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THE USES OF JURISDICTIONAL REDUNDANCY: INTEREST, IDEOLOGY, AND INNOVATION

Robert M. Cover*

The jurisdictional complexities of the American system of courts have occupied generations of scholars, perplexed generations of students, and enriched generations of lawyers.¹ Consider the enormity of it all. There are more than fifty separate systems of state courts, for most purposes largely independent of one another, but coordinated in important respects by the full faith and credit clause and by some dubious, specialized applications of due process.² Conflict of laws is a distinctive field of American jurisprudence—quite different from its private international law counterpart—because of those “loose” coordinating factors, enforced from time to time by the Supreme Court.³ Under the applicable juris-

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1. Jurisdictional rules may be viewed, from one perspective, as limitations upon the authority of public actors. Like other procedural principles designed to impose regularity upon public authority, jurisdictional rules may be manipulated to the strategic advantage of private parties and their lawyers. The more opaque the procedural principles are to discernible ends, the more their manipulation becomes an arcane province of lawyers to be used in a purely strategic manner. See Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 30-64, 91-113. The objective of this Article, to discern a set of principles justifying jurisdictional redundancy, leads to decisional principles in this area by which to judge the strategic demands of lawyers.

2. What is dubious about the application of due process is the use of the phrase to designate insufficient state authority to adjudicate quite apart from consideration of fairness to the parties. See the dissent of Justice Brennan in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 299-313 (1980).

3. There seems to be a cyclical character to the Supreme Court's concern for coordination in conflicts. The last three years have witnessed an intensified concern with the imposition of limits upon state court jurisdiction combined with an apparent continuation of the longstanding trend of imposing few constraints upon choice of law. Compare *Rush v. Savchuk*, 444 U.S. 320 (1980), *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), *Kulko*

dictional rules, many cases may be heard in the courts of more than one state.

Superimposed upon this array of state institutions is the separate system of federal courts. Since 1789 the overwhelmingly consistent element in the relationship between these federal courts and the state court systems has been concurrency or overlap of jurisdiction.⁴ The federal courts have never been primarily tribunals vested with an exclusive special subject matter jurisdiction.⁵ Rather they have been seized of classes of cases almost all of which could have been heard in the courts of one or more states.⁶ While both the state and federal courts are subject to the appellate jurisdiction of the Supreme Court of the United States on matters of federal law, the independence of each of the state systems from one another and of all from the federal system has remained real and significant.⁷ The possibilities of concurrency are thus both "vertical" (state-federal) and "horizontal" (state-state).

Two different emphases are possible in understanding this jurisdictional array. The first treats the complex patterns of concurrency as both an accident of history and an unavoidable, perhaps unfortunate incident of the formal logic of our system of states.⁸ Political fragmentation and imperfect administrative integration of the American nation in the late eighteenth century necessarily carried with it the malformed jurisdictional anomaly that we have endured, if not loved, for so long. The outline of our fractured juris-

v. California Superior Court, 436 U.S. 84 (1978), and *Shaffer v. Heitner*, 433 U.S. 186 (1977), with *Allstate Ins. Co. v. Hague*, 49 U.S.L.W. 4071 (Jan. 13, 1981).

4. See H. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* 1-14. Compare H. HART & H. WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 38-40 (1953), with ALI, *STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS* 99-104, 162-68, 366-69, 375-80 (1969).

5. The most important exception has been jurisdiction over federal crimes. Even that "exclusive" jurisdiction has become, in an important sense, concurrent in fact, if not in law. See notes 73-89 & accompanying text *infra* for a discussion of the implications of the creation of what are in effect concurrent crimes. Another apparent area of federal exclusivity, admiralty and maritime cases, has been rendered for many practical purposes concurrent with state jurisdiction by the "savings" clause. See H. HART & H. WECHSLER, *supra* note 4, at 373-74.

6. See P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 309-438 (2d ed. 1973).

7. The systems may vary from one another in terms of recruitment and selection of judicial personnel, in terms of court organization, and in terms of procedure and administration.

8. See H. FRIENDLY, *supra* note 4, at 1-6.

dictional mosaic, according to this view, was set in 1789 and, with the inertia characteristic of all institutions, persisted long after any functional basis had gone.⁹ The Constitution embodied the recognition in some measure of the formal sovereignty of states, with the attendant formal independence of tribunals. Indeed, it may be this independence as much as any other feature which makes our states demonstrably *not* merely administrative units.¹⁰

But this emphasis upon etiology and formal sovereignty, however plausible as to origins, is weak in explaining the persistence of these complex patterns of concurrency of jurisdiction. Despite a civil war and a reconstruction which worked a partial revolution in some features of nation-state relations, despite developments in administration of welfare programs which, in fact, *have* made states and their agencies mere administrative units of the national government for many purposes,¹¹ despite massive changes in the substance and terms of federal court jurisdiction itself—the enlargement of federal question jurisdiction, the attack upon diversity,¹² which already have thoroughly reversed the pattern of caseload in the federal courts as categorized by substantive law¹³—despite all these changes, the structural pattern of redun-

9. See ALI, *STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS* 99-110 (1969), for an example of the expression of this view concerning general diversity jurisdiction.

10. Cf. H. HART & H. WECHSLER, *supra* note 4, at 11 (where the authors write of the federal judicial power concerning "the general understanding [of the framers] that a government is not a government without courts").

11. Consider the detailed federal statutory and regulatory constraints on state administration in a typical federal/state program of "cooperative federalism." See, e.g., 42 U.S.C. § 602 (1976); 45 C.F.R. §§ 200-282 (1980).

12. See the pending bill which would abolish diversity jurisdiction except for federal interpleader and would concomitantly remove the amount in controversy requirement for general federal question jurisdiction. H.R. 2404, 97th Cong., 1st Sess. (1981).

13. In 1951, of private civil actions in the United States district courts (those in which neither the United States nor a federal officer were parties), 6,062 were federal question cases, 12,772 were diversity, and 2,591 were admiralty. H. HART & H. WECHSLER, *supra* note 4, at 52. In 1978, of private civil actions, 59,271 were federal question cases, and 31,625 were diversity. DIR. AD. OFF. U.S. COURTS ANN. REP. 5 (1978). Of the 1951 federal question cases, 482 were habeas corpus for state prisoners, 122 were Civil Rights Act cases, and almost 3,000 were FELA and Jones Act cases (all personal injury cases of one sort or another). H. HART & H. WECHSLER, *supra* note 4, at 53. By 1978, that had changed: 16,969 were state prisoner petitions, 1,494 were FELA cases, and 4,843 were marine tort actions. DIR. AD. OFF. U.S. COURTS ANN. REP. 60 (1978).

dancy, of near total overlap in jurisdiction, has persisted.¹⁴ Many of the formal attributes of the sovereignty of the states have bowed before the onslaughts of necessity and convenience time and again throughout our history while the crazy patchwork of jurisdiction, if anything, has become more complex and apparently anachronistic.¹⁵

An alternative emphasis is possible. Instead of viewing the persistence of concurrency as a dysfunctional relic, one may hypothesize that it is a product of an institutional evolution.¹⁶ The persistence of the anomaly over time requires a search for a strong functional explanation. With such an approach, one makes the working assumption that the historical explanation of the origin of the structure of complex concurrency of jurisdiction, even if accurate, does not suffice to explain its persistence. It is this approach that I shall pursue here. But the objective of this paper will be a limited one—the exploration of a hypothesis. I shall attempt to identify the utility of the pattern or structure of jurisdiction that we have had for 200 years—not the justification for some particular rule or institution, but the justification for the very pattern itself. For it is the structure of overlap that has been constant, rather than the particular rules and areas of dispute. This argument will remain incomplete—a first step in a longer argument. The identification of functions that complex concurrency of jurisdiction may plausibly be said to serve constitutes neither a full explanation nor a justification for the structure. It does seem reasonable, however, to suggest that both a fuller causal explanation and an adequate justification of the structure must entail, at the least, an understanding of the utility of the pattern. The objective of this Article, then, is to take that first step. The Article will proceed to outline the functions of complex concurrency, largely ignoring, without thereby rejecting, the formal or historical arguments that

14. The increase in federal question jurisdictional redundancy has corresponded to the growing importance of federal law.

15. See *Developments In the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1133 (1977), for a good overview of the growing complexity of one important area of federal jurisdiction.

16. I stress that the use of the "evolutionary" metaphor is only heuristic. I am by no means suggesting that such a process of institutional evolution necessarily occurs; but, it is permissible to set up such a conclusion as a hypothesis to be explored.

might be said to explain or justify the system.

DISPUTE RESOLUTION AND NORM ARTICULATION

The jurisdictional pattern we are dealing with concerns jurisdiction to adjudicate. An understanding of the significance of the pattern therefore requires an understanding of the adjudicatory act. Adjudication in the common law mold entails two simultaneously performed functions: dispute resolution and norm articulation. The work of comparativists and anthropologists should satisfy anyone that the intertwining of these two functions in the common law fashion is neither a logically necessary nor an empirically universal condition.¹⁷ But there are deep cultural and contingent bases for the strong connection in American law. Moreover, these expectations are embodied in a series of formal norms with respect to the conduct of adjudication that forbid outright, or discourage in some contexts, the performance of one of these distinct functions without the other. For example, the requirement of "case and controversy" in the federal courts is a formal embodiment of the requirement that the norm articulation function not be performed apart from dispute resolution.¹⁸ The converse requirement may also be found. It is true that there are many individual instances of literally inarticulate dispute resolution by courts.¹⁹ Nevertheless, both court rules governing adjudicatory procedure and, in some cases, the Constitution's due process clauses require that dispute resolution be accompanied by reasons.²⁰ This requirement of articulation, together with even a weak consistency requirement, over time, will necessarily entail the articulation of general norms. As

17. For an interesting exploration of other ways in which dispute resolution and norm articulation interact, see Eisenberg, *Private Ordering Through Negotiation: Dispute Settlement and Rulemaking*, 89 HARV. L. REV. 637 (1976).

18. The reasons behind the requirement have been rehearsed by almost every commentator and critic of court and Constitution. I continue to find Bickel's discussion the best starting point. A. BICKEL, *THE LEAST DANGEROUS BRANCH, THE SUPREME COURT AT THE BAR OF POLITICS* 111-98 (1962) (chapter entitled "The Passive Virtues").

19. Consider the now frequent, but very questionable practice of many appellate courts in rendering decisions without opinion. See, for example, Reynolds & Richman, *The Non-Precedential Precedent—Limited Publication and No-Citation Rules in the United States Courts of Appeals*, 78 COLUM. L. REV. 1167, 1173 (1978), for a discussion of the federal practice.

20. FED. R. CIV. P. 52; FED. R. CRIM. P. 23(c); *Goldberg v. Kelly*, 397 U.S. 254 (1970).

Cardozo wrote, "as a system of case law develops, the sordid controversies of litigants are the stuff out of which great and shining truths will ultimately be shaped. The accidental and the transitory will yield the essential and the permanent."²¹ It is important to realize that these *two* functions are normally performed simultaneously in adjudication. Moreover, devotees of the common law often attribute its genius to precisely this mix of dispute resolution and norm articulation.

The dual function of adjudication has repercussions for our consideration of jurisdictional patterns. The advantages and disadvantages of complex concurrency in a jurisdictional structure will often be differentially associated with the dispute resolution and norm articulation functions. That is, some particular characteristic of redundancy in the jurisdictional structure may be justified by reference to an acknowledged purpose which is peculiar either to dispute resolution or to norm articulation quite apart from the effect on the counterpart. For example, diversity jurisdiction is usually justified and explained as a device for avoiding partiality of local tribunals to local litigants. Partiality may be viewed as primarily a problem in dispute resolution.²² The very significant area of concurrency of jurisdiction thereby established is justified by reference to a dispute resolution end. However, a significant tension is thereby set between the "normal" model of adjudication with intertwined dispute resolution and norm articulation and a concur-

21. B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 35 (1921).

22. One trenchant restatement and critique of the traditional justification is to be found in Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 L. & CONTEMP. PROB. 216, 234-40 (1948). See also Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483 (1928); Yntema & Jaffin, *Preliminary Analysis of Concurrent Jurisdiction*, 79 U. PA. L. REV. 869 (1931); Frankfurter, *A Note on Diversity Jurisdiction—In Reply to Professor Yntema*, 79 U. PA. L. REV. 1097 (1931). I confess that the battle of the late 1920's and early 1930's on this subject seems to remain more interesting than more recent controversy. One participant is constant. See H. FRIENDLY, *supra* note 4, at 139-52. See also Currie, *The Federal Courts and the American Law Institute*, 36 U. CHI. L. REV. 1 (1968).

Local prejudice may, of course, be demonstrated through norm articulation as well. Indeed, one might well conclude that the single most virulent form of prejudice against out of staters in today's world of ordinary state court adjudication is the home-party-biased choice-of-law methodology of "interest analysis." It is clear that one simple way to alleviate that problem is to extend the scope of jurisdictional redundancy by overruling *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941), which requires federal courts sitting in diversity to apply the choice of law rules of the state in which they sit. See notes 114-115 & accompanying text *infra*.

rent jurisdiction that is erected to solve a dispute resolution problem only. The question arises: will the concurrency of competence with respect to dispute resolution carry with it concurrency of competence in norm articulation as well? That question, of course, constitutes the *Erie* problem.²³ The fact that the *Erie* problem has remained well-nigh intractable and capable of evoking heated scholarly debate throughout our history²⁴ testifies to the difficulty of separating the two dimensions of adjudication.

It has been no less problematic to construct complex structures of concurrency primarily to resolve norm articulation problems and then try to isolate that function from dispute resolution. For over fifty years special three-judge federal district courts heard cases in which the constitutionality of acts of Congress or of state legislation was called into question. These courts were set up because alternative forums were considered insufficient for articulation of norms of such consequence. However, the impulse to use three judges instead of one, which arose out of norm articulation concerns, ran counter to standards of efficient dispute resolution. Because of the case and controversy requirement, a total formal separation of norm articulation from dispute resolution was impossible; but complicated, unsatisfactory, and often inconclusive devices and standards were developed to separate the constitutional norm articulation act to the extent possible—either by dismissing the constitutional claim as a preliminary matter, or by resolving the legal claim and remanding most fact-finding to a single judge as a matter of remedy.²⁵

It may also be maintained that all appellate review, including a great deal of judicial review of administrative behavior, entails a special purpose of articulating norms with attendant devices for

23. The relation between *Erie* and the fact of jurisdictional redundancy is well articulated in Wechsler, *supra* note 22, at 240-42.

24. Compare Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49 (1923), with Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693 (1974).

25. See, e.g., *Gonzales v. Automatic Employees Credit Union*, 419 U.S. 90 (1974). The Act of Aug. 12, 1976, Pub. L. No. 94-381, § 3, 90 Stat. 1119, eliminated the three-judge court as a requirement in cases challenging the constitutionality of statutes, saving only the requirement that they be used in reapportionment cases. 28 U.S.C. § 2284(a) (1976). There are a few other provisions that may require such a court. See 42 U.S.C. §§ 1973b(a), 1973c, 1973h(c) (1976).

separating the articulation of the norm from the dispute resolution. Prospectivity in appellate review, because most explicit, is the most controversial of a series of such devices.²⁶

These examples suggest that the jurisdictional solution to a monofunctional problem imposes a strain either upon the normal forms of adjudication or upon the remaining function of adjudication. If we are to distill "great and shining truths" out of "sordid controversies," it is surely a bit too much to expect that not only the system of case law, but also the crazy-quilt of concurrency in jurisdiction, will further this alchemy. Time and again one component of the jurisdictional array has been manipulated either for the purpose of resolving sordid controversies or for the purpose of polishing up shining truths with negative consequences in the other areas.

COMPLEX CONCURRENCY

The jurisdictional array that I have identified as the traditional and constant American structure of courts is a form of redundancy that I shall call complex concurrency. This structure exemplifies at least one of three important characteristics: strategic choice, synchronic redundancy, and diachronic or sequential redundancy. The first of these is nearly always present. The other two are manifestations of redundancy which are so costly that substantial and often successful efforts are made to avoid their effects. As a result they are frequently unrealized in the event.

Strategic choice is the pervasive attribute.²⁷ In the jurisdictional world of complex concurrency, it is usually possible for one of the parties in a law suit to choose the most favorable from among two or more forums in terms of expected return. And the United States is uncommon in the degree to which it multiplies the potential for forum shopping. The fifty-plus state jurisdictions reenact the international order in many respects, while the potential choice between a state and federal forum squares the difficulties or opportunities. Moreover, perhaps because the United States is not

26. See the discussion of prospectivity in A. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 55-58 (1978).

27. For a classic discussion of strategic behavior, see T. SCHELLING, *THE STRATEGY OF CONFLICT* (1960).

composed of truly independent sovereignties, jurisdictional lines have not been of the bright-line variety.²⁸ Both the states exercising jurisdiction vis-à-vis one another and federal courts deciding upon the availability of the federal forum manipulate soft, imprecise standards subject to tremendous good faith, and bad faith, variations in interpretation.²⁹ The uncertainty of these standards contributes to the likelihood that alternative forums will be invoked as part of a pattern of strategic behavior.

The strategic behavior entailed in forum shopping is only one manifestation of complex concurrency. The structure of American jurisdiction presents the possibility of more than forum shopping. In some cases it is possible for more than one forum to be invoked simultaneously. I shall call this phenomenon "synchronic redundancy." Synchronic redundancy again is not unknown in the law of nations. But the American phenomenon is more widespread and complex. The principle of full faith and credit requires that most clear cases of synchronic redundancy ultimately abort. There may be two or more proceedings initiated, with two or more discovery stages, two or more trials, and more. But there will ordinarily be only one effective judgment. General principles of res judicata read into full faith and credit require this result. Other doctrines militate against synchronic redundancy by requiring deference on the part of one forum once another forum has started to act. The *Younger* doctrine,³⁰ the anti-injunction statute,³¹ and the abstention doctrine³² are but a few instances of such rules and principles.

Nevertheless, there are a number of situations in which the principles of res judicata do not apply in an unproblematic way. For example, the relation between two pending criminal prosecutions, arising out of the same conduct but properly within the legislative competence of two or more jurisdictions, will not be governed by res judicata.³³ And the application of full faith and credit to ac-

28. See Field, *The Uncertain Nature of Federal Jurisdiction*, pp. 683-724 *infra*.

29. *Id.* at 723-24.

30. *Younger v. Harris*, 401 U.S. 37 (1971). See Fiss, *Dombrowski*, 86 YALE L.J. 1103 (1977).

31. 28 U.S.C. § 2283 (1976).

32. See, e.g., Field, *Abstention in Constitutional Cases: The Scope of the Pullman Abstention Doctrine*, 122 U. PA. L. REV. 1071 (1974).

33. See *United States v. Lanza*, 260 U.S. 377 (1922); notes 73-91 & accompanying text

tions for injunctive relief is by no means straightforward.³⁴ Nevertheless, it must be said that synchronic redundancy is very seldom allowed to run its course, in the sense that multiple forums seized simultaneously of a matter proceed to judgment without adjusting for the judgments of the others.

A third pattern is somewhat more common than synchronic redundancy. The complex concurrency of the jurisdictional structure frequently permits recourse to the courts of another system after one system has adjudicated and reached a result. This diachronic or sequential redundancy is comparatively common. Federal habeas corpus constitutes a large and important instance of it.³⁵ But recourse to sister state courts in child custody and other domestic relations matters is also common.³⁶ In general, wherever res judicata is not absolute, so that sequential redundancy is a theoretical possibility in a unitary system, the concurrent complexity of the American jurisdictional structure affords a greater opportunity to realize the potential for relitigation.³⁷ Of course, not every dispute will lead a litigant to go to the lengths necessary to invoke a concurrent forum. In the case of federal habeas corpus the cost is small, given the plight of the petitioner.³⁸ In a child custody case, however, the price of the alternative forum may be an otherwise unplanned change in residence or domicile. For better odds for a child, some have paid the price.³⁹

Strategic behavior in the choice of a forum, synchronic redundancy, and diachronic redundancy—all are manifestations of the complex concurrency of jurisdiction. It is time now to consider its uses.

infra.

34. See, e.g., *Fall v. Eastin*, 215 U.S. 1 (1909); Reese, *Full Faith and Credit to Foreign Equity Decrees*, 42 IOWA L. REV. 183 (1957).

35. Compare Cover & Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035 (1977), with Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963).

36. See, e.g., *Ferreira v. Ferreira*, 9 Cal. 3d 824, 512 P.2d 304, 109 Cal. Rptr. 80 (1973).

37. The fact that relitigation is formally possible in a unitary system does not mean that it will likely produce a different result. A losing party, therefore, will often eschew relitigation. The alternative forum may afford a reason to believe that relitigation will be profitable to one side or the other.

38. See Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142 (1970).

39. *Ferreira v. Ferreira*, 9 Cal. 3d 824, 512 P.2d 304, 109 Cal. Rptr. 80 (1973).

REDUNDANCY

The three possibilities discussed above emerge from the structural characteristic of forum or jurisdictional redundancy. This characteristic of redundancy in the design of other sorts of systems is now well understood to be essential to secure reliability. Everyone understands that if you wish to make sure that a physical structure is strong enough at certain points you put extra material or extra strong material at the given point. Or you may duplicate the critical beam or arch, using two components where one might do. Fairly early in the development of cybernetics as a separate discipline, it was also demonstrated that redundancy could provide a solution in principle to the problem of unreliability of components in information systems.⁴⁰ Since that time, sophisticated refinements in specification of necessary redundancy characteristics in information systems have been made.⁴¹ Still more recently, political theorists have borrowed from cyberneticists and have argued that redundancy in a political decision system may have some of the same positive characteristics as it has in inanimate decision systems.⁴² Of course, in a real sense, the work of classical liberal political theory had already made many of these points, albeit without the technical jargon.⁴³

In this section I shall review some specific arguments for the utility of redundancy in human decision systems in four important, related areas. I shall denominate these areas as Error, Interest, Ideology, and Innovation. Of these, the latter three will be shown to constitute justifications for the jurisdictional redundancy which characterizes our federalism.

40. The classic paper, I am told, is von Neuman, *Probabilistic Logics and the Synthesis of Reliable Organisms from Unreliable Components*, in *AUTOMATA STUDIES* 43-98 (C. Shannon & J. McCarthy eds. 1956). I confess that I understand only the general outline of the paper.

41. J. SINGH, *GREAT IDEAS IN INFORMATIONAL THEORY LANGUAGE AND CYBERNETICS* (1966), is a readable introduction.

42. J. STEINBRUNER, *THE CYBERNETIC THEORY OF DECISION* (1974); Landau, *Redundancy, Rationality and the Problem of Duplication and Overlap*, 29 *PUB. AD. REV.* 346 (1969); Shapiro, *Toward A Theory of Stare Decisis*, 1 *J. LEGAL STUD.* 125 (1972).

43. Landau makes this point nicely in Landau, *supra* note 42, at 351.

Error

The theoretical treatments of redundancy in artificial intelligence and in communication theory undertake to use this characteristic of a system to deal with "error." Error in a computer can be easily defined. It means that a gate is open when it should be shut or shut when it should be open. If all operations consist of combinations of binary positions, there is, in theory, a mechanically derivable *correct* position to all gates. The reliability of a component can be defined as its probability of being in the correct position. By appropriate levels of redundancy in the right places, it is possible to use a series of components, each of which is insufficiently reliable, and to construct with them a system with a much higher reliability coefficient.⁴⁴ With enough redundancy you can make that coefficient theoretically as high as you might wish.

A somewhat more mundane application of redundancy to deal with error in communication might elucidate its uses. Suppose one were confronted with the need to receive a very important message over a communication medium with a high level of static interference. It is essential that the message be received with a virtual certainty of accurate reception. One might imagine a company of three on the receiving end of the message making several possible arrangements. Suppose only one person can listen and there can be but one reception. Presumably the "best" listener will listen, and the group will ponder the lacunae or uncertain segments after the reception to figure out a plausible message. If there can be but one transmission, but no limit on listeners, the team will be better off with redundant receptions. All three will listen and transcribe independently. Several things might happen. Certain message components will be "confirmed." By this I mean that all three listeners, independently of one another, will receive the same message parts. It will be well to treat such message components as "correct." The reason is simple. Assume the probability of A having correctly received a message that he thinks he heard correctly to be .9. Assume the same for B and for C. The probability of error for any single one is .1. It can then be shown that if A, B, and C all

44. Singh's explanation of this principle is more accessible to the general reader than is von Neumann's proof. See J. SINGH, *supra* note 41, at 39-58.

believe that they correctly heard a component and independently agree upon it the probability of error is .0014,⁴⁵ a major increase in reliability.

Confirmation of the clearer parts of the message is only one small part of the benefit of the "redundant receiver" strategy. Suppose certain components are received by one but not the others of the listeners. It may be that the received component elicits subsequent acquiescence of the others. They may agree, "Yes, now that you say it that did sound like 'orse' with a cockney accent." Such confirmation is "weak confirmation." The subsequent acquiescence of the others is not independent of the reception being confirmed so that one cannot use the law of joint probabilities of mutually *independent* events. Nevertheless, the confirmation is worth something. The weakly confirmed message is certainly no less certain than the unconfirmed component received by only one listener. The three listeners may do more than confirm or weakly confirm one another. Suppose each receiver receives one or more components wholly *unconfirmed* by the others. These components, individually no more reliable than the single receiver case, may gain confirmation from context. But the potential for contextual confirmation increases with the amount of material for context that is provided. Whereas a single receiver might not provide sufficient context to confirm component X_n , the joint product of three receivers may provide X_m and X_o to flank X_n . Each of these three unconfirmed components may confirm each other indirectly by providing the context for one another within a larger message. Indeed, it is conceivable in an extreme case to find these unconfirmed components to be the links which indisputably make sense of the whole message.

Note that it is the redundancy of three independent centers of reception that make possible all of these advances over the single receiver situation. Consider now the situation of redundant trans-

45. This is the probability of error given the fact that all three *agree*. The prior probability of all three agreeing and being in error is $.1 \times .1 \times .1 = .001$. The prior probability of all three agreeing is $.9 \times .9 \times .9 + .001 = .730$. Given the fact that all three agree, the probability that all three are in error rather than all three being correct is $.001 - .730 = .00137$. $P(U)$ is the probability of unanimity and $P(E)$ is the probability of error. We wish to calculate $P(E/U)$ or the conditional probability of E given U . The formula $P(E/U) = P(E + U) - P(U) = .001 - .73 = .00137$. For a more general formula, see note 51 *infra*.

mission as well as reception. It is clear that static interference randomly distributed over a message may sufficiently blot out the message so that no amount of receptor redundancy will help. But repeated transmissions will, by the same law of joint probabilities of independent events, be quite likely to yield acceptable levels of clarity of more components than would a single transmission. There will again be confirmations, weak confirmations, and indirect confirmations of different components.⁴⁶

Receptor redundancy and transmission redundancy still leave out one component in our highly simplified story. That component may be called "deliberative redundancy." If the message as a whole remains unclear even after confirmed components are put together with all the components received by even one of the listeners, then a problem of deduction remains. This problem will have cryptographic elements to it. It is the hypothesis of at least some decision theorists that small groups are better at resolving such tasks than is a single individual.⁴⁷ It is not clear that one would or should refer to the decision process characteristics of such a small group of people working together as entailing redundancy. But in some ways the term is not wholly inapposite. The problem-solving capacity of each of the individuals in the group is a dimension quite apart from the "reception" of information. That problem-solving capacity is backed up by the not identical and partly independent problem-solving capacity of the other actors. Moreover, almost all problems require the solver to bring information or experience to bear which is not communicated as part of the problem itself. The group of problem-solvers will bring, collectively, large amounts of information and experience to bear that a single individual would not.⁴⁸ There are, of course, limits to the size of a group that can

46. "Redundancy may be said to be due to an additional set of rules, whereby it becomes increasingly difficult to make an undetectable mistake." C. CHERRY, *ON HUMAN COMMUNICATIONS: A REVIEW, A SURVEY AND A CRITICISM* 185 (1957), quoted in Shapiro, *Toward a Theory of Stare Decisis*, 1 J. LEGAL STUD. 125, 129 (1972).

47. See Lempert, *Uncovering "Nondiscernible" Differences: Empirical Research and the Jury-Size Cases*, 73 MICH. L. REV. 643 (1975). Contrast I. JANIS, *VICTIMS OF GROUPTHINK: A PSYCHOLOGICAL STUDY OF FOREIGN-POLICY DECISIONS AND FIASCOES* (1972).

48. This is to say, of course, that the additional decisionmakers are not really redundant. A more precise use of terms here might require that we state that multiple decisionmakers introduce a situation in which there is a high level of redundancy. The decisionmakers do replicate one another to a substantial extent, but the nonredundant information and abili-

effectively communicate. In any event, short of exceeding such size limits, the group of problem-solvers constitutes a redundant array of solution potentials which may lead to quicker or better results.

Up to this point I have been speaking of the solution to a problem that has, in principle, a correct answer—the accurate reception of a message. The utility of redundancy lies arguably in the reduction of the probability of errors or of certain kinds of error. The applications of this use to our problems of adjudicatory jurisdiction are by no means straightforward. And yet, a most obvious, simplistic application must be made—subject to elaboration and revision in the sections which will follow.

It is an important element in the liberal theory of adjudication that decisions are rendered on the basis of correct determinations of *fact*. While everyone understands that the degree of certainty of correctness may vary greatly—with complex legal rules and institutions designed to attribute consequences to varying degrees of certainty in different kinds of cases—it is nonetheless supposed to be an approximation to a truth, in principle discoverable.⁴⁹ (Even the umpire who says, “They ain’t nothin’ till I call ‘em,” does not thereby claim that his calls are *independent* of the physical course of the ball.) It is therefore in order to ask whether redundancy in the design of the adjudicatory system furthers the desired end of reducing “error” defined simplistically as deviation of outcomes from those that would be predicated upon an accurate and truthful account of the event.

The answer to this question is an unqualified “yes.” There are many redundancy features in procedure most of which are not jurisdictional. Trial testimony and exhibits go over the same ground covered by depositions, interrogatories, and document discovery. Multiple witnesses routinely testify to the same events. A given witness is asked essentially the same question in different ways by different lawyers. There are twelve or fewer jurors to hear, see, evaluate, and decide the same case on the same evidence. There is a judge who, along with the jurors, hears, sees, evaluates, and decides the case and possibly intervenes in the juror’s decision. All of these devices may be said to entail a measure of redundancy for

ties justify the practice.

49. See H. HART, PUNISHMENT AND RESPONSIBILITY (1968).

the purpose of correction of error or identification of areas of doubt and uncertainty. If several witnesses confirm one another's stories, we treat the *confirmation* as significant. If they contradict one another, we do not, as system builders, regret that we permitted the redundancy element—multiple witness—that led to the contradiction. Rather, we pride ourselves that a problematic area of doubt has been identified.⁵⁰ Similarly, if trial testimony and discovery material are confirmatory, no problem arises. If a comparison reveals contradictions, we permit the deposition or interrogatory to be used for impeachment. Thus, we identify a potential *uncertainty* through redundancy. Likewise, cross-examination may reveal that we are less certain about something than we would have been had we relied upon direct examination alone.

Examples could easily be multiplied. The point is clear. Redundancy is in fact a critical strategy in procedural systems for purposes of confirming the "correct" and establishing the areas of uncertainty, that is, the areas of more probable "error" in any element of the proceeding. But, these uses of redundancy are not ordinarily jurisdictional. That is they do not entail the use of multiple potential or actual forums for disputes. It is, of course, possible to use multiple forums to deal with the potential of mere error,⁵¹ and we do so occasionally in providing for a *de novo* review.

50. A principle function of syntactic redundancy is the identification of problematic parts of a message. Often, only higher levels of redundancy will identify the correct message. See J. SINGH, *supra* note 41, at 39-58; Shapiro, *Toward A Theory of Stare Decisis*, 1 J. LEGAL STUD. 125, 125-28 (1972).

51. Professor Bator in his classic article on habeas corpus seems to deny both of the premises of this section: that proceedings are based in any straightforward sense on correct determinations of fact; and, assuming they are so based, that redundancy produces significant gains in reliability. Bator, *supra* note 35, at 446-49. On the latter issue Bator seems to be wrong. If we have n independent iterations of an event with a probability of error $P(E)$ for each event, then the probability of *all* iterations producing erroneous results is $P(E)^n$ (We will assume that $P(E)$ is less than .5, otherwise there can be no acceptable level of certainty with one trial or with 1000.) The probability of all iterations producing correct results is $[1 - P(E)]^n$. Obviously, the probability of agreement of all iterations, $P(A)$, is the sum of these two probabilities. $P(A) = P(E)^n + [1 - P(E)]^n$. The probability of divergent results is $1 - P(A)$. The probability of any given array of divergent results, where exactly m outcomes are in error and $n - m$ results are correct, is determined by expanding the binomial. $P(E)_m^n$, the probability of error in m of the n trials, is

$$\frac{n!}{m!(n-m)!} P(E)^m [1 - P(E)]^{n-m}$$

The probability of exactly m of n trials being correct is, of course, simply the probability of

But, it is very expensive and the coordination principles necessary

$n-m$ being in error.

$$P(E)_{n-m} = \frac{n!}{m!(n-m)!} P(E)^{n-m} [1 - P(E)]^m$$

The prior probability that outcomes will split so that there is a distribution in which exactly m outcomes diverge from the other $n-m$ is the sum of those two probabilities. The probability of a distribution of m outcomes of one sort and $n-m$ of the other, $P(D_m, n-m)$, is $P(E)_m + P(E)_{n-m}$. This result is intuitive for the distribution occurs both when m outcomes are in error and $n-m$ are correct and when $n-m$ are in error and m are correct.

Once n trials have occurred and we know the distribution $(D_m, n-m)$ which resulted, we will wish to know what the probability is that the m trials are in error as opposed to the $n-m$. The contingent probability that m trials are in error, given the distribution $(D_m, n-m)$ is computed as follows. $P(E_m/D_m, n-m)$, the contingent probability of error in m cases given the distribution $(D_m, n-m)$ is

$$\frac{P(E_m)}{P(D_m, n-m)} = \frac{P(E_m)}{P(E)_m + P(E)_{n-m}} = \frac{P(E)^m [1 - P(E)]^{n-m}}{P(E)^m [1 - P(E)]^{n-m} + P(E)^{n-m} [1 - P(E)]^m}$$

In the special case where $m = n$, that is where the results are in agreement in all trials the formula yields the result

$$P(E_n/D_{n,0}) = \frac{P(E)^n}{P(E)^n + [1 - P(E)]^n}$$

The general formula yields other interesting patterns. In the special case where $m = n/2$, the probability of error in exactly m cases, given the distribution (D_m, m) , becomes 1. Therefore, the outcome is not helpful in determining which of the results to adhere to. In all other cases, however, the formula yields a $P(E_m/D_m, n-m)$ which is *at least* as informative as a single trial. Where $m = n - m + 1$, $P(E_m/D_m, m-1) = P(E)$. In general, where $n = m + (m - q)$ the formula simplifies so that

$$P(E_m/D_m, m-q) = \frac{P(E)^q}{P(E)^q + [1 - P(E)]^q}$$

It will be recognized that this is the formula for the contingent probability of error in q trials, given the agreement of all q outcomes. The implications for Bator's rejection of redundancy are clear. Any odd numbers of trials will always yield as great or greater certainty than a single trial. A measurable *increase* in certainty over the outcome of a single trial is achieved whenever the number of trials with one outcome exceeds the number of trials with the opposite outcome by more than one. Even a spread of *one* achieves the same degree of certainty as a single trial.

If one takes a number such as .1 for $P(E)$ and 3 for n , this means that the prior probability of unanimity is .73. The probability of error given agreement is .0014. The probability of a 2-1 split is .27. And, given a 2-1 split, the probability of the two results in agreement being in error rather than the one being in error is .1. Thus, in 73% of the cases we are better off than with a single trial. In the other 27% we are no worse off. Note that in terms of the structure of a procedural system we can achieve the higher level of certainty of $n=3$ by routinely giving two trials of an event and providing a third only when the first two diverge, since in all cases in which the first two trials agree the third trial would only either confirm the first two or yield a 2-1 split with the first two trials providing the rule of decision. Such a structure is reminiscent of the structure imposed by federal habeas although

to deal with inconsistent outcomes may become cumbersome. Within a single forum and proceeding, the contradictions among witnesses or between different statements of a single witness may be evaluated in a single act of judgment which encompasses a view of all the contradictory material. The output of a system of redundant forums, however, is either confirmatory or contradictory *verdicts*. Presented with such verdicts, one cannot easily pass judgment on questions of error in reconstructing events without first unpacking what might be called forum effects. The redundant forum causes us to focus on forum variables just as redundant testimony causes us to focus on testimony variables.

A commonplace observation supports this point. Ad hoc "jurisdictional" redundancy is commonly demanded when questions of factual error assume massive political significance. I have in mind special commissions or boards which might advise political leaders concerning the use of pardon or related powers in special political cases. The Sacco-Vanzetti case⁵² called forth such a solution, as did

the limited character of the federal court's jurisdiction and the limited scope of redundancy in fact-finding makes the analogy only suggestive.

If one assumes a fairly high $P(E)$ such as .2 a redundant regime of $n=3$ provides truly dramatic improvement. In 52% of the cases all three outcomes will agree. In those cases the probability that all three are in error will be .011. Thus in slightly over half of the cases we move from 20% chance of error down to a 1% chance of error. In the other 48% of the cases the outcomes will split 2-1. By deciding in accord with the two we run a 20% risk of being in error. Note, however, that if that risk is too high we may add contingent layers of redundancy thereby reducing the risk still further. An additional two trials in all such (2-1) cases would yield 4-1 splits after the five trials in 52% of these cases. As to these cases we would achieve the 1% error rate. As to the 48% of the original 48% (23% of the original population) there would remain a .2 probability of error. One could, in theory, continue to iterate in the problematic population until the number of such cases approached zero.

Of course, since we are not dealing with mere mechanical iterations with a constant $P(E)$ but with strategic interactions by "players" who learn from experience, the model cannot be useful without including the game theoretic implications of redundancy. Such a model is beyond the scope of this footnote. Professor Bator's rejection of redundancy, however, seems to be based on the simple notion that repetition achieves nothing. Given the demonstrable gains from repetition in the simplified case, the burden would appear to be on one who would deny its utility to show that the strategic interactions destroy any such gains.

Of course, nothing in this footnote provides an answer to the question of whether the gains from redundancy are worth its costs. On that issue, compare Cover & Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035 (1977), with Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963).

52. Governor Fuller appointed a commission headed by Abbot Lawrence Lowell, President of Harvard, to investigate the case. The Lowell Committee found no unfairness. See G.

the Dreyfus case.⁵³ The phenomenon attests to the naturalness of the impulse to invoke another forum when there is grave factual doubt based on political mistrust of the forum. The question that the rest of this paper addresses is whether this simple observation can be generalized to support current and long-standing practice.

The potential for simple error, then, justifies a measure of redundancy in the structure of procedural systems. But the coordination devices necessary for jurisdictional redundancy are awkward, and the bluntness of jurisdiction as a tool does not permit the redundancy to be focused upon particularly suspect issues and facts. But this does not mean that more systemic sources of divergence of outcomes are not best dealt with through jurisdictional solutions. The cleavage between jurisdictional systems of courts corresponds to more general political lines within our nation. The uses of jurisdictional redundancy, therefore, might best be sought by examining the kinds of problems associated with systematic political authority. There are three such areas that I have singled out for discussion here: Interest, Ideology, and Innovation. These terms are a shorthand for three general problems: (a) the self-interest of incumbent elites in a regime; (b) the more or less unconsciously held values and ways of seeing the world, reflected in the governing elites, which tend to serve and justify in general and longrun terms the social order which the elites dominate; and (c) the consciously determined policies of the authoritative elites, especially insofar as they depart from traditional, common cultural norms and expectations.

The proposition that I begin with is that different polities with differing constituencies, peopled by distinct governing elites, indeed will differ from one another in some measure with respect to all three areas. Clearly, the self-interest of the incumbents of one system is not necessarily furthered by the possibly corrupt pursuit of self-interest by the incumbents of another polity. Whether there are salient ideological differences among governing elites in polities within a larger national and cultural entity is a more difficult ques-

JOUGHLIN & E. MORGAN, *THE LEGACY OF SACCO AND VANZETTI*, 298-309 (1948) (Chapter XI, "The Governor and His Committee").

53. After Dreyfus' conviction of treason in 1894, a period of five years of intense political struggle led to a second trial in 1899. A third proceeding occurred in 1906, which finally exonerated Dreyfus. See D. JOHNSON, *FRANCE AND THE DREYFUS AFFAIR* (1967).

tion. It may well be argued that, on the whole, the United States has become sufficiently integrated economically and culturally so that distinct ways of understanding the world no longer tend to characterize our geographic regions nor to characterize the elites responsible to national as opposed to local constituencies. Mind you, I am here commenting on ideology rather than interest and policy. The different constituencies of different states and regions may well give rise to elites with differing interests and different policy objectives. But, so the argument might run, the pursuit of locally, regionally, or nationally oriented policy objectives all may proceed from a common epistemology, a common, if implicit, political economy, and a common ethic. I am inclined to believe that the very long-range trends are distinctly in the direction of rendering geography a less salient corollary of ideological differences. But I am also inclined to believe that this is a matter of degree and that there remain important ideological correlates to the political lines within America.⁵⁴ I am not prepared to prove or disprove this hypothesis, and the argument within proceeds upon the assumption that some such salient differences do remain.

The political subdivisions of America do indeed present a range of policy initiatives differing both in terms of conditions to be met and ways of meeting them. While it would be absurd to suggest that policy differentiation does not now occur among the several states and between the national and state levels of government, it is by no means absurd to suggest that the most significant policy questions are increasingly a function of a single, national-level decision and implementation process. If this is true and remains true, it does not destroy the argument that follows but reduces the significance of the conclusions that flow from it.

Each of these three areas must now be addressed separately and in detail. We proceed first to a discussion of "interest."

Interest

Let us take a most obvious case first—a case so obvious that the point seems to have been missed by ten federal judges—a district

54. I am, of course, counting regional variations as correlating with the political divisions of America because it can be captured by groups of states, even though the differences among states within each group are ideologically insignificant.

judge and the nine Supreme Court Justices—who recently considered the matter. Suppose all the judges in a particular judicial system have a personal, financial interest in the subject matter of a law suit. Such would be the case if, for instance, the manner in which the judges are paid or the salary scale applicable to the system as a whole were in dispute.⁵⁵ The old maxim that no man shall be a judge in his own cause—reinforced by the Code of Judicial Conduct and in the federal system by the disqualification provisions of the judicial code⁵⁶—requires that such a case, if possible, not be heard by the interested judges. If the case involves state court judges, the natural solution to the dilemma of self-interest is to hear the matter in the federal courts. Often, this may be possible. If the objection to a state judicial compensation scheme is that it fosters or constitutes partiality and unfairness, the objection may be cast in due process terms and heard by federal courts as an issue of federal constitutional law.⁵⁷ Conversely, any objections to a federal judicial compensation scheme may, in principle, be heard in state court in the first instance. For state courts are charged with the application of federal law and, as the Supreme Court never tires of informing us, are the tribunals of residual general jurisdiction in our system both for state and *federal* law.⁵⁸

In fact, while federal courts have been used as forums for deciding cases in which state judges are interested parties, the absence of the converse is striking. In *United States v. Will*,⁵⁹ several fed-

55. *United States v. Will*, 49 U.S.L.W. 4045 (Dec. 15, 1980) (holding that the timing of revocation of raises that would have accrued under the Executive Salary Cost-of-Living Adjustment Act violated the compensation clause of article III). See also *Evans v. Gore*, 253 U.S. 245 (1920).

56. 28 U.S.C. § 455 (1976).

57. See, e.g., *Tumey v. Ohio*, 273 U.S. 510 (1927).

58. It is difficult to know what to make of the fact that no one seems to have suggested that a case like *United States v. Will*, 49 U.S.L.W. 4045 (Dec. 15, 1980), be decided in state court. Of course, the plaintiffs chose the federal forum, and, as a suit against the United States, there was a jurisdictional basis. The question is what kind of interaction there ought to be between jurisdiction and the so-called "Rule of Necessity." The court treats jurisdiction as a lexically prior step to its consideration of the Rule of Necessity. Assuming federal subject matter competence, there is no basis for recusal since all federal judges are equally interested. But the problem of direct and substantial self-interest might be understood, given the potential state forum, as a jurisdiction-blocking issue just as the deference implicit in the abstention doctrine blocks jurisdiction. Indeed, the Court might have conceived a special abstention doctrine for such cases.

59. *Id.*

eral judges sued, claiming, on a variety of theories, that the denial of raises to them over a period of years violated the compensation clause of article III. All of the federal judges who heard the case thought the Rule of Necessity permitted federal judges to sit and decide the case despite an interest inseparable from that of the plaintiffs.⁶⁰ The United States as defendant did not contest this application of the Rule of Necessity

These somewhat extreme instances of system-wide self-interest would not, in themselves, go very far to justify an ongoing structure of redundancy. In such bald form they are too obvious and too infrequent. The Supreme Court had to wait sixty years between *Evans v. Gore*⁶¹ and *United States v. Will*.⁶² If we define "interest" in the narrow sense of a direct monetary stake in the outcome of litigation, it will be rare indeed for the whole system of judges to be "interested." However, there are less obvious and more insidious kinds of self-interest that are likely to infect a judicial system. The most common and disturbing phenomenon is the reality or suspicion of too strong linkage between the judiciary and political power. Reliable judges are terribly useful to political machines. They may be called upon to certify election results, to take appropriately lenient action when insiders are caught *en flagrante*, or to take appropriately stringent action when enemies of the machine must be punished. In short, their task is to clothe power in the cloak of law and favoritism in the garb of justice. The "interest" implicated in such regimes is simple enough. Judges who are chosen for their strong links to the regime in power may be expected to identify regime interest with their own self-interest. A carrot or a stick, or both, insure a generally adequate level of reliability on the part of such judges. It may be necessary at times to rely upon the less tangible and often less certain bonds of ideological identification, and many cases are intermediate areas between the judge who is a virtual hired hand of a machine and one who simply

60. See *id.* at 4049. See also *Will v. United States*, 478 F. Supp. 621 (N.D. Ill. 1979) (issue not addressed by trial court).

61. 253 U.S. 245 (1920).

62. 49 U.S.L.W. 4045 (Dec. 15, 1980). There were sequellae to *Evans v. Gore*, 253 U.S. 245 (1920). See *Miles v. Graham*, 268 U.S. 501 (1925), and *O'Malley v. Woodrough*, 307 U.S. 277 (1939), both of which involved only individual judges rather than the full bench. See also *O'Donoghue v. United States*, 289 U.S. 516 (1933).

shares a world-view with the dominant elite in the machine. Acknowledging that a continuum of positions exists between those two points, we shall treat one end of the continuum—that associated with direct, often corrupt, forms of self-interest—as the separable problem of “interest,” while the other end of the continuum will be discussed in the next section as the problem of “ideology.”

The kind of self-interest represented by the judicial compensation cases is so stark that it identifies itself. Even if the judges presume to decide the dispute despite their self-interest, they must discuss the issue and be accountable for their having decided it. The illegitimate self-interest of the machine judge does not proclaim itself though it may be notorious. Even if notorious, it may be unprovable. Moreover, it is often, though by no means always, difficult to know to which cases the interest extends. All of the above considerations militate against the use of conventional, ad hoc disqualification devices for the corrupt judge.

Jurisdictional redundancy is a structural solution that will frequently give relief.⁶³ It is the suspicion of corruption, so often unprovable, that leads a litigant to invoke a parallel forum. Even if *one* of the litigants expects to benefit from corruption and opts for the corrupt forum, the potential of a system of concurrency for synchronic redundancy inhibits the operation of corruption. The development of data to prove or reinforce the suspicion of corrupt complicity will be greatly aided by an independent forum, even if its outcomes must compete with those of the corrupt forum for ultimate implementation. To put it bluntly, if I am someone about to get railroaded by a corrupt system, I greatly value the opportunity to invoke a fair forum even if the corrupt forum's verdict does not bear its corruption on its sleeve and, thus, will compete with that

63. Madison supported an independent system of inferior federal tribunals in part on the ground that it is a structural solution to interested state courts. A federal appellate presence would not suffice.

“[U]nless inferior federal tribunals were dispersed throughout the Republic with *final* jurisdiction in *many* cases, appeals would be multiplied to a most oppressive degree.” Besides, “an appeal would not in many cases be a remedy.”

“What was to be done after improper Verdicts in State tribunals obtained under the biased directions of a dependent Judge, or the local prejudices of an undirected jury?”

H. HART & H. WECHSLER, *supra* note 4, at 17 (quoting 1 M. FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 124-25 (1937)).

of the fair forum for recognition. The concurrent forum does not provide a solution for the corrupt interest of judges, then, but rather a weapon with which to fight it. And this may be suggested as a general point about the utility of concurrency as a strategy. This structure is not in general useful for the imposition of determinate solutions. Rather, it facilitates conflicting answers and thus necessarily increases the area of indeterminacy. It is an approach to dilemmas of suspicion and uncertainty, not a formula for clear-cut answers.

Ideology

I have stated that the liberal conception of justice depends upon the idea that *in principle* there are relevant *facts* to be found. The success of such a system based upon the determination of facts depends upon the degree and scope of trust in the society. The philosopher, Michael Polanyi, has written:

The widely extended network of mutual trust, on which the factual consensus of a free society depends, is fragile. Any conflict which sharply divides people will tend to destroy their mutual trust *and make universal agreement on facts bearing on the conflict difficult to achieve*. In France the Third Republic was shaken to its foundations by a question of fact: the question whether Captain Dreyfus had written the 'bordereau.' In Britain the dispute over the genuineness of the 'Zinoviev Letter,' as in the United States the trial of Alger Hiss, aroused popular conflicts which made it impossible to agree universally on the facts of these matters.⁶⁴

Polanyi points to a disturbing, recurring phenomenon in liberal adjudicatory systems. But it may be argued that he somewhat understates the depth of the problem. For it is surely not the specific conflict, the facts of which are to be adjudicated, that is itself responsible for the chasms of mistrust that make it difficult or impossible for normal adjudicatory institutions to be trusted to reach reliable findings. Rather, certain specific conflicts are understood to lie upon a perceptual or conceptual fault line determined by the

64. M. POLANYI, *PERSONAL KNOWLEDGE: TOWARDS A POST-CRITICAL PHILOSOPHY* 241 (1958) (emphasis added).

different and conflicting ideologies of the relevant social groups. Robert K. Merton summarizes the essence of this ideological perspective on thought:

The sociology of knowledge takes on pertinence under a definite complex of social and cultural conditions. With increasing social conflict, differences in the values, attitudes and modes of thought of groups develop to the point where the orientation which these groups previously had in common is overshadowed by incompatible differences. Not only do there develop universes of discourse, but the existence of any one universe challenges the validity and legitimacy of the others. The co-existence of these conflicting perspectives and interpretations within the same society leads to an active and reciprocal *distrust* between groups.⁶⁵

Thus, it is the existence of social groups in conflict which is the precondition for the development of conflicting "universes of discourse," while those conflicting universes of discourse serve to aggravate and create distrust. Put somewhat differently, for each group its "ideology" serves as a "template" to organize experience.⁶⁶ But the fact that different groups use different templates in organizing experience cannot but lead to distrust and conflict. For ultimately, the most profound determinants of our thought are those of which we are least conscious. And if even these dimensions of our epistemology are socially determined and only relative, we shall be beset by gravest anxiety and anger when we unwittingly come across a different and distinct epistemology. As Lippmann put it almost sixty years ago:

Without the habit [of treating our own experience as necessarily filtered through our "stereotypes,"] we believe in the absolutism of our own vision, and consequently in the treacherous character of all opposition. For while men are willing to admit that there are two sides to a "question," they do not believe that there are two sides to what they regard as a "fact."⁶⁷

And so we finally come back to adjudication. In a society such as

65. R. MERTON, *SOCIAL THEORY AND SOCIAL STRUCTURE* 218 (1949).

66. See C. GEERTZ, *Ideology As a Cultural System*, in *THE INTERPRETATION OF CULTURES* 193-229 (1973).

67. W. LIPPMANN, *PUBLIC OPINION* 82 (1922).

ours, in which the social bases for diversity in total world-views is surely present, and in which there is persistent mistrust—though it fluctuates in intensity—adjudication can always become a ritualized enactment of the epistemological chasms between one class and another, one race and another, one gender and the other; between different generations, different nations; and between city and country, town and gown.⁶⁸

When we challenge a verdict on ideological grounds—that is, on the ground that the decisionmaker's construction of reality was distorted by the social determinants of his mental world—we make what is both far more and much less than a claim of error. On the one hand we *may* (but need not) concede that the decisionmaker acted correctly within his or her frame of reference. Given his or her perceptual and conceptual apparatus, it was the "correct" decision. Presumably, if such is conceded, we may expect a like-equipped decisionmaker to reach the same result. The confirmation of an outcome by iteration of trials within a suspect apparatus only confirms the suspicion. So in one sense there is no claim of error at all. However, the very structure of the mind of the decisionmaker is challenged once one argues that it is a socially contingent apparatus and that it is functionally related to the needs and experiences of the group characterized by that structure.⁶⁹ For, if the dispute in question can be fairly understood as intergroup in some sense, then the question that begs for an answer is why does the ideology of *this* group, rather than that of its antagonist, determine the outcome.

Most of the forms of redundancy within a unitary system do not solve the dilemma of an ideological challenge. There is one marked exception. The overlapping domains of judge and jury speak to the issue. This overlap is unique in this respect and deserves to be

68. For an example of one commentator who would drive the logic of these chasms to their conclusion, see Note, *The Case for Black Juries*, 79 YALE L.J. 531 (1970).

69. The distrust and suspicion which men everywhere evidence towards their adversaries may be regarded as the immediate precursor of the notion of ideology. [But we] began to treat our adversary's views as ideologies only when we no longer consider them as calculated lies and when we sense in his total behaviour an unreliability which we regard as a function of the social situation in which he finds himself.

K. MANNHEIM, *IDEOLOGY AND UTOPIA* 61 (Wirth and Shils trans. 1936).

treated with jurisdictional redundancy in any comprehensive functional account.⁷⁰ On the other hand, redundancy across jurisdictional lines is admirably suited to speak to many of the dilemmas of ideological challenges. As our political lines continue to correspond less and less to differences in social systems and culture, this claim may become less valid, but it remains true today to an important degree.

Thus, to the extent that the jurisdictional alternatives differ with respect to the supposed salient social determinants of ideology, complex concurrency constitutes a strategy for coping with ideological impasse. If outcomes are confirmed by the courts of two or more different systems which vary with respect to supposed social determinants of knowledge and mind, this result would suggest some common epistemological ground with respect to the issue presented and with respect to its resolution. For a series of jurisdictional alternatives to present a plausible network of redundancy sufficient to "correct" ideological bias requires that those alternative forums arise out of widely varied political bases with attendant variations in the constituencies to which they speak. In terms of the American judicial systems, an approximation to this variation obtains in several ways. Most state court trial judges are drawn from local, provincial elites, while federal district court judges are more likely to be drawn from a national elite. Levels of education, bonds of loyalty, status, and even economic class may differ radically from one group to the other. Members of the national elite corps share a common education, a cosmopolitan reference group. Members of the state bench share provincial concerns, a local reference group, and ol' boy politics.

All judges, of course, can be presumed to be members of a professional elite. As such, regardless of jurisdictional redundancy, we could hardly expect too great a diversity of class identity—at least so long as one takes such gross factors as occupation and income as prime, if not sole, determinants of class. But neither class homogeneity in such terms nor the somewhat milder race or gender homogeneities found among judges is conclusive of the matter. Both in terms of their need for comprehensive ideological positions and in terms of their need for practical political allies, political elites can

70. See R. MERTON, *supra* note 65, at 218.

differ radically from one another.

Indeed, the differences between primary identification with local as opposed to national elites is a major theme in the literature of modernization.⁷¹ In the United States, no less than in more recently developing countries, continental integration is a matter of degree. The degree of identification of an officialdom with national rather than local groups may often correlate with its attitudes on a series of critical social, economic, and political questions. Indeed, in the United States virtually all major ideological clashes of the past century have had strong geopolitical correlates. Often they have pitted local against national ideologies; frequently, they have presented urban-rural conflicts or have set one region against another. We need not answer the question of why this is so. Some would undoubtedly argue that it is because geopolitical identification itself correlates with a more fundamental variable—that is, degree of economic development with attendant class structure. But whatever the reason, if it is the case that ideological conflicts correlate with geography, then redundancy structured along such lines will be a relevant mechanism for addressing many ideology-type claims. To put it more concretely, a system of complex concurrency between a state court in Mississippi and a federal court in New York⁷² may not thereby capture in either forum the class consciousness of the proletariat or peasant. But insofar as the primary local elites of Mississippi grow out of and speak to the experiences of a social structure radically different from that in which a New York federal judge is located, they will bring to bear conceptual and perceptual equipment which does differ with respect to matters that are salient to industrial worker and poor farmer. While neither court may be made up of anything but politically well-connected elite lawyers, these elites may be faithful to and responsible for different social orders. If one views judges primarily as enforcers of and apologists for a social order, then the responsibility for different orders and different dimensions of order will determine different mind sets. Put more generally, it is both position in a

71. See, e.g., C. GEERTZ, *The Integrative Revolution: Primordial Sentiments and Civil Politics in the New States*, in *THE INTERPRETATION OF CULTURES* 255-310 (1973).

72. The issue is not purely hypothetical. Consider the problem of libel through the national media.

social order and the nature of the social order itself which determines ideology. Even if judges in all systems have in common a somewhat privileged position in their respective social orders, they do not, in a nation as diverse as ours, necessarily share the same social order.

This paper does not attempt to establish the empirical data to support the proposition that American jurisdictional lines do correlate positively with diverse social orders. I should like rather to assume at least a weak case for that fact and proceed to consider its implications. The assumptions will be (1) that there are differences between state and federal judges in terms of relevant background, responsibilities, and reference groups sufficient to determine different ideologies, and (2) that there are differences among states or groups of states sufficient to determine different ideologies. For now, we need not take a position as to why those differences exist.

I have mentioned that the adjudicatory process entails both dispute resolution and norm articulation elements. Ideological distrust entails related challenges to both dimensions of adjudication. It implies skepticism about the reliability of a range of adjudicatory acts and orientations: ethical and practical judgment, capacity for critical or empathetic orientation to parties and witnesses, and appreciation for consequences. Thus, in its most blatant form, a system may be challenged because its judges cannot be expected to understand—to empathize with—“our” kind of people. They will literally not comprehend “us” without an act of translation, will not believe even when they understand what is foreign to them in the experience of “our” people, and will not appreciate the consequences to “us” of “their” standards.

Confusion and misunderstanding is most acute where there is an *apparent* convergence of discourse, when words and terms are the same or similar but meaning is different. However, when there is clear disagreement about relevant norms, expressed as such, it is possible to grapple with the differences directly. Thus, in the realm of dispute resolution, in precisely those cases in which relevant norms, as articulated, appear not to be subject to controversy, ideological differences may work their most insidious harm. For it is here that authority is seen not only as in conflict but as untrustworthy. Moreover, clear divergences in the articulation of norms,

whether or not the result of divergent ideologies, are readily susceptible to hierarchical solutions if a solution be desired. But the work of ideology in dispute resolution admits of no such easy hierarchical solution. If the problem is to be addressed *at all*, it must be addressed through one or another redundancy device. These points are best developed by an example.

a. *Multiple Prosecutions Based on Mistrust of Forum*

The general principle forbidding double jeopardy is held not to apply in instances where the same conduct constitutes a violation of state and federal criminal law.⁷³ Since the 1910's there has been a steady progression of criminalization on the federal level so that a very large number of crimes under state law constitute federal crimes as well.⁷⁴ Some of these statutes make the very same conduct criminal under federal law whenever the conduct has an interstate element to it.⁷⁵ Other federal statutes use a more indirect approach by taxing certain transactions which are criminal in most states.⁷⁶ The reporting and disclosure necessary to comply with the tax laws on the federal level entail high risk of prosecution on the state level. Therefore, these tax laws have the intended effect of a predictable pattern of noncompliance by those engaged in state criminal conduct. That pattern of noncompliance thus brings a federal enforcement and adjudication apparatus into service. Redundant federal criminalization is also very widespread where there is broad federal regulatory oversight, as in securities and banking,⁷⁷ or where there are federal instrumentalities, as in banking⁷⁸ or mail-related crimes.⁷⁹ Prostitution,⁸⁰ auto theft,⁸¹ bootleg-

73. *E.g.*, *Abbate v. United States*, 359 U.S. 187 (1959) (federal prosecution following state prosecution); *Bartkus v. Illinois*, 359 U.S. 121 (1959) (state prosecution following federal prosecution).

74. *See* Schwartz, *Federal Criminal Jurisdiction and Prosecutors' Discretion*, 13 L. & CONTEMP. PROB. 64 (1948).

75. *See, e.g.*, The Interstate Racketeering Act, 18 U.S.C. § 1952(a)(2) (1976) (making a federal crime out of interstate travel or use of the mails to further any unlawful activity).

76. *See, e.g.*, *United States v. Kahrnger*, 345 U.S. 22 (1953) (gambling); *United States v. Sanchez*, 340 U.S. 42 (1950) (marijuana).

77. *See* Securities Act of 1933, 15 U.S.C. §§ 77a-77aa (1976).

78. *See, e.g.*, *Jerome v. United States*, 318 U.S. 101 (1943); 18 U.S.C. § 2113 (1976).

79. 18 U.S.C. § 2114 (1976) (interference with the mail); 18 U.S.C. § 2115 (1976) (post offices).

ging,⁸² kidnapping,⁸³ riot,⁸⁴ narcotics,⁸⁵ embezzlement,⁸⁶ bank robbery,⁸⁷ and mail frauds⁸⁸ are all necessarily or potentially federal as well as state crimes. In many instances the decision to develop or invoke the redundant criminal law forum is related to a mistrust of the alternative, a mistrust frequently arising out of considerations of interest or ideology.

For example, 18 U.S.C. § 241 makes criminal any conspiracy to "injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same;" 18 U.S.C. § 242 similarly makes criminal any such deprivations "under color of any law." These statutes have been repeatedly used to remedy perceived deficiencies in local and state law enforcement and adjudication whether rooted in the racist or other suspect ideological characteristics of the locality, or in the entrenched powerful positions of the wrong-doers.

Justice Roberts wrote in *Screws v. United States*: "The only issue is whether Georgia alone has the power and duty to punish, or whether this patently local crime can be made the basis of a federal prosecution."⁸⁹ The answer to Roberts' question, that "local" crimes such as murder can be made the basis of federal prosecutions, has become more and more evident over the ensuing thirty-five years. And the clarity of the answer is related to clarification of the uses of redundancy to check distortions in the primary criminal justice system. In *Screws* itself, the Justice Department sounded what has become a general theme. The United States argued that the allegation of involvement of local officials in wrongdoing is itself a reason for invoking an independent system to

80. See *Hoke v. United States*, 227 U.S. 308 (1913).

81. See 18 U.S.C. § 2312 (1976). But see *United States v. Crawford*, 466 F.2d 1155 (10th Cir. 1972).

82. See 18 U.S.C. §§ 1261-1265 (federal regulation of liquor traffic). See also *Seaboard Air Line Ry. v. North Carolina*, 245 U.S. 298 (1917).

83. See *Brooks v. United States*, 267 U.S. 432 (1925).

84. See 18 U.S.C. § 2101 (1976).

85. See, e.g., *United States v. Sanchez*, 340 U.S. 42 (1950).

86. See 18 U.S.C. § 641 (1976).

87. See note 78 *supra*.

88. See 18 U.S.C. § 1342 (1976).

89. *Screws v. United States*, 325 U.S. 91, 139 (1945) (Roberts, J., dissenting).

guard the guardians. This use of redundancy to check the self-interest of law enforcement officials in failing to prosecute their own wrongful acts is by now almost uncontroversial, although there are those who prefer that the redundancy be incorporated as an epicycle within the unitary legal system.

b. *Multiple Prosecutions Based on Ideological Differences*

A somewhat more controversial practice has also developed: bringing federal prosecutions based upon ideological, rather than self-interested, mistrust of the state forum or of its prosecutorial apparatus. It is now common to ask, for example, after a controversial acquittal in a state trial prosecuting the issue of racism, whether a federal civil rights prosecution will be brought. The uses of sections 241 and 242 for thirty years have been most prominent in the civil rights arena; the crisis of ideology created by the civil rights movement is hardly unique. Indeed, the modern statement of the rule that such sequential intersystemic prosecutions do not constitute double jeopardy derives from the felt ideological necessities of a somewhat different era. The gulf that separated wet from dry during the heyday of the politics of prohibition entailed a complex of attitudinal differences encompassing much more than booze. In some parts of the country local fervor for prohibition enforcement greatly exceeded that of the federal government; in other states and localities, however, that federal enforcement which did exist was met with considered campaigns of nullification. Everywhere allegations of blatant corruption were common. The solution ratified by *United States v. Lanza*⁹⁰ permitted separate state and federal prosecutions arising out of the same conduct, thus recognizing that the mistrust engendered by a too lax regime of enforcement might be mitigated by an adjudication in the more "reliable" forum.⁹¹

The relation of federal and state prosecutions in such instances of mistrust based on ideology and/or interest is by no means simple. It may be that the two jurisdictions will confirm one another. For example, an alleged bootlegger might be acquitted by the

90. 260 U.S. 377 (1922).

91. See Schwartz, *supra* note 74, at 71.

courts of New York, ideologically suspect to the dry's,⁹² or an alleged Klan killer of blacks might be acquitted by a state court in Mississippi. If a subsequent federal prosecution in such cases confirms the acquittals, it may remove some measure of the mistrust created by and directed at the local verdict. The capacity of the federal court decision to serve this function depends in part on its independence from factors making the state court a target of suspicion. Are the federal judges less tied to local elites? Are the federal juries drawn from a different pool without the characteristics of the state jury pool? The alleviation of suspicion may be accomplished even if there is only a partial mitigation of ideologically biasing factors.

Reiterated acquittals mitigate suspicion on one side while reiterated convictions may serve to alleviate it on the other. The defendant is being shown, after all, that even the jurisdiction with leanings most in tune with the ideological claims of the accused perceives the defendant as the perpetrator of conduct not to be tolerated. Thus, for example, federal prosecutions directed at civil rights activists or southern state prosecutions directed at local white violence might have moral effects that the more predictable pattern of prosecution by the more hostile jurisdiction would not have.

The opportunities for mitigating distrust by confirmation of outcomes and of their implicit messages that are a product of complex concurrency is, however, only half the story (perhaps less than half), for the several systems seized of a matter may fail to confirm one another. Indeed, if we are to suppose that the common perceptions of lay observers, litigants, and lawyers alike have any basis in fact, the more different the public perception of various tribunals—that is, the more they are perceived to speak from different social bases—the more likely they are, in fact, to differ in adjudicating cases. Is there any value to the display of nonconfirming results in different tribunals?

If there is a chasm rendering the social reality of one group in our nation problematic to another, and if that problem of perception and apprehension is to arise in the work of adjudication, there

92. For a view of the federal role during prohibition which confirms that which I state here, see M. WILLEBRANDT, *THE INSIDE OF PROHIBITION* (1929).

is much to be said for making it explicit. Systematic differences in perception and apprehension by various court systems is not to be expected as a result of deviance and marginality alone. In some respects the ideological gulf separating the truly dispossessed of the society from its governing elites is not going to be bridged or displayed in the variations among state and federal tribunals. For despite recurring complaints about judicial salaries, no system has yet turned its bench over to its luftmenschen and beggars. But the political bases of the elites in different polities do vary remarkably and have varied historically still more. Filtered through the elites, we may thus perceive a modified and rationalized version—a tamed variation—of the naked interests of constituent groups.

In short, when we see the alternative forums reaching nonconfirming, inconsistent results, we are watching the impasse between the toned-down versions of social reality and right conduct held by at least locally significant groups in the society. Of course, there must be ways of dealing with an impasse. A defendant either will or will not go to jail. But it may be very significant to be apprised of the fact that this defendant goes to jail in consequence of an impasse rule or goes free because of one, while another conviction or acquittal has been confirmed without inconsistent results in two or more tribunals. Such knowledge might well affect prudential decisions relating to the party, such as sentencing or pardoning, or might affect political decisions with respect to future enforcement policy or subsequent norm articulation. In effect, the disagreement of outcomes in redundant proceedings is a signal and an important one.

Innovation

One of the most familiar metaphors in federalism is that of the social "laboratory." Both Brandeis and Holmes used the image often. As Holmes wrote in *Truax v. Corrigan*, "There is nothing I more deprecate than the use of the Fourteenth Amendment beyond the absolute compulsion of its words to prevent the making of social experiments that an important part of the community desires, in the insulated chambers afforded by the several states

. . . . ”⁹³ This simple figure of speech can be fleshed out into an argument that innovation in norm articulation is healthier in a federal system. Such an argument requires only that there be a sizable number of polities, a sufficiently similar set of experiences within each, and effective communication among the political entities.⁹⁴ If these three conditions are met, one may postulate that certain distinct advantages in terms of norm articulation will accrue.

If there were a unitary source for norm articulation over a given domain, the costs of error or lack of wisdom in any norm articulation would be suffered throughout the domain. Now consider the actual state of affairs in the United States. There may be with respect to many matters a potential for a unitary national norm. Congress or the Supreme Court could, perhaps, announce a uniform and exclusively federal rule—constitutional, common law, or statutory. However, more typically we rely upon a regime of polycentric norm articulation in which state organs and lower federal courts enjoy a great deal of legislative autonomy. This multiplicity of norm articulation sources provides opportunities for norm application over a limited domain without risking losses throughout the nation. This proliferation of norm-generating centers also makes it more likely that at least one such center will attempt any given, plausible innovation. For, although one cannot know this with certainty without understanding the politics of each separate entity, it is likely, as a practical matter, that the many centers will include among themselves norm articulators both more and less risk averse than would be a single national source.⁹⁵ With adequate communication, successful experience

93. *Truax v. Corrigan*, 257 U.S. 312, 344 (1921) (Holmes, J. dissenting).

94. Consider the analogous argument of Martin Shapiro that the 52 jurisdictions constitute in some sense a single decentralized decision system for torts. Shapiro, *Decentralized Decision-Making In the Law of Torts*, in *POLITICAL DECISION-MAKING* 44-75 (S. Ulmer ed. 1970).

95. Assume a very simplistic politics. Decisionmakers in each polity reflect risk averseness in their decisions according to the results of a poll of their constituents. A linear and continuous scale relating decisions to constituent responses to the poll exists. In the national polity the constituent response is simply the sum of all subentity constituent polls. Thus, it is clear that either the national constituent preference is identical with all subentity constituent preferences or there are some subentity preference patterns reflecting greater and lesser risk averseness. If decision patterns follow constituent preferences, the decisions will also

with an innovation will persuade others, slightly more risk averse, to follow suit. Thus, if one assumes a distribution of risk averseness among the "local" legislators, state and federal, which brackets the risk averseness of the sources for national norms, the result will be an important qualification upon the inertial quality of the polity as a whole. The multiplicity of centers means an innovation is more likely to be tried and correspondingly less likely to be wholly embraced. The two effects dampen both momentum and inertia. Assuming a general readiness to take risks, the array of multiple norm articulation sources, some of which will not go so far in innovation, will then mitigate the damages suffered through risky experiments. All of these are familiar concepts. It justifies, at least in some areas, the existence of a system of polycentric norm articulation. Such a system is a prerequisite for, but does not itself justify, jurisdictional redundancy.

It is possible to specify more exactly the ways in which polycentric norm articulation operates, especially in a world in which the various jurisdictions are not chambers wholly insulated from one another. Such a specification will suggest some of the uses of jurisdictional redundancy as well.

a. *Confirmatory Redundancy*

If the several legislative authorities⁹⁶ articulate the same norm, the norm is, if anything, clarified and intensified. One of the characteristics of those prohibitory regulations often labeled *malum in*

have this characteristic. However, as I have indicated in the text, the politics of the various polities may differ. Thus, it may be the case that in the national polity, decisionmakers will be, on some issue, less closely linked to constituent preferences than would be local decisionmakers. This might be the case on a relatively low visibility item if lobbyists and special interests have concentrated on national decisionmakers. The "special interests" might be risk preferring on some issue. Because they are active only on the national level, they may influence decisions so that the national norm shows less risk averseness than any of the subentities. Even though the constituency at the national level is simply a sum of the subentities, national politics bear no such simple relation to state politics. Thus, one cannot say for certain that the elimination of local polities would leave a national polity more moderate than the extant extremes of the fifty-odd jurisdictions we know. The analysis in the text assumes, nonetheless, that an exclusively national rule would be more moderate. This is an assumption of the conventional wisdom even if it is not true. Pursuing the assumption at least demonstrates the logic of the conventional model of federalism.

96. I use the term "legislative" here to mean all norm articulation work including that of legislatures and courts.

se is the fact that a wide variety of norm articulating sources, independent of one another, reinforces the prohibition. There are several ways in which the iteration of a norm operates to reinforce it. It first removes what might be called jurisdictional doubt. If the norm is found almost everywhere, then it is a safer inference that the norm will be applied even when it is unclear what norm articulation source operates over a given domain. Second, the fact that a variety of norm articulators have independently arrived at a given conclusion about some conduct reduces the likelihood that the conclusion is a product of local error or prejudice, ideology, or interest. If a large number of jurisdictions arrive *independently* at the conclusion that a certain kind of conduct is wrong or detrimental, then the conclusion is more apt to reflect the problematic character of the conduct than the problematic character of the norm articulation process.⁹⁷ Finally, the meaning of the norm will be clarified by reiterating independently the "central core" conduct, which all jurisdictions include within the prohibition, while leaving less clear signals for the penumbral areas with respect to which controversy exists. It will be clearer that there is in fact an unproblematic core area of conduct to which the norm will be applied. The redundancy that establishes clarity through iteration, however, need not be cross-systemic. A unitary system may, over time, clarify by repetition as well. Density of contemporaneous utterances of equal authority then is simply a horizontal array performing a function similar to that of a body of precedent over time. Insofar as the array occurs over similar domains, the contemporaneous array has greater force as (redundant) repetition of a principle.

b. *Nonconfirmatory Redundancy*

If we turn from the very "simple" case of redundant articulation of a norm as confirmatory to the more complex instances of conflict or confusion among the sources of articulation, a very different image emerges. Nonconfirmatory articulation of norms by different polities may reflect, of course, different social conditions and/or ideologies. The prior sections have dealt with that result. However, there may be a more prosaic explanation. As law changes, it may

97. It is not important here to decide whether such a widespread norm reflects human nature or a broad cultural adaptation to a common environmental factor.

change in different ways and at a different pace in different jurisdictions. The social laboratory metaphor does not tell us how the results of "experiments" in one lab come to claim the attention and deliberative energies of another.

Up to this point in the analysis, the distinctive and arguably advantageous characteristics of polycentric norm articulation have not required jurisdictional redundancy. Once we focus upon the overlapping effects of legislation outside the limited domains of individual states and districts, however, jurisdictional redundancy becomes central. If fifty-odd primary legislative authorities and several hundred coordinate judicial authorities are to pronounce upon the effects and limits of conduct which is entitled to and regularly does cross those political/jurisdictional lines, then there are two important advantages that flow from jurisdictional redundancy. First, the ensuing jurisdictional conflict may play a special role in communication among polities. Second, jurisdictional choice affords a kind of fairness to people whose affairs are caught in the vice of change—whose private lives and expectations are shaken by innovation.

(1) Communication.

The advantages of polycentric norm articulation are greatest for little things.⁹⁸ Decision theorists have contrasted two paradigms for decisionmaking. One, variously denominated "synoptic"⁹⁹ and "analytic,"¹⁰⁰ posits a comprehensive choice between two alternative end-states with a complete cost-benefit analysis or similar mode of choice employed. Such a comprehensive comparison among options places an enormous burden on the decisionmaker. It may place impossible demands for information, analytic power, and attention upon the decision process.¹⁰¹ Great decisions may

98. See Shapiro, *Stability and Change in Judicial Decision-Making: Incrementalism or Stare Decisis?*, 2 L. TRANSITION Q. 134 (1965).

99. D. BRAYBROOKE & C. LINDBLOM, *A STRATEGY OF DECISION; POLICY EVALUATION AS A SOCIAL PROCESS* (1963).

100. J. STEINBRUNER, *supra* note 42, at 25-46.

101. See *id.* See also R. CYERT & J. MARCH, *A BEHAVIORAL THEORY OF THE FIRM* (1963); J. MARCH & H. SIMON, *ORGANIZATIONS* (1958). Both of these classic works in organization theory build from the point that limited decisional capacity requires modifications in the paradigm of comprehensive optimization decisions.

possibly require that such demands be met. The demands will be met, *if possible*, if the matter is so important that few other decisions can compete for these resources. But more routine decisions cannot totally usurp the attention of the authoritative decisionmaker or the informational and analytic resources available. Systems must be structured to cope with such decisions more routinely. Different analysts have concentrated upon somewhat different dimensions of such routinized decisionmaking, labelling it alternatively "disjointed incrementalism"¹⁰² or the "cybernetic paradigm."¹⁰³ In such systems the component act of decision focuses on a relatively small number of marginal changes in critical variables and responds to these with a repertoire of "programmed" responses. The insufficiency of such a set of responses to complex problems in a complex environment is obvious. But "under conditions of complexity, decisionmaking organizations arise which attempt to match the complexity of their environment by means of an internal complexity which is not the property of a single decision maker, but rather of the collective."¹⁰⁴ The polycentric norm articulation of our court system is one such instance.

Today, courts may or may not be said to operate with a limited number of programmed responses to a few critical variables.¹⁰⁵ Unlike the kinds of organizations studied by Cyert and March,¹⁰⁶ by Steinbruner,¹⁰⁷ or by Simon,¹⁰⁸ they are typically uncontrolled by a top-level "management" which can integrate the decisions, whether analytically or by "sequential attention to goals."¹⁰⁹ The system, if it is to be successful, must have nonhierarchical solutions to the problem of integration of decisions, solutions which are

102. D. BRAYBROOKE & C. LINDBLOM, *supra* note 99.

103. J. STEINBRUNER, *supra* note 42, at 47-87.

104. *Id.* at 69.

105. It might be argued that in a traditional system built on *stare decisis* each decision departs only marginally from preset responses, and then only in response to a very few salient variables in the situation. Whether that description ever fits appellate courts in the United States I do not know, but it seems far from an apt description of many appellate courts today.

106. See R. CYERT & J. MARCH, *supra* note 101.

107. See J. STEINBRUNER, *supra* note 42.

108. See J. MARCH & H. SIMON, *supra* note 101.

109. The term is that of R. CYERT & J. MARCH, *supra* note 101.

themselves adequately complex.¹¹⁰

A large number of decision centers, simultaneously dealing with the same or similar problems, generates a density of experience that produces information quickly with simultaneous, interactive effects of decision and environment. At this point jurisdictional redundancy comes into play. The availability of alternative forums makes information, at least about pairs of jurisdictions, a matter of practical relevance to lawyers and litigants. Forum shoppers and those who oppose them thus become the carriers that pollinate one system of courts with the information about another system's experience.¹¹¹ Moreover, where synchronic or diachronic redundancy is possible, each system must confront the potentially conflicting outcome *in the same case* of some other court with its alternative norms. Such a possibility makes second thoughts and adjustments more likely. Finally, such conflict of laws cases present a dramatic enactment of paired alternatives for future norm articulation. No longer is the court presented with an abstract choice of which rule to choose. Rather it is presented with at least two parties, each of whom claims as his own one of the alternative norm formulations. In short, acquiring information about other jurisdictions and their rules is a time consuming and costly process. It is in those cases in which a party claims another forum and/or its rule that a given court is forced to focus upon the other courts that compose this internally complex response to a complex environment.¹¹²

110. See Shapiro, *supra* note 94.

111. For a number of reasons this effect should be more pronounced in a system with jurisdictional redundancy than in one of a multiplicity of wholly independent decision centers. While in both cases adversaries might raise the law and experience of another jurisdiction, it is far more likely when those data have been part of the earlier strategic choices concerning the forum. Moreover, the vertical redundancy of the federal courts permits the neutral perspective on alternative norms.

112. There is another way of looking at this. Courts are much more likely to seriously encounter another court's law in an explicit choice of law situation. While such choice of law cases can arise whether or not there is jurisdictional redundancy, there is a strong positive correlation between the availability of multiple forums and the appearance of choice of law questions. The reason is simple enough. Many cases can appear to be domestic—the interstate element largely ignored—if it is natural and inevitable that they be heard only in the courts of the state with a particular relation to the subject. Once that jurisdiction link is established, several other relations become more salient and choice of law becomes problematic.

(2) Fairness.

Innovating jurisdictions have a simple interest in externalizing the costs of the transition to whatever extent possible. While there are constitutional limits to what a state can do in externalizing such costs, those limits are very far from a comprehensive and effective bar.¹¹³

Moreover, it is by no means clear in many cases which of several different norms is the "innovation," and it is rarely if ever plain who ought to bear the costs of a transition. In short, a right answer to the question of how much of the cost can be imposed upon whom may be impossible to conceive. Nonetheless, there may be plain enough questions to be asked and some likelihood that different courts will answer them differently, not because of ideology or interest but because of differing views and commitments with respect to the policy issues at stake.

Jurisdictional redundancy can alleviate such problems in one of two ways. Most simply it may—as in the case of ideology—simply facilitate fighting fire with fire. A party prejudiced by the policy commitments of Forum One will have an opportunity to try to invoke Forum Two with its contrary policy whether as an alternative to, a replacement or supplement for, or a sequel to Forum One. Alternatively, the concurrent jurisdiction may afford a neutral choice of law forum, a sort of Archimedean fulcrum above the commitments of either of two forums. The disinterested forum for choice of law might have developed out of diversity were it not for the *Klaxon* rule.¹¹⁴ Moreover, the case could be made that, today, choice of law is one of the primary areas where some respectable state courts *do* systematically prejudice the out-of-staters.¹¹⁵ So an anti-*Klaxon* rule would be consistent with the supposed office of diversity.

Not all problems of innovation in a coordinate system involve state-state choice of law questions. Lower federal courts and state

113. The "dormant" commerce clause is one of the chief limits. See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 319-412 (1978).

114. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941) (requiring that federal district courts sitting in diversity apply the choice of law rules of the state in which they sit).

115. This point is sharply and justifiably made by Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 MICH. L. REV. 392 (1980).

courts stand on a par as expositors of federal law, including the Constitution. I have shown elsewhere, in detail, that the relation of state courts to lower federal courts in habeas corpus situations facilitates a creative dialogue in the ongoing work of articulating constitutional norms to govern the criminal process.¹¹⁶ The fact of diachronic jurisdictional redundancy means that each system must attend closely to the articulations of the other. For each system can withhold from the other an element necessary to full success. If there is disagreement as to what the Constitution requires, federal courts may release prisoners and thus frustrate the specific objective of the state court. However, the state courts may persist in their independent and contrary view of the norm and, thus, in future cases, frustrate the norm the federal court seeks to impose.

In all such transition cases, civil or criminal, it is important to see the nature of the plight of the litigant. She appeals to "law" against law. It may be an appeal to law which one of several alternative forums calls no law. But so long as such a forum is only one of several, there is room, for awhile at least, for recognition of the truly open, tentative, and transitional status of norms which do not yet command common acquiescence among all relevant authoritative courts. Openness about such transitional norms might be useful in many ways. It might lead, for example, to compromise either upon the underlying claim or upon a third "neutral" forum.¹¹⁷

THE CHALLENGE TO COORDINATION RULES

If jurisdictional redundancy has affirmative functional characteristics in these three, related areas of interest, ideology, and innovation, what consequences will follow with respect to the specific rules that govern coordination in a system of complex concurrency? These rules are of three sorts, involving: (a) rules and principles governing invocation of the forum, including rules governing in personam and subject matter competence, stays, abstention and other discretionary declinations of jurisdiction, *forum non con-*

116. Cover & Aleinikoff, *supra* note 35.

117. We do not often think of compromise as the judicial solution to conflict over norm articulation. Other cultures use compromise more fully than do we. See Eisenberg, *supra* note 17, at 640-46.

veniens, and others; (b) rules and principles governing the law applied, involving largely choice of law and *Erie*; and (c) rules governing effects of determinations, such as *res judicata*, collateral estoppel, effects of judgments, and double jeopardy. Nothing of what I have written thus far provides a determinative answer to any question about specific coordination rules. Rather, I have presented a justification for the system as a whole with its characteristic need for coordination. Despite this lack of specific answers, several general principles are suggested that do have practical implications.

First, since the substantive battlefields upon which conflicts of interest, ideology, and innovation are fought change over time, it is not to be expected that effective coordination rules will be substance-neutral emanations of formal structure alone.¹¹⁸ Rather, the areas of relatively unrestrained redundancy will change with the salient social conflicts. Thus, recourse to the federal forum in diversity was of utmost significance, in terms of both ideology and innovation, with respect to large scale equity receiverships and municipal bond litigation in the last half of the nineteenth century and with respect to labor in the 1920's and early 1930's. Access to the redundant federal forum under sections 1983¹¹⁹ and 1343¹²⁰ has been of equivalent concern in the 1960's and 1970's. When diversity, rather than civil rights jurisdiction, captures the relevant ideological differences, it will be with respect to diversity that coordination principles are highly articulated. The intricacies of diversity jurisdiction could occupy the scholars of the 1890's and 1920's with much the same degree of refinement as is now lavished upon section 1983.

Second, the political pressure for open avenues of redundancy comes about when effects are not random. Thus, to the extent that the redundant forum simply provides an avenue for forum shopping with no systematic differences arising from interest, ideology, or innovation, there will not be an identifiable and cohesive group prejudiced by the presence or absence of the alternative forum.

118. An example is the rule that a state must give the judgment of a sister state the same effect as it has in the state of rendition.

119. 42 U.S.C. § 1983 (1976).

120. 28 U.S.C. § 1343(a)(3) (Supp. III 1979).

When the forum becomes an issue to an identifiable group, it is because that group thinks that there is more than mere randomly distributed error at stake. This means that the very fact that significant groups have conflicting systematic preferences for a forum or type of forum as to some issue is a strong argument for relatively unrestrained redundancy.

CONCLUSION

This paper has been a plea for a nonsolution. For some time the jurisdictional structure of "our federalism" has struck me as comprehensible only as a blueprint for conflict and confrontation, not for cooperation and deference. It seems unfashionable to seek out a messy and indeterminate end to conflicts which may be tied neatly together by a single authoritative verdict. Unquestionably, my perverse perspective may be carried too far. I, ultimately, do not want to deny that there is value in repose and order. But the inner logic of "our federalism" seems to me to point more insistently to the social value of institutions in conflict with one another. It is a daring system that permits the tensions and conflicts of the social order to be displayed in the very jurisdictional structure of its courts. It is that view of federalism that we ought to embrace.