rate of intervention in the civil side is still higher than the highest rate of reversal in criminal cases.[23]

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tion activity is higher and, in fact, comparable to what Howard found when modifications (mixed) and remands are included. Indeed, we see that the appeals courts assume a relative activist intervention stance vis-à-vis agency appeals, reversing or modifying in more than one-third of the decisions.

[23] A second perspective again aids in interpreting the relationship between issues and intervention behavior. The Atkins and Green (1976) data show also that courts of appeals are less likely to intervene in appeals raising criminal and constitutional issues. Cf. the discussion in Davies (1982) and Dubois (1988). On average, courts of appeals intervene in criminal and constitutional appeals 23 and 30 percent of the time, respectively. The average intervention rate across all circuits in civil appeals, by contrast, is 36 percent. This pattern holds in most circuits. Exceptions are in the First, Fourth, and Fifth circuits, where issues raising constitutional claims were the subject of relatively intense intervention activity. As a more general pattern, the appellate circuits showed as much of an interventionist posture in agency appeals as they did in noncriminal appeals from the district courts, and in some circuits, the Sixth and Eighth, particularly, the rate of intervention was sharply higher in agency appeals.

In making these comparisons, however, we must be alert to the possible impact of selective publication in the United States and England. The English Court of Appeal data are based on all published and unpublished decisions. Intervention rates on the U.S. courts of appeals based on Administrative Office data include dispositions for all cases with hearings. The Atkins and Green court of appeal data are based on cases published in the *Federal Reporter*; thus if unpublished decisions accounted for a significant portion of cases and were more likely to be affirmations than reversals, the higher intervention rates observed in the Atkins and Green data might reflect bias introduced by selective publication practices. It is unlikely that such practices account for much, if any, of the disparity we observe. For example, many courts of appeals reversals remain unpublished, although there is much variance across the circuits (Steinstra, 1985: 41–43). Our data cover 1966–70, and selective publication was used only to a limited extent in a few circuits prior to the 1970s. Reynolds and Richman (1978, 1981) provide an excellent account of se-

Table 3. Reversal Rates (in Percent) in United States Courts of Appeal by Circuit and by Subject Matter (1985)

Circuit	Civil		Criminal	
	N	% Reversed	*N*	% Reversed
District of Columbia	435	14.9	54	9.2
First	451	33.4	113	14.1
Second	918	20.2	368	6.5
Third	1,108	21.7	279	7.5
Fourth	1,245	15.8	308	9.4
Fifth	1,617	18.6	367	11.7
Sixth	1,392	20.2	369	8.6
Seventh	845	15.5	290	4.1
Eighth	991	16.7	275	5.8
Ninth	1,647	24.9	549	11.6
Tenth	696	14.9	215	11.6
Eleventh	1,278	16.8	558	5.9
All circuits	12,624	19.4	3,745	8.5

SOURCE: United States Administrative Office, *Annual Reports of the Director of the Administrative Office of the United States Courts.*

Intervention by the Court of Last Resort

We can thus see that the English intermediate appellate court is relatively active in supervising actions of lower courts and tribunals. Another set of aggregate comparisons allows us to place the absolute scores in context: comparison of the intervention rate for the intermediate appellate court in each system with that of the court of last resort. Because of the politically intensive role adopted by the U.S. Supreme Court, we expect the U.S. federal model to be characterized by relatively low intervention rates at the intermediate level and high intervention rates in the court of last resort.

The data charted in Figure 2, presenting intervention rates for the Supreme Court over a twenty-seven-year period in cases decided on the merits across the 1953–79 terms, supports this expectation.[24] There is much in this figure that points to the Supreme Court's unique capacity to supervise and control actions in lower forums. In the first place, the Supreme Court intervenes at a considerably higher rate than other English or U.S. appellate courts (an average rate of intervention of 66.6 percent across the twenty-seven terms). Because the Supreme Court has all but complete

lective publication in U.S. circuits. For a discussion of selective publication in England see Atkins (1989).

[24] These data were assembled by the author.

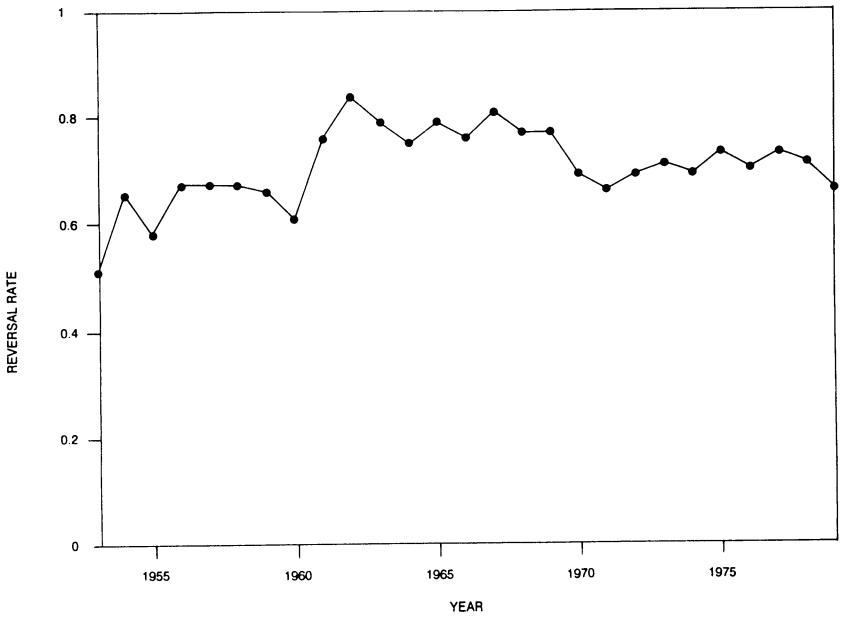

Figure 2. Reversal rate (in percent) in United States Supreme Court, 1953–1979

discretionary power over which cases it will hear, it may not be surprising that it intervenes so often in the cases it elects to hear.

Yet the fact that the Supreme Court reverses at such a high rate indicates that its power to decide which cases it will hear and its ability to alter in some fashion what has occurred below draws controversial cases to this "storm center."[25] It would be possible, of course, for the Court to combine its impressive powers to shape policy with more frequent affirmations of lower court actions. Yet this is not what we see. Rather, the exercise of power by the contemporary Supreme Court is manifested through an almost routine exercise of intervention in actions arrived at below.[26]

Still, the overall frequency of intervention does not tell all. By displaying the reversal rate longitudinally, we capture yet another dimension to the Supreme Court's exercise of appellate power. Intervention rates do not meander about the mean, as they do for the English Court of Appeal and for the U.S. federal appeals courts. Rather, the pattern for the Supreme Court is decidedly nonstationary over time and very much curvilinear. The low point in this trend (46 percent) at the first data point corresponds to the initial term of the Warren Court. The high point (79 percent) is reached during the 1962 term, and the intervention rate remains

[25] The analogy is Holmes's, the book title is O'Brien's (1986).

[26] As used here, an intervention is any decision that disturbs a lower court ruling by reversing or remanding, in whole or in part. See also notes 6 and 7.

high through the 1960s before it reverts after 1969 to a level closer to the mean. This pattern, in fact, corresponds almost directly with important ideological changes that occurred on the Supreme Court over this twenty-seven-year period, encompassing the early (1953–61) and late (1952–68) Warren Court and the first ten terms of the Burger Court (beginning in 1969). These data are, of course, aggregate figures tracked over time, and we would not want to infer too much in terms of what accounts for the patterns without doing a deeper analysis of the Supreme Court itself. Yet these data do help us understand that the Supreme Court's exercise of intervention power, although relatively high across the twenty-seven-term segment, is seemingly tied to an ideological component, with a more intensive use of the reversal power corresponding to the terms usually associated with Warren Court activism.

To a considerable extent the politically intensive role of the Supreme Court in the U.S. system may encourage this high rate of intervention. In addition, these data suggest that as a final appellate court with all but complete discretion over its agenda, the Supreme Court functions in a context that encourages interventions. Yet what we might assume to be a general pattern based upon the U.S. federal relationship does not necessarily hold in other contexts. Available evidence suggests that this pattern is not characteristic of courts of last resort generally and clearly is not characteristic of all U.S. courts of last resort.

The most common court of last resort is the state supreme court. Data from various sources indicate that state supreme court intervention rates are not very high. For example, a study of sixteen state supreme courts tracked over three periods encompassing the one hundred years from 1870 to 1970 found, on average, a reversal rate of 38.5 percent (*Yale Law Journal*, 1978). In addition, while some variation exists among state supreme courts both cross-sectionally and longitudinally, only a few courts have exceptionally high or low scores. Within this distribution, the highest rates are 58.1 percent (West Virginia) and 43.1 percent (North Carolina) and the lowest is 28.8 percent (Minnesota). The highest rate for any of the sixteen supreme courts for any period was 67.3 percent for West Virginia (1940–70), but this rate of intervention was truly exceptional when compared to the rates for the other courts over time. In fact, West Virginia is the only supreme court with an intervention rate above 50 percent in each of the three periods, and the reversal rate for most courts remained very close to the mean over the entire hundred-year period. Moreover, while intervention rates for some supreme courts changed over time (e.g., Kansas's declined from 49.1 percent in the 1870–1910 period to 24.8 percent in 1940–70), the rates exhibited by most courts were relatively stable.[27]

[27] The data used in the Yale study were drawn from sixteen states sam-

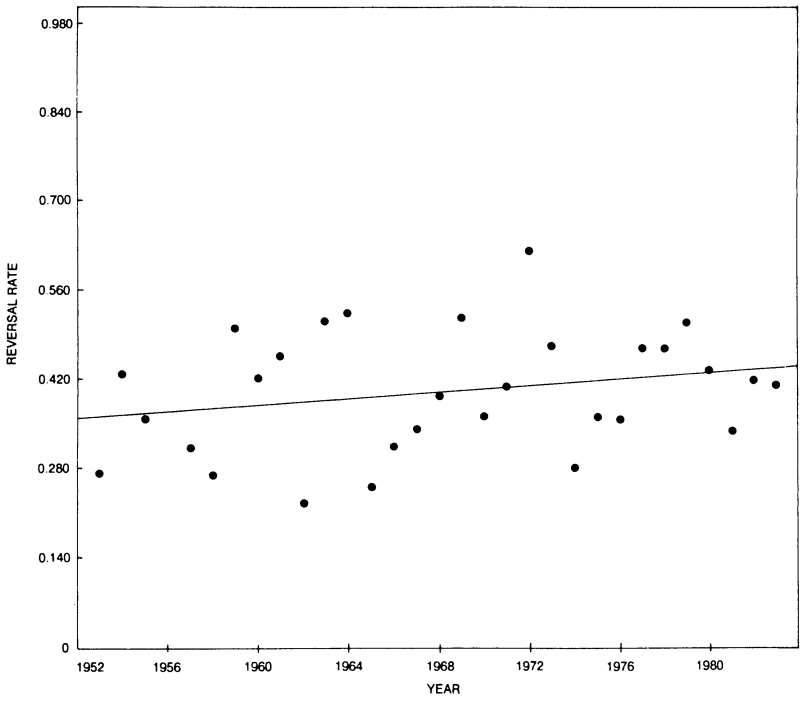

Figure 3. Reversal rate (in percent) for House of Lords. United Kingdom. 1952–1983. (Data assembled by Atkins from *Judicial Statistics,* published annually by the Lord Chancellor's office.)

Intervention rates of courts of last resort may also be affected by the presence or absence of intermediate appellate courts and the latitude of discretionary control exercised by courts of last resort. In the U.S. federal system the court of last resort, armed with a high degree of discretionary control and a complex network of intermediate appellate courts, all with open-textured jurisdiction, intervenes often and the intermediate appellate courts intervene infrequently.

The U.S. state courts of last resort illustrate the impact of discretionary control. The *Yale Law Journal* (1978) found that state courts of last resort which hear cases as a matter of right reverse, on average, at a 36.8 percent rate, while supreme courts which decide cases with discretionary controls intervene an average 50 percent of the time. While the Yale study found no difference in the supreme court reversal rates in systems with intermediate appellate courts below and those courts in systems with no second-tier appellate structure, Atkins and Glick (1976) found that supreme courts in two-tiered systems reversed, on average, 33.3 percent of

pled over a hundred-year period. They are, nonetheless, representative of intervention activity in state courts of last resort generally. For example, fifty state data used by Atkins and Glick (1974, 1976) showed comparable intervention rates by state courts of last resort.

the time, whereas courts of last resort in three-tiered systems reversed in almost half their decisions (49.2 percent).

The English Hierarchy

We next examine the relationship between the intermediate and final appellate courts in England. Figure 3 charts the intervention activity of the Judicial Committee in the House of Lords from 1952 to 1983. These data are remarkable in a number of respects. First, the average rate of intervention (a fairly stable rate by and large) is very low compared to the U.S. Supreme Court's intervention rate and is comparable to the intervention rate in many state supreme courts, even those in three-tiered systems; but perhaps more important, the intervention rate in the court of last resort is not much higher than the intervention rate in the civil division of the Court of Appeal at the intermediate level.[28] These data alert us to the diverse roles performed by appellate courts in the Anglo-American context. They show, first, that the Court of Appeal not only intervenes more than U.S. appeals courts but also accounts for about the same amount of intervention activity as we observe in England's court of last resort. In addition, they show that the U.S. model of judicial power does not necessarily represent the way judicial power is used in other systems.

The English experience suggests that discretionary control per se may not always encourage intervention. The process that governs how cases come to the House of Lords judicial committee, fascinating in the implications it holds for understanding the relationships among appellate courts, is fundamentally different from the process that operates in the U.S. Supreme Court. Appeals to the House of Lords are not by right. Rather, "leave to appeal" is required—litigants must obtain permission by the court that has made the decision below before they can seek rehearing in the House of Lords. Leave is granted by one of two mechanisms. Usually leave is granted by the court below (in most cases the Court of Appeal) on the request of one of the parties. With this mechanism, discretionary control over a final appeal still exists, but discretion is exercised by the court below and not the court to which the appeal is sought. In effect, the agenda of the court of last resort is determined by the intermediate appellate court. There is, however, an alternative route. If the court rendering the judgment refuses a litigant's request for leave to appeal, a separate petition can be sought in the Appeal Committee, a subcommittee of Law Lords that entertains leave petitions in those situations where a lower court has denied the request. If the Appeal Committee

[28] The consistency in the House of Lord's intervention rate through this extended period is remarkable given some of the activist Law Lords who participated in decisions though some of these years. For an excellent discussion of the Law Lords see Stevens (1978).

grants leave, the leave denied below is, in effect, reversed, and the case moves to the Law Lords for consideration on its merits.

Although this process does not distinguish appeals in terms of those which occur by right and those which are at the discretion of the court, it does nevertheless bifurcate appeal routes in terms of which level of the appellate hierarchy structures and controls the agenda for the court of last resort. It thus establishes a unique subset of appeals, those in which the intermediate appellate court declines to grant leave but which, on application by the litigant, the court of last resort nevertheless wishes to hear. We might suppose that the route by which appeals move to the House of Lords affects the rate of reversal—that the rate would be higher and perhaps approximate that of the U.S. Supreme Court in the subset seized upon by the Appeal Committee. These are, after all, cases in which the subcommittee of the Law Lords feels that both some important question of law was raised and it was sufficiently important to bypass the decision in the lower forum to reject the leave request. Yet no difference in intervention rates exist. One study found that cases which came to the Law Lords when leave to appeal was granted by the Court of Appeal were reversed at virtually the same rate as were appeals brought to the appeal committee (34 percent) (Blom-Cooper and Drewry, 1972: 133).[29]

IV. THE HIERARCHICAL CONTEXT OF APPELLATE INTERVENTION

These comparative data assist us in evaluating the frequency with which the Court of Appeal reverses or modifies decisions below. They tell us that while the Court of Appeal's level of intervention activity in civil cases is about the same as the average found in U.S. state supreme courts, it is considerably higher than most U.S. federal appeals courts and about the same as England's court of last resort. Only the U.S. Supreme Court has a higher rate of intervention. Indeed, these data make clear that the high rate of intervention we observe for the U.S. high court is exceptional. The data suggest also that the English Court of Appeal assumes a relatively active role, or at least is not passive, in supervising the activities of forums below.

By themselves, however, these data cannot inform us about the hierarchical dynamics set in motion by an intervention at the intermediate appellate level. Although the Court of Appeal evi-

[29] My discussion has, of course, examined aggregate rates of intervention in Anglo-American appellate courts. It is possible that variations in intervention rates exist among appellate courts depending upon the types of problems they encounter. We had seen above, for example, that U.S. courts of appeals intervene more often in civil than in criminal appeals. Further distinctions may exist depending upon the blend of common as opposed to public law questions they decide. Likewise, the relative proportion of statutory and private law cases may be related to intervention rates.

dently is not reluctant to use its intervention power, we have not yet seen whether the process of intervention at the intermediate level has consequences for activity at the top of the appellate hierarchy. To what extent, for example, does the intervention serve as a mode of communication with the court of last resort? And if its attention is drawn, to what extent does the court of last resort itself intervene in litigation once the Court of Appeal has done so?

I noted earlier that hierarchical lines between the English intermediate and final appellate courts are blurred in comparison with those that define the U.S. appellate hierarchy because the agenda assembled in England's court of last resort is, in large measure, determined at the intermediate level. The requirement that litigants obtain permission from the Court of Appeal to seek a final appeal in the House of Lords thus allocates responsibility for what is generally perceived as a significant power in U.S. appellate courts—the power to define the agenda—across the two tiers of the English appellate hierarchy. The residual power over the agenda left to the Law Lords through petitions by litigants to the Appeal Committee thus establishes alternative routes through which litigants seek to persuade the court of last resort to intervene in decisions reached at the intermediate level.

The various paths of interaction set in motion by this procedure and the actual flow of appeals between the Court of Appeal and the House of Lords are reported in Table 4.[30] These data provide a number of insights into the interaction between the intermediate and final appellate courts in England. In only 21.3 percent of all Court of Appeal decisions did litigants request leave to appeal. In part, this relatively low rate reflects the fact that a large number of appellate actions (for example, interlocutory appeals from trial courts heard by two-judge panels) are not likely to be the source of leave requests. Still, the Court of Appeal was not especially generous in granting leave; only 9.4 percent of leave requests (57 out of 603) were granted when litigants made such re-

[30] Whether the request is made and whether it is granted can typically be ascertained by reading the transcripts of the judgment. Occasionally, however, a leave request is made after a judgment has been handed down and is not therefore found in the transcript. I ascertained whether such appeals came to the Lords by leave granted by the Court of Appeal or, alternatively, by the Appeal Committee by tracking appeals from the intermediate to the final appellate courts. Assembling these data on the interactions between the Court of Appeal and the House of Lords was no small task, inasmuch as the civil appeals office attached to the Court of Appeal does not maintain records on which cases were appealed to the House of Lords. To assemble these data I examined all decisions produced by the House of Lords that overlapped with the time frame that defined the Court of Appeal data base (1983–85) and for the years thereafter to produce a compilation of all Lords decisions that had come from the civil division of the Court of Appeal. To do this, I examined transcripts of Lords' decisions, since not all are published. House of Lords decisions that had been handed down by the Court of Appeal during the 1983-85 period were coded in terms of how the appeal was lodged and what the outcome of the appeal had been.

quests. In effect, then, in the vast proportion of decisions (78.7 percent), there was no initiative by the litigant to seek a hearing in the House of Lords. But even these data underestimate the finality of Court of Appeal rulings. The table shows, for example, that in an additional nineteen cases (0.7 percent), leave to appeal was granted by the Court of Appeal but was eventually withdrawn by litigants or struck by the House of Lords itself. More important, however, these data show that the Court of Appeal, like U.S. courts of appeals, is the end point for virtually all civil appeals moving through the system: of the total output produced by the Court of Appeal, 96.5 percent were not reviewed by the court of last resort; thus, in effect, the Court of Appeal was the de facto appellate court of last resort for virtually all civil appeals entering the system.[31]

For all that these numbers tell us about the comparative role of the intermediate and final appellate court in the context of the quantity of appeals flowing through the system, they tell little about the quality, or relative importance, of appeals. If an appeal serves as a mechanism by which an appellate court, at the behest of the litigant, dips into the universe of decisions below to select a sample to review, the case so separated out by this process is by some understanding "pathological." There is, in other words, something nonroutine about such a case that has prompted a review by a higher court. Still, as cases move from trial to intermediate appellate levels, generally by right, intrinsically important appeals—those that raise important issues for the system at large—are easily lost sight of amid the quantity of cases. But the sifting process from the intermediate to the final level is a decidedly different one, especially when the appeal is not taken as a matter of right and is at the discretion of the court. Appeals heard by the final appellate court are again a "pathological" sample of what has transpired below. But since litigants do not control which cases are accepted by the court of last resort, the substantial drop in quantity of appeals makes the quality, or importance, of such cases that much more salient. Such cases thus constitute a particularly important slice of litigation that has moved through the various levels of the judicial system and has reached the final court because litigants sought review and because the court of last

[31] This role has not gone unnoticed by the Court of Appeal itself. For example, Master of the Rolls Sir John Donaldson observed:

> [S]ome 1,000 appeals are heard by this court (the civil division of the Court of Appeal) every year, of which about 50 go to the House of Lords. . . . [I]t is a very tiny proportion which go to the House of Lords. So in practical terms in the everyday life of this country this court is the final court of appeal and it must always be the final court of appeal in circumstances of real urgency. . . . The purpose of any supreme court, including the House of Lords, is to review historically and on a broad front; it is not to decide matters of great urgency which have to be decided once and for all. (*C v. S*, transcript no. 87-151, 24 and 25 February 1987).

Table 4. House of Lords Review of Court of Appeal, 1983–1985

Action by Law Lords	Leave Action by Court of Appeal: Granted N	Granted % Cases	Granted % of Total	Denied N	Denied % Cases	Denied % of Total	No Request for Appeal in Transcript N	No Request for Appeal in Transcript % Cases	No Request for Appeal in Transcript % of Total	Total All Cases	Total % of Total
Affirmed	20	35.1	0.7	33	6.0	1.2	1	0.0	0.0	54	1.9
Reversed	18	31.6	0.6	25	4.6	0.9	2	0.1	0.1	45	1.6
Not heard	19[a]	33.3	0.7	488	89.4	17.2	2,225	99.9	78.6	2,732	96.5
Total	57		2.0	546		19.3	2,228		78.7	2,831	100.0

[a] Includes cases where request was granted but case was withdrawn.

resort felt the case warranted its consideration. Yet, to what extent does the court of last resort intervene in these truly exceptional appeals?

Table 4 shows that 45 percent of the ninety-nine cases decided by the House of Lords arising from the civil division of the Court of Appeal were reversed by the Law Lords. Thus, when the House of Lords does review Court of Appeal decisions, it sustains them more often than not. The degree of finality of Court of Appeal decisions thus emerges from two vantage points. First, only a small proportion (3.5 percent) of Court of Appeal judgments are reviewed by the court of last resort. In addition, when review does occur, it does not lead to a disproportionate rate of intervention. In the final analysis, then, only 1.6 percent of Court of Appeal decisions in the data set were altered by the House of Lords when litigants secured review in the court of last resort.

Although this pattern of interaction between intermediate and final appellate courts has a number of parallels with what we observe in the United States, the two systems nevertheless diverge in one important aspect. Howard's (1981) study of three circuits found that the Supreme Court disturbed about two-thirds of the decisions it heard from the federal appeals courts, whereas the appeals courts themselves tended to affirm about 75 percent of the time. As Howard observes, "this contrast alone should dispel casual assumptions that federal appellate courts are alike" (p. 59). Yet, this relationship, where an intermediate court usually affirms but the court of last resort generally intervenes, seems to be very much a function of the U.S. federal context and especially of the unusual role played by the Supreme Court. It seems reasonable to suppose that the low rate of intervention by state courts of last resort in the United States suggests that the federal pattern is not typical at all of U.S. appellate hierarchies. Moreover, the relatively low reversal rate exhibited by the House of Lords following

a relatively high disturbance rate by the Court of Appeal suggests, once again, the exceptional nature of judicial interaction among U.S. federal appellate courts propelled by the interventionist posture typically adopted by the Supreme Court when it agrees to accept a case.

The Contagion of Conflict

It is ironic that the process of review—a process designed to correct errors, supervise the administration of justice, integrate subunits in the system, and control the distribution of outcomes allocated by the system—should itself spark conflict. Yet, research on the U.S. judiciary has found that dissent is associated with appellate court reversals of trial court decisions (Richardson and Vines, 1970; Howard, 1981; Songer, 1986). Although the "rod of reversal is used sparingly" (Howard, 1981), when used, the rod injects conflict into the decisionmaking process. For example, in his study of the Second, Fifth, and District of Columbia circuits Howard reports a dissent rate of 14 percent when a court of appeal reverses a decision as opposed to 6 percent when it affirms (p. 42). Songer (1986: 129) reports similar differences in a sample of criminal and labor cases decided by the appeals circuits, 13.8 percent and 12 percent, respectively, when reversing and 5.1 percent and 6.4 percent when affirming. The Atkins and Green (1976) data show comparable rates in more than seventeen thousand cases constituting a universe of published decisions across all federal appeals courts, with a 4.2 percent dissent rate when the appeals court affirms lower court actions as opposed to a 10 percent dissent rate when it reverses. Dissent rates when the appeals courts affirmed or reversed agency decisions were marginally higher, 6 and 11.9 percent, respectively.

These data underscore the relationship between inter- and intracourt conflict—a relationship in which a reversal by an appellate court of a lower court decision is associated with conflict within the appellate court engaging in the intervention behavior.[32] Yet these data focus on the inter/intracourt conflict from the intermediate appellate court's perspective regarding decisions directed below. As such, they do not necessarily enlighten us about the reciprocal of the relationship, the impact of intervention by the intermediate appellate court on the kind of action taken above,

[32] The U.S. Supreme Court stands as an interesting exception to this pattern. I had noted earlier that the Supreme Court exhibits a very high intervention rate, at least compared with other Anglo-American appellate courts. Yet unlike the patterns within appellate court noted by a number of researchers in which reversals by a court encourage dissent within that court, in the Supreme Court it is the affirmation, not the reversal, that is associated with higher dissent. For example, over the twenty-seven terms from 1953 to 1979, encompassing 3,373 decisions on the merits, 65.7 percent of affirmations produced a dissent, whereas 56.7 percent of the reversals did so, a difference that is statistically significant ($p < .05$) (data collected by the author).

and particularly whether it injects additional conflict into the system. Indeed we already see that the intermediate appellate court's intervention encourages review by the court of last resort; and, of course, the process of review allows the court of last resort to itself engage in the kind of intervention behavior that injects an additional dose of conflict into the units of the judicial hierarchy. The data presented so far suggest that the dynamics of inter/intra-institutional conflict are not unique to U.S. judicial politics. Rather, they appear to be common to the hierarchical judicial dynamics in the U.S. and English judiciaries. These data thus tend to blur the otherwise clear differences purported to characterize English and U.S. models of judicial politics.

In fact, the exercise of intervention power by the Court of Appeal encourages review in turn by the House of Lords: of those cases that went to the House of Lords from the Court of Appeal, 57 percent represented Court of Appeal reversals of actions below. In other words, the segment of Court of Appeal decisions reviewed by the House of Lords is an atypical sample of its decisions, at least insofar as the conflict dimension is concerned, given the Court of Appeal's overall reversal rate of 37 percent. But the inducement for conflict to flow up the hierarchical chain is even more pronounced than these figures suggest. The data on the House of Lords' pattern of intervention in reviewing Court of Appeal decisions shown in Table 5 reveal a pattern of intervention breeding intervention. When the Court of Appeal had affirmed the ruling of a lower forum, the House of Lords in turn affirmed that decision in the majority (69 percent) of cases. However, when the Court of Appeal had reversed a lower court decision, the House of Lords endorsed the position of the Court of Appeal in less than half (44 percent) of the cases.

These data provide a two-stage view of how intervention by one level of the judicial hierarchy encourages intervention by an-

Table 5. Intervention Pattern Between Court of Appeal and House of Lords

	Court of Appeal Action on Court Below			
	Affirmed		Reversed	
	N	%	*N*	%
House of Lords action on Court of Appeal				
Affirmed	29	69	25	44
Reversed	13	31	32	56
Total	42	100	57	100

$p < .02$
gamma = .48

other. They show in the first place that conflict between lower levels of the judicial hierarchy prompts review by the House of Lords, both by providing the Court of Appeal itself with a cue that leave to appeal to the Lords should be granted if a litigant applies, and by providing an incentive for the Appeal Committee in the House of Lords to grant leave when the Court of Appeal declines to do so.[33] Intervention behavior thus provides a mechanism by which disputes rise up the appellate hierarchy. These patterns also suggest that the appellate review process in England occurs within a broader scheme designed to encourage at least the appearance of consistency among levels of the judicial hierarchy. As noted earlier, the House of Lords reversal rate is consistently less than 50 percent; data in Table 5 suggest that the strategies adopted by barristers in considering whether to seek a final appeal from the Court of Appeal is probably not unrelated to the interinstitutional dynamics within the judicial system. In turn, these data suggest that much of the activity within the English appellate system may be explained by the kinds of models relating to litigation strategy and decisionmaking that we take for granted in the U.S. system.[34]

V. SUMMARY AND CONCLUSIONS

I proposed earlier that the English and U.S. judiciaries could be viewed as distinct models that define divergent relationships in their respective political systems. The U.S. model denotes a judiciary that is highly integrated into the mainstream of political activity, both in terms of the formal relationships between courts and other institutions, the nexus between politics and recruitment of judges, the manifestation of politically relevant divisions associated with decisionmaking in appellate courts, and the manifold ways in which decisions allocate politically relevant burdens and benefits to litigants and to the polity as a whole. The English model, by contrast, assumes a judiciary very much divorced from the primary currents of political activity. Structurally, the English judiciary stands at the periphery of political power symbolized by the fusion of legislative and executive power in Parliament and more precisely in the cabinet. The recruitment of judges, even at the appellate level, seems to exhibit virtually no trace of partisan activity. Divisions within appellate courts over outcomes, while occurring from time to time, are far less frequent (presumably) than in U.S. appellate courts. Finally, the political saliency and content of judi-

[33] See Blom-Cooper and Drewry (1972: 134) for further discussion of these cues.

[34] For example, work is already in progress exploring agenda building in the House of Lords from the perspective of the outcome of appeals at the intermediate appellate level. The multivariate model being developed and tested includes assumptions derived from whether conflict exists between the Court of Appeal and the trial court below.

cial decisions in England is far less obvious than in the United States and by some estimates is negligible at best.

By simplifying the two systems in these terms, we are better able to interpret the exercise of judicial power in each system. In focusing on an appellate court's intervention in a lower court decision, either by modifying the outcome reached below or by reversing the decision outright, I have viewed the intervention as an exercise of authority in which a valuable resource—one that has costs associated with its use—is employed by the appellate court to refashion the outcome reached below. Much of the literature on appeals has taken great pains to distinguish between error correction and supervision. This distinction has a considerable amount of face validity. Yet to focus too much on this distinction loses sight of the fact that an intervention, regardless of whether it corrects or supervises, serves as an important mechanism of control within the judicial hierarchy and that it redistributes tangible and intangible resources to litigants involved in the appeal. Just as Holmes's "bad man" had little interest in the principles on which his case was decided but had a keen concern about whether he won or lost, so, too, would a litigant care little about error correction/supervision dichotomies.

In a larger sense, then, who is winning and losing in these interventions and what is being distributed by the decisions becomes, by these reckonings, the more important feature. But interventions also have significance beyond the immediate case because they transmit cues to other litigants, real and potential, about the possible worth of using the appellate intervention for their own benefit in the future. Viewed broadly, then, appeals represent an extension of the "contagion of conflict" phenomenon in which losing parties, or those at a disadvantage, seek to gain initiative by drawing new players and new institutions into the fray. That the use of intervention and political power are ultimately commingled is perhaps best seen in the United States where, as noted earlier, the Supreme Court's political power is channeled through an extremely high reversal rate in decisions on the merits.

Thus the intervention power of an appellate court serves as a means for looking beyond the structural formalities and conventional wisdom on which U.S. and English models of courts and judicial powers are constructed to the actual use of the power in the two systems. My primary focus, of course, has been upon the English Court of Appeal. In this context, I have examined the frequency with which the Court of Appeal intervenes below, both in absolute terms and in relation to other Anglo-American appellate courts. We have seen that the Court of Appeal's intervention rate is higher than that of most U.S. appellate courts and very close to the reversal rate exhibited by the House of Lords. A variety of factors in the English system encourage this high intervention rate. Two that I have noted here are, first, the broad scope of re-

view power provided to the Court of Appeal and, second, the impact of the procedure whereby a losing party in an appeal must normally pay the winner's costs. The wide range to the scope and intensity of review commanded by the Court of Appeal thus provides a range of opportunities in which to intervene. With the knowledge that a substantial number of appeals require leave to appeal, we can thus envision how the scope and intensity of the review power, combined with a process that generally encourages only the stronger claims to move from trial to the appellate level, provide the Court of Appeal with a configuration of cases that encourages intervention.

If these data indicate that, in relative terms, the Court of Appeal is willing to use its appellate power to a great extent, they also indicate that the interventions set in motion dynamics within the judicial hierarchy like those we observe in the U.S. federal system. For example, the low rate at which the court of last resort reviews decisions of the English Court of Appeal indicates that the intermediate level represents the de facto court of last resort. In fact, the proportion of intermediate appeals court decisions review by the courts of last resort in England and the United States are remarkably similar, despite the obvious contextual differences in the two systems captured by such notions as "English and American models."

Yet the two systems diverge to some extent at this juncture, for while an intervention by the English Court of Appeal encourages review and intervention by the House of Lords in the same way that intervention by the U.S. courts of appeals encourages review by the Supreme Court, the Law Lords in fact affirm a majority of Court of Appeal's decisions. In contrast, the U.S. Supreme Court intervenes in courts of appeals cases primarily to reverse outcomes (Howard, 1981). Still, these data suggest that although the overall finality of the intermediate appellate courts in the two systems is comparable, the intermediate appellate court in England prevails more often when its decisions are challenged and reviewed. Since cases reviewed by the Law Lords are regarded as those which raise important issues of law and policy, the fact that the Court of Appeal in England prevails more often than not in such circumstances suggests that the intermediate appellate court plays an especially important role in the evolution of law and policy in England.

In light of the details associated with the use of reversal power, the differences between the U.S. and English models of judicial power are not nearly do distinct. If we assume that the use of intervention power serves as a catalyst for the allocation of political resources in the American federal courts, we must be struck by the English Court of Appeal's relatively high intervention rate. The data suggest, then, that the conventional wisdom about differences between U.S. and English models may not suffi-

ciently capture some of the subtle characteristics associated with the use of judicial power that blur the otherwise distinct parameters of the two models.

I have explored here only the aggregate characteristics associated with the use of the intervention power by the Court of Appeal. Perhaps a more important question concerns the actual benefits and burdens the appellate courts distribute as they intervene and reshape decisions below. These divisible and nondivisible goods (Shapiro, 1980) can be expressed in terms of characteristics of litigants who seek the intervention of the Court of Appeal, the parties they oppose, the issues they raise and, more specifically, the legal rights and obligations they seek to advance or defend. By examining the interaction between litigants, issues, and rights we can then configure more completely the structure associated with the use of appellate power generally. These are among the issues for an agenda of cross-national research.

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