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COMMENTS

Citation Sources and the New York Court of Appeals

INTRODUCTION: THE NATURE OF THE INQUIRY

COURT citation practice is an objective measure of judicial behavior which, it can be hypothesized, will vary with the type of issue before the court. In citing a particular source to support their processes of decision making, judges are both seeking legitimacy and legitimizing the source used.¹ Practicing attorneys must select and assert authority in their roles as adversaries. Similarly, legal scholars are interested in the use of such authority by the courts, in part as an indication of the process of judicial decision making.² Variation in citation practice that can be related to the subject matter of the suit before the court may provide useful information about the judicial process attorneys and legal scholars alike.

What sources of knowledge do courts turn to when providing authority for their decisions? What sources are seen as legitimate, and thus given legitimacy by citation in court opinions? By studying the citation practices of the New York Court of Appeals, it is hoped that the influence of various sources, and the legitimacy of the use of some sources, can be quantified. This information is relevant to two audiences. To the scholar interested in judicial decision making, a study of the court's citation practices can provide objective empirical evidence on the sources of the court's legal reasoning.³ To the practicing lawyer, such a study can illuminate

1. Merryman, *The Authority of Authority*, 6 STAN. L. REV. 613, 616 (1954). Professor Merryman initiated the study of court citation practices with this study of the California Supreme Court.

2. *Id.* at 613. See *infra* notes 3 & 10-15.

3. Daniels, "Far Beyond the Law Reports": *Secondary Source Citations in United States Supreme Court Opinions October Terms 1900, 1940 and 1978*, 76 LAW LIBR. J. 1, 4 (1983).

those sources of legal reasoning that best persuade the court.⁴

In this study, the citation practices of the New York Court of Appeals were analyzed through the use of sample cases from particular areas of law selected from three different years (1963, 1973, and 1983). Cases from four different areas of law were sampled: constitutional, criminal, "concriminal" (cases falling within both the constitutional and criminal categories), and negligence. Differences in citation practice over time and between types of cases were found. Court citation practice in particular areas of law varied widely. Cases involving constitutional issues invoked a fuller use of authority than did those involving negligence or criminal issues alone. Suits containing negligence issues generally cited to more authority than those involving criminal issues. In all of these groups, differences were found in the types of authority cited by the court.

The scope of the conclusions which can be drawn from this study must be circumscribed. Such a study will obviously be underinclusive—its results "reflect only the superficiality of citation and not the deep undercurrents of unacknowledged reliance."⁵ Two other factors will be left out of the empirical results: "[T]he citation of precedent may represent (and leave unstated) a bundle of reasons that lie behind why the precedent is persuasive. There is . . . much unstated legal and social philosophy behind any decision,"⁶ and policy arguments are often similarly left out of written opinions.⁷ Thus, these objective measures of the forces at work in a judge's process of legal reasoning must, to a certain degree, be inadequate. But the style and content of opinions is the guide to which we have access, and analysis of these characteristics might allow us to glimpse the inner workings of judicial decision making, even if all we discern are those sources which judges perceive to be legitimate authority upon which to base decisions.⁸ Judicial opinions do not tell what is going on in judges' minds. "It may be mere rationalization. But . . . the opinion and its reasoning show

4. *Id.*

5. Scurlock, *Scholarship and the Courts*, 32 UMKC L. REV. 228, 230 (1964). Professor Scurlock studied Missouri, California, New York, and Supreme Court citation practices.

6. T. MARVELL, *APPELLATE COURTS AND LAWYERS* 108-09 (1978).

7. *Id.* at 108-09. See also Waits, *Values, Intuitions, and Opinion Writing: The Judicial Process and State Court Jurisdiction*, 1983 U. ILL. L. REV. 917, 926-27.

8. Friedman, Kagan, Cartwright & Wheeler, *State Supreme Courts: A Century of Style and Citation*, 33 STAN. L. REV. 773, 773 (1981) [hereinafter cited as Friedman].

what judges *think* is legitimate argument and legitimate authority, justifying their behavior.”⁹

A knowledge of this perception of legitimacy is essential for the lawyer since it is the advocate’s responsibility to bring not only precedent, but social facts and value choices before the courts.¹⁰ Given the time constraints on appellate courts, the advocate’s brief must be concise while bringing as much information to bear on the issue as possible.¹¹ A knowledge of appropriate sources can thus aid the lawyer.

In the past thirty years researchers have examined the citation practices of various courts. The Supreme Court’s citation practices have received great attention.¹² Individual state court practices have also been studied. One example is John Henry Merryman’s extensive study of the California Supreme Court.¹³ The Maryland Court of Appeals¹⁴ and the North Carolina Supreme Court have also been subjects of inquiry.¹⁵ William Landes and

9. *Id.* at 794 (emphasis in original).

10. Leflar, *Quality in Judicial Opinions*, 3 PACE L. REV. 579, 581 (1983); Waits, *supra* note 7, at 923 n.44, 926. Waits warns against lawyers’ temptation to skirt value issues in court briefs:

One undesirable side effect of the profession’s lack of candor on the value question is that lawyers may fail to bring to the court’s attention important value-related arguments. Lawyers trained in the “law-as-a-series-of-rules” tradition may fail to see value issues altogether; other advocates may fear backlash from the court if such arguments are perceived as appeals to irrationality and emotionalism. In truth, the court needs the adversaries’ help on policy issues as much as it does on questions of fact. If the parties do not identify and argue the relevant value choices, no guarantee exists that the court will spot them by itself.

Id. at 927.

11. S. WASBY, T. MARVELL & A. AIKMAN, VOLUME AND DELAY IN STATE APPELLATE COURTS: PROBLEMS AND RESPONSES 86-88 (1979). From a judicial perspective:

My experience has been that appellate briefs and arguments on the whole insufficiently set the case in the broader context of the legal and jurisprudential mosaic. Because of the volume of our work, ever increasing, the individual members of the court have little time to indulge in research and cogitation beyond the close borders of the case at hand.

Jones, *Cogitations on Appellate Decision-Making*, 52 N.Y. ST. B.J. 189, 215 (1980).

12. Daniels, *supra* note 3. See also Landes & Posner, *Legal Precedent: A Theoretical and Empirical Analysis*, 19 J.L. & ECON. 249; Scurlock, *supra* note 5.

13. Merryman, *Toward a Theory of Citations: An Empirical Study of the Citation Practice of the California Supreme Court in 1950, 1960, and 1970*, 50 S. CAL. L. REV. 381 (1977).

14. Reynolds, *The Court of Appeals of Maryland: Roles, Work and Performance*, 38 MD. L. REV. 148 (1978). Professor Reynolds focused on the high court of Maryland in part because of the dearth of studies on this type of influential court. *Id.* at 148.

15. Mann, *The North Carolina Supreme Court 1977: A Statistical Analysis*, 15 WAKE FOR-

Richard Posner have conducted a study of the citation practices of various courts.¹⁶ In addition, an extensive study of a number of state supreme courts has been conducted, producing several scholarly articles analyzing citation practice.¹⁷

Only one study to date has included an analysis of the New York Court of Appeals citation practices.¹⁸ John Scurlock examined the citation practices of several state courts in the area of criminal law. His study concentrated on the use of legal treatises, law review articles, and reference works in court opinions in criminal cases. Scurlock found that the use of such sources varied between courts, and that a total of thirty-one percent of the opinions studied did cite to one of these sources.¹⁹ Twenty-five percent of the New York Court of Appeals cases studied, written between 1959 and 1962, contained citations to sources other than cases and statutes.²⁰ Because this study was conducted twenty-five years ago, it would provide an informative contrast to more recently collected data presented here.

I. THE STUDY

In this section the methodology of the study will be explored. In addition, the general areas of opinion practice at issue will be examined. The usefulness and limits of this study's results can best be understood through a thorough knowledge of the methodology employed. An explanation of the issues studied will aid in understanding the significance of the data presented in the next section.

EST L. REV. 39 (1979).

16. Landes & Posner, *supra* note 12. Landes and Posner utilize an economic framework in which precedents are viewed as constituting a stock of legal capital, subject to depreciation and production. *Id.* at 250-51.

17. Kagan, Cartwright, Friedman & Wheeler, *The Evolution of State Supreme Courts*, 76 MICH. L. REV. 961, 963 (1978) [hereinafter cited as Kagan]. *See also* Friedman, *supra* note 8.

18. Scurlock, *supra* note 5, at 230-31.

19. *Id.* at 228. Conversely, 69% of the examined decisions "rested exclusively on cases, statutes or rules of court." *Id.*

20. *Id.* at 238. Scurlock also presents a list of treatises and law review articles cited in the criminal case sample. This list will be compared to more recent results. *See infra* text accompanying notes 75-89.

A. Design

Many authors have suggested the use of legal computer programs in aiding scholarly research.²¹ This study was aided by the availability of the Westlaw data base. Queries were used to locate New York Court of Appeals cases which had certain characteristics.²² A sample of cases was then read and analyzed. The analysis focused on different issues,²³ concentrating on factors which could be objectively measured, including opinion length and the number and type of citations to authority. The data was then compared to available data from New York State and other states.

The sample was divided into two basic dimensions: time and subject matter. Time periods ten years apart were selected for study: 1963, 1973, and 1983. A longitudinal study of this nature allows for evolution in the philosophy of the court.²⁴ An examination of several years increases the possibility that patterns of citation practice will emerge.²⁵ It must be noted, however, that there is no certainty that the years selected are not anomalous in one or more respects. Various factors, such as the stability of the membership of the court, can affect citation practice. The membership of the New York Court of Appeals remained fairly constant within each year chosen, although it changed across the length of the study.²⁶

The second dimension of the division is subject matter. Four different categories of law were chosen for each of the three test

21. See, e.g., Daniels, *supra* note 3, at 27-28.

22. The characteristics are the year of the decision and the topic of the case. For a more detailed description of the methodology, see *infra* note 31.

23. See *infra* text accompanying note 27.

24. See Merryman, *supra* note 13, at 381.

25. *Id.* at 382.

26. The judges of the court of appeals during the 1983 term were: Chief Judge Lawrence H. Cooke and Associate Judges Matthew J. Jasen, Hugh R. Jones, Sol Wachtler, Bernard S. Meyer, Richard D. Simons and Judith C. Kaye (appointed September 6, 1983, following the resignation of Jacob D. Fuchsberg). See DEPARTMENT OF STATE, 1982-1983 MANUAL FOR THE USE OF THE LEGISLATURE OF THE STATE OF NEW YORK 893 (1983). Judges of the court of appeals during the 1973 term were: Chief Judge Stanley H. Fuld and Associate Judges Adrian P. Burke, Charles D. Breitel, Matthew J. Jasen, Dominick L. Gabrielli, Hugh R. Jones and Sol Wachtler. See DEPARTMENT OF STATE, 1973 MANUAL FOR THE USE OF THE LEGISLATURE OF THE STATE OF NEW YORK 1098 (1973). Judges of the court of appeals during the 1963 term were: Chief Judge Charles S. Desmond and Associate Judges Marvin R. Dye, Stanley H. Fuld, John Van Voorhis, Adrian D. Burke, Sydney F. Foster and John F. Scileppi. See DEPARTMENT OF STATE, 1963 MANUAL FOR THE USE OF THE LEGISLATURE OF THE STATE OF NEW YORK 912 (1964).

years: criminal, constitutional, "concriminal" and negligence cases. Criminal cases are defined as those listed under the Westlaw criminal topic, but not the constitutional topic. Constitutional cases are similarly defined as those constitutional cases not cross-listed with the criminal category. Thus, another category, "concriminal" can be used to define those cases classified under both topics. Negligence cases, of course, are defined by their classification under that topic. This use of exclusive topic categories, that is, categories that cannot contain the same cases, provides a basis for the use of various statistical tests.²⁷ In addition, the testing of hypotheses regarding different citation practices between categories is clearer if the categories are exclusive. The effect of the presence of criminal or constitutional issues, or both types of issues, within a case may be more clearly observed.²⁸

Many scholars have noted that court citation may vary according to the subject matter of the suit, and that court caseloads in different types of suits have changed over time.²⁹ These four categories were chosen for analysis here because of the differing types of disputes they presented to the court for resolution.

Random samples of the court cases were taken in two areas: constitutional and criminal law. A population universe³⁰ was obtained containing all court of appeals cases dealing with these Westlaw topics for each of the three years. A random sample was then drawn from the cases in each category.³¹ Cases which fell

27. The use of the Chi Square test, for example, is aided through the use of exclusive categories. H. REYNOLDS, *ANALYSIS OF NOMINAL DATA* 19 (2d ed. 1984). A drawback of the use of such categories is that they become less representative. The class of "constitutional" cases with criminal cases removed may no longer provide accurate information about constitutional cases as a whole.

28. In their study of federal court case citation practices, Landes and Posner utilize a similar method of separating criminal from constitutional issues and examining the effect of the presence of both. Landes & Posner, *supra* note 12, at 253.

29. See, e.g., Kagan, *supra* note 17, at 1004; Landes & Posner, *supra* note 12, at 252; Scurlock, *supra* note 5, at 228.

30. The "population universe" is the set of all entities which contain the characteristics under study. In this case it includes all criminal, constitutional, and negligence cases for the three study years.

31. Technically, random sampling from such categories may be termed stratified random sampling. H. BLALOCK, *SOCIAL STATISTICS* 393-96, 437-40 (1960). A Westlaw query was formulated, containing the name of the court, the desired year (1963, 1973 or 1983) and the West topic desired (constitutional, criminal, or negligence law). A population universe was obtained for all court of appeals cases involving these topics for each of the three years. Random samples were taken in the first two categories. Cases which appeared in

within both categories were set aside as a separate category, "con-criminal" cases.

Several factors led to the use of these categories. First, criminal and constitutional cases make up a large part of many state high court caseloads, and this percentage is increasing.³² Second, these categories represent two different sorts of disputes. Following Robert Kagan's typology, criminal cases represent public law disputes, which can be seen as the exertion of public power on the individual.³³ Constitutional cases can be seen as representing a similar type of dispute, but with the force reversed—an attempt to exert individual interests upon the public. The differing nature of these disputes may be reflected in differing sources of citation.

In addition, several hypotheses have been presented with regard to court practices in these areas. Katherine Waits argues that constitutional law is more "value-laden" than other types of law.³⁴ This argument implies that values and societal beliefs must be presented to the court by lawyers, and that such sources of information will appear in court citation.³⁵ Scurlock, in his study of criminal cases in several state courts, argues that citation practice in this category might be more conservative, emphasizing statutes and caselaw.³⁶ Data from another study supports the hypothesis that courts decide these cases differently. Ron Steinberg, in his more recent study of the voting practices of the judges on the New York Court of Appeals, notes that "[j]udges in New York apparently see the appeals of those threatened with criminal prosecution and physical detention from a perspective fundamentally different from that operating with respect to those suffering personal injury, property damage, or loss of work."³⁷

both the criminal and constitutional categories were separated out. The samples in each resultant category were checked to ensure that at least a 10% sample of the total possible number of cases had been obtained. In certain categories an additional random sampling was performed to assure that this minimum percentage was contained in the sample. All of the cases under the negligence heading were analyzed.

32. See Kagan, *supra* note 17, at 987-88.

33. *Id.*

34. Waits, *supra* note 7, at 926.

35. *Id.*

36. Scurlock, *supra* note 5, at 228.

37. Steinberg, *Sympathetic Voting Dimensions on the New York Court of Appeals*, 41 ALB. L. REV. 699, 730 (1977). Professor Steinberg examines judicial voting behavior through an analysis of individual judge characteristics, following the line of research developed by Glendon Schubert. See, e.g., G. SCHUBERT, QUANTITATIVE ANALYSIS OF JUDICIAL BEHAVIOR

The last category of cases studied were those listed under the negligence heading. This group represents a different type of dispute—one between private parties. Negligence law has undergone great changes over the past twenty years.³⁸ Because the number of cases in this group was small, each could be analyzed.

The initial random samples from the criminal and constitutional categories, when divided into exclusive groups, provided a sample of less than ten percent of the total possible number of cases for some year-category combinations. An additional random sample was obtained, including a number of cases sufficient to bring the percentage of cases studied in the sample to a minimum of ten percent. There are also three 1963, four 1973 and seven 1983 New York Court of Appeals cases classified under the Westlaw negligence heading that were included in the study. This brought the total number of cases analyzed to sixty-eight (see Appendix A for a list of cases analyzed). Although at least one student of court citation practice has used this minimum percentage standard for sample size,³⁹ valid sample size is determined with reference to the variability of the population universe, not size alone.⁴⁰ Therefore, it is difficult to determine an appropriate sample size without a knowledge of the variability of the criteria to be

(1959).

In a recent law review article, the Honorable Sol Wachtler, Chief Judge of the New York Court of Appeals, recognized the potential for differential judicial response to different types of disputes. Wachtler, *Stare Decisis and a changing Court of Appeals*, 59 ST. JOHN'S L. REV. 445 (1985). The judge noted that the concept of stare decisis plays a more important role in cases "involving wills, title to land, commercial transactions, and contracts," statutory interpretation, and those invoking long standing commitment to a particular policy. *Id.* at 449. In contrast, commitment to stare decisis might be less firm in several areas examined in this study. Judge Wachtler noted that "courts more readily examine rules they themselves have promulgated, for example common-law rules of tort liability." *Id.* at 453. This may be implicated in this study's analysis of citation practice in negligence cases. The judge also noted the rule's weaknesses in constitutional interpretation and criminal cases (at least where adherence to precedence would injure a criminal defendant). *Id.* Here, too, the categories chosen for study may represent those where stare decisis plays a comparatively meager role in the settlement of disputes. The range of citation sources may reflect this fact, for, where the force of stare decisis is weakened, a court may more freely turn to a multitude of legal and extra-legal sources of authority.

38. Laufer, *Tort Law in Transition: Charles S. Desmond's Quarter-Century on the New York Court of Appeals*, 15 BUFFALO L. REV. 276, 280 (1965). See also Wachtler, *supra* note 37, at 453 n.44.

39. Landes & Posner, *supra* note 12, at 252.

40. W. DANIEL & J. TERRELL, *BUSINESS STATISTICS: BASIC CONCEPTS AND METHODOLOGY* 171-80 (1983). The equation for determining sample size is given as:

measured. An attempt to approximate the variability and determine an appropriate sample size leads to the conclusion that an extremely large number of cases would have to be studied.⁴¹ In this study a certain degree of statistical vigor has been sacrificed to the constraints of time and other resources. The results, though not statistically valid, are similar enough to the results of other state studies to provide some assurance of sufficiency.⁴² Figure 1 summarizes the sample sizes of this study and gives the sample size as a percentage of the total possible number of cases.

To those who view citation practice as a matter of an individual judge's preference, its study may seem to be a "dubious undertaking."⁴³ Yet, as Posner notes on the citation of caselaw precedent: "the question whether or not the use of precedents is systematic does not have to be decided on *a priori* grounds; to the extent that judicial citation practices exhibit regularities explicable within a systematic analytic framework, a statistical analysis of precedent should reveal them."⁴⁴

$$n = \frac{Nz^2\delta}{d^2(N-1)+2^2\delta^2}$$

where: N = population size;
 Z = standard normal variable;
 δ^2 = population variance; and
 d = the confidence interval desired.

Id. at 173.

41. One method of estimating the population variance is to utilize whatever variance is found in an initial sample. *Id.* at 172. Utilizing this method and the sample size equation for estimating the mean, it was determined that a sample size of several hundred would be required for some categories. Since this number of cases did not exist, only the analysis of the entire population would have met this statistical test.

42. The sample validity can be tested to some degree in comparison with data from other states. Severely anomalous differences might indicate a sampling error in the study. Conversely, where results fit a general trend which is presumed to have applicability within this state, sample validity is supported. *See infra* text accompanying notes 65-66. *See infra* Figure 1 for a chart representing sample size and population percentages.

43. Landes & Posner, *supra* note 12, at 251.

44. *Id.* at 252.

YEAR	TOPIC	SAMPLE SIZE	TOTAL POPULATION	PERCENT
		(No. Cases Studied)	(No. Possible Cases)	(Cases Studied/ Total No. Cases)
1963	CONSTITUTIONAL	6	6	100
	CRIMINAL	7	26	26.92
	CONCRIMINAL	2	4	50
	NEGLIGENCE	<u>3</u>	<u>3</u>	<u>100</u>
	TOTAL	18	39	46.15
1973	CONSTITUTIONAL	7	10	70
	CRIMINAL	7	27	25.93
	CONCRIMINAL	4	5	80
	NEGLIGENCE	<u>4</u>	<u>4</u>	<u>100</u>
	TOTAL	22	46	47.83
1983	CONSTITUTIONAL	8	23	34.78
	CRIMINAL	11	91	12.09
	CONCRIMINAL	1	2	50
	NEGLIGENCE	<u>7</u>	<u>7</u>	<u>100</u>
	TOTAL	27	123	21.95

Figure 1: Sample Size And Percentage of Population Studies

B. Issues

1. *Opinion Length.* Opinion length is important for several reasons. First, it is a measure of the sheer magnitude of the legal reasoning in the opinion. Studies have noted the relationship between opinion length and court caseload,⁴⁵ and also between the "importance" of a case (as measured by subsequent citations) and the length of the opinion.⁴⁶ The use of page length can also modify the significance of some statistical findings. Thus, one could find that constitutional opinions contain a great many more cites than criminal opinions. The significance of this finding could be mitigated by the discovery that the number of citations per page (or other measure) is equivalent.

Page length, a typical measure of opinion length,⁴⁷ could not be used consistently in this study because the reporter for the New York Court of Appeals (New York Reports) has changed format and typeface over the years. Hence, this data was of little practical use for comparisons. The number of words per opinion

45. Friedman, *supra* note 8, at 783; Kagan, *supra* note 17, at 971.

46. Kagan, *supra* note 17, at 991.

47. Friedman, *supra* note 8, at 775-85.

was used instead as a measure of opinion length. Rough comparisons could then be made between the different categories in this dimension. Comparisons to data from other studies are limited, however, by the use of a different standard of measure.

Two different factors might have an effect upon opinion lengths in the present study. The lengths of opinions exhibited great differences among categories (see Figure 2). Concriminal cases were the longest, although they steadily decreased in length across the sample years. If opinion length is related to the “importance” of a case, one might expect constitutional cases to have the next greatest opinion length. Surprisingly, however, negligence cases were the next longest. A significant change in the negligence case length also occurs over time, with the longest average length found in the 1973 year. Constitutional cases do show greater length than criminal cases, but their length decreases over time. Criminal cases, with the shortest length, rise and fall in a manner similar to that shown in the negligence cases.

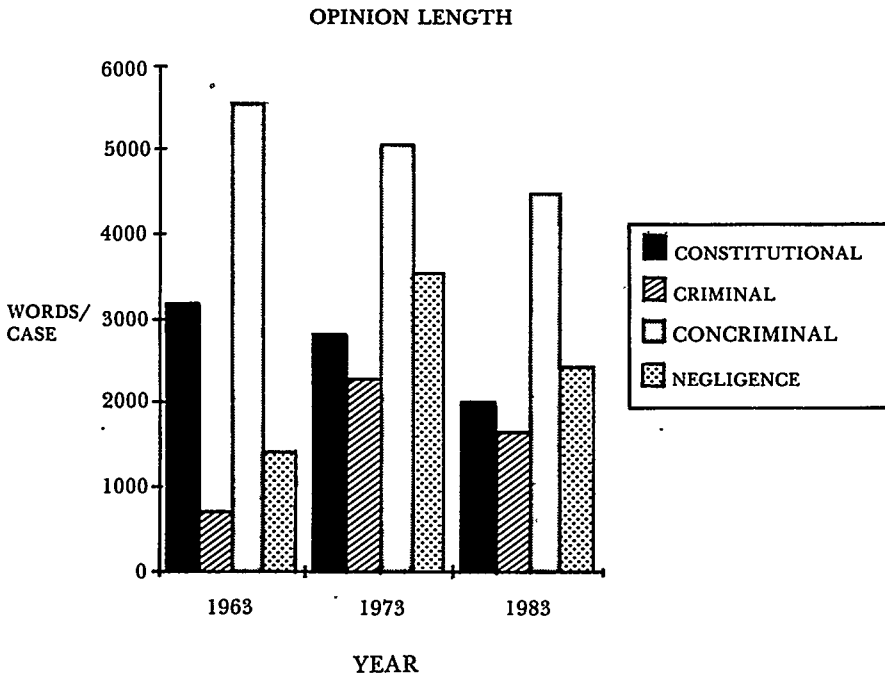


Figure 2: Opinion Length per Category by Year

The lengths of the cases differ among categories in ways which implicate this study's hypotheses about the types of disputes they represent for resolution by the court. As Lawrence Friedman and his colleagues noted: "[i]t seems reasonable to assume that judges write shorter opinions . . . for cases they perceive to be 'easy'—clearly controlled by precedent—and longer ones in cases they feel are legally difficult, or politically controversial, or liable to have major social impact."⁴⁸ It is in these difficult cases that one might expect the court to call on different and wider sources of authority for its decisions. Under this reasoning, the topic cases of this study should show differences in citation style reflecting differences in the difficulty of the decision before the court.

Less clearly related to the value-laden nature of a particular case is the length of any concurring or dissenting opinion which appears (see Figure 3). Majority opinions exceed both other types of opinions in length, substantially so in the 1973 year. The average length of concurrences is relatively constant in 1963 and 1973, but increases in the 1983 sample, where it exceeds the average length of dissenting opinions. Dissenting opinions remain relatively constant in length over time. The implications of these differences are unclear. One significant result of this analysis of opinion length is the observed substantial increase in majority opinion length for the 1973 year. It would appear that the court majority was resolving less straightforward issues in this year. It is puzzling, however, that dissent length did not show a corresponding increase in 1973.

Opinion length measured across time showed no clear pattern. This result is at odds with the notion that increases in court caseload affect opinion length inversely.⁴⁹ This provides further support for the hypothesis that the court was engaged in complex dispute resolution in those areas in which opinion length increased, despite an increased caseload.

48. Friedman, *supra* note 8, at 777. Cases which have more "issues" might also be longer. Certain topics may be more likely to involve more than one issue.

49. Kagan, *supra* note 17, at 971.

OPINION LENGTH/TYPE OPINION

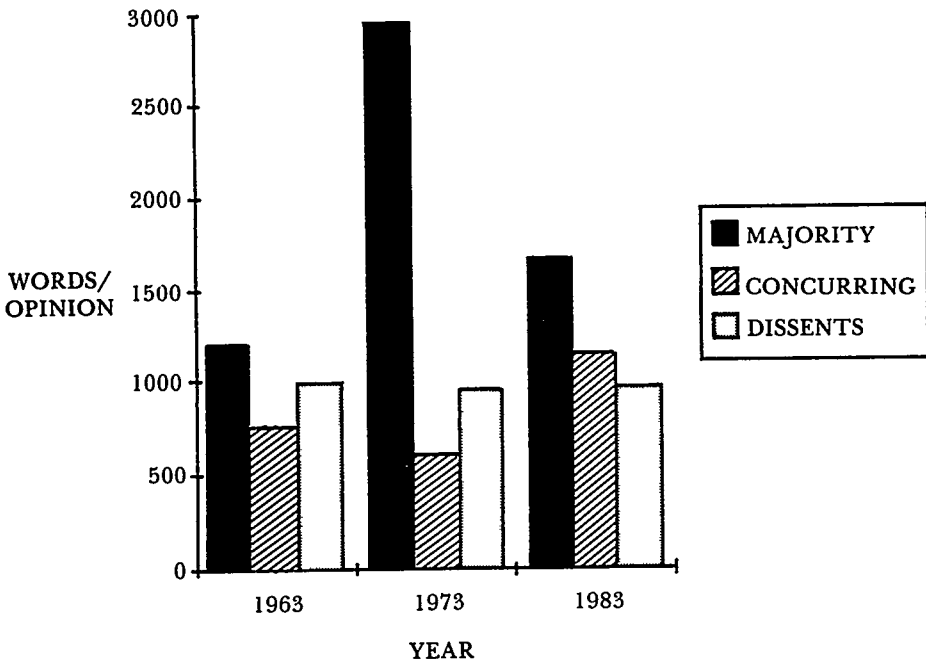


Figure 3: Opinion Length/Type Opinion/Year

2. *Rates of Concurrence and Dissent.* While opinion length may be an indicator of the *amount* of legal reasoning represented in the cases, the dissent rate may represent the use of a particular *style* of legal reasoning. One extensive study of state courts has shown that dissent rates may increase as policy issues are brought into the judicial decision making process.⁵⁰ While most cases on the state level are typically decided unanimously,⁵¹ interesting relationships have been drawn in the rate of dissent over time, and

50. Friedman, *supra* note 8, at 775-84. The study data supported the hypothesis that as cases deal more with policy decisions, dissent rate increases. Individual judges may identify their obligations to unanimity differently, but at least one New York Court of Appeals judge advocates restraint in the writing of concurring and dissenting opinions. The judge would limit the writing of separate opinions to either those cases with federal or constitutional issues that have the potential to reach the Supreme Court, or those cases that one's sense of integrity or principle compels the writing of a separate opinion. See Jones, *supra* note 11, at 218-19, 222.

51. Friedman, *supra* note 8, at 786-87.

in the decisions of particular judges.⁵²

In the instant study, the sample categories chosen had higher rates of dissent and concurrence than the rates for all court of appeals cases (see Figure 4). This may be due to the high visibility of decisions in these categories. Waits' hypothesis that constitutional cases involve more value choices is supported by the fact that in the constitutional sample the dissent rates are significantly greater than those in the criminal sample. Of particular interest here is the difference between the criminal, constitutional, and concriminal rates. The concriminal cases had the highest proportion of dissenting opinions, suggesting that these cases presented particularly contested value choices for the court. Large dissent rates are also found in the negligence sample for 1983, again suggesting that this area presented difficult choices for the court. Of interest is the decline in dissent and concurrence rates for both constitutional and criminal cases. Here the dissent rate remains high, although it drops briefly in 1973. Negligence cases, on the contrary, have shown a steady growth in the rate of dissenting opinions. It would appear that policy considerations have increasingly been at issue in these cases. These trends, including the general decrease in the dissent and concurrence rates, have implications for further investigations. This decline in rates suggests a lagging interest in policy issues, or possibly a more homogeneous court. In opposition to the general trend, the higher rates for concriminal and negligence cases suggest increasing policy considerations. These differences in dissent and concurrence rates, are similar to the differences found in opinion length above.⁵³ This suggests that the citation sources utilized by the court may exhibit a change in character, particularly in the 1983 sample.

3. *Citation Practices.* Several analyses have been performed on the citation practices of the sample court of appeals cases. Two basic levels of analysis are used. In the first, a broad statistical approach is taken. It is here that the average number of citations (per year, per category, and per type of opinion) are calculated.

52. Mann, *supra* note 15, at 42-43. Mann examined individual judge participation in dissents or majorities in criminal and noncriminal cases. *Id.* at 53.

53. In fact, differences in case length may be due to the rate of concurrence or dissent in different categories. Cases with more of such opinions would undoubtedly be longer than those in which the rate of occurrence for separate opinions was lower. See *supra* text accompanying notes 48-49.

These statistics provide a broad overview of the citation practices of the court. They begin to answer the question: "What sources of knowledge does the court turn to in providing authority for their decisions?" Further, such data can be used to examine whether there are differences in the types of citation sources across time, category or the type of opinion (majority, dissent or concurrence). The second level of analysis focuses on which particular sources are used by the court. Here, the court's use of nontraditional citation sources is examined; sources such as legal treatises, law reviews, and lay materials are considered nontraditional.

The statistics generated represent some basic quantifiable aspects of citation practice that can be compared with courts in other states.⁵⁴ These statistics can aid in examining the judicially perceived need for supporting authority across time and category. Of particular interest here, however, is the examination of the *types* of authority cited in the variable situations. Several hypotheses may be implicated in the use of one sort of information source over another.⁵⁵

The first step in analysis, then, is to determine the total number of citations⁵⁶ made by the court of appeals in the sample years and categories per case. As Figure 5 details, there appears to be a general trend across the three years toward a decrease in average citation number. The citation totals for the categories show that this trend is not constant. Negligence citations, for example, have remained fairly constant through this period, opposing the trend toward increasing opinion length and rate of dissent noted above. Concriminal citations presented a different pattern, decreasing in 1973 but rising in 1983. This too seems unrelated to the opinion length pattern found above. Constitutional and criminal cases showed a general decrease in the average number of citations per case.

54. See Friedman, *supra* note 8, at 796-817; Merryman, *supra* note 13, at 389-91.

55. See *infra* text accompanying notes 69-96. See also Merryman, *supra* note 1, at 621-26.

56. A "citation," as defined for the purposes of this study, is a reference to a case, statute, legal treatise (including legal encyclopedias and restatements), law review article, or other source (i.e., citations to nonlegal works or periodicals). The sources are considered the relevant subject for study. Therefore, multiple citations to the same source are not considered relevant if they appear in the same case. See, e.g., Merryman, *supra* note 13, at 388.

YEAR	NEW YORK SAMPLE										TOTAL NEW YORK CASES				OTHER STATES	
	CONSTITUTIONAL		CRIMINAL		CONCRIMINAL		NEGLIGENCE		TOTAL SAMPLE		C (%)*	D (%)*	C (%)**	D (%)**		
	C (%)	D (%)	C (%)	D (%)	C (%)	D (%)	C (%)	D (%)	C (%)	D (%)						
1960-70	—	—	—	—	—	—	—	—	—	—	—	—	3.70	12.8		
1963	0	53.85	11.11	11.11	22.22	55.56	16.67	33.33	10.81	40.54	—	—	—	—		
1973	0	22.28	11.11	11.11	0	42.85	28.57	14.29	9.38	21.88	3.56	22.94	—	—		
1983	9.09	18.18	7.69	7.69	0	50.00	0	41.67	5.26	23.68	3.29	10.70	—	—		

Figure 4: Rates of Concurrence (C) and Dissent (D)

* Estimated using data from 1975 JUD. CONF. OF THE ST. OF N.Y. ANN REP. 20, at 34; 1974 JUD. CONF. OF THE ST. OF N.Y. ANN REP. 19, at A85.

** Percentages from Friedman, Kagan, Cartwright & Wheeler, *State Supreme Courts, A Century of Style and Citation*, 33 STAN. L. REV. 773, 787 (1981)

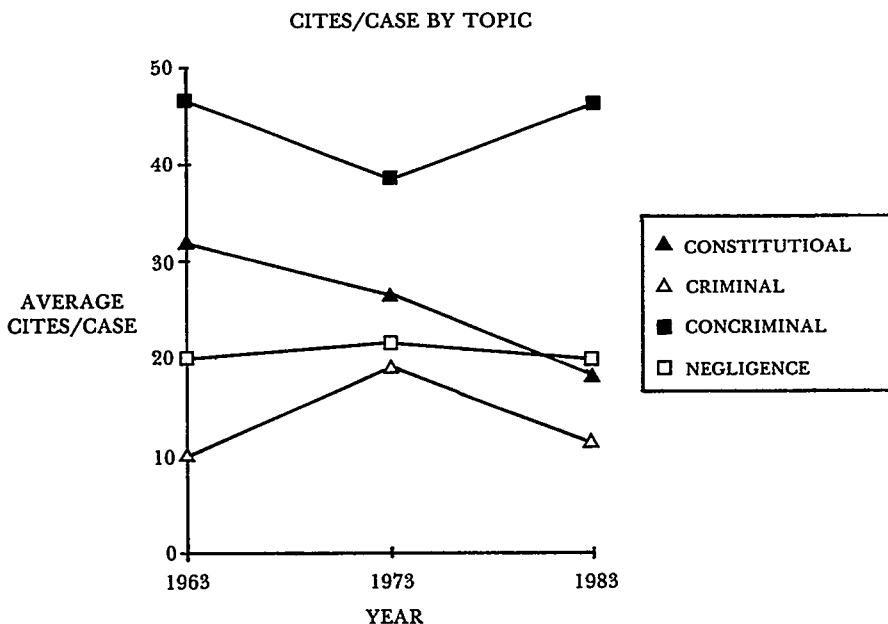


Figure 5: Average Citation/Case by Topic

Concriminal cases contained the greatest number of average citations per case, followed by the constitutional, negligence and criminal cases, in that order. Citation practice as a whole seems to be related to category in the same way that other objective measures of opinion style were affected. Concriminal cases again seem to have presented the greatest difficulty for the court in dispute resolution. Constitutional citations were, as would be expected, greater in number than those in the criminal cases. A greater number of citations would be expected in this area because it is more value laden,⁵⁷ and because courts are here exercising their most powerful function—setting limits on the power of the legislature.⁵⁸ Negligence cases also had a greater number of average cites per case than criminal cases. This result follows from the analysis of page length and dissent rate discussed above.⁵⁹

57. See *supra* text accompanying note 34.

58. See Reynolds, *supra* note 14, at 161-63.

59. See *supra* note 57.

The criminal cases exhibited the sharpest change between 1973 and 1983. During this period, the number of citations per case took a steep drop, after actually increasing somewhat between 1963 and 1973. Perhaps this rise and fall in criminal case citation can be correlated with the rise and fall of concern with criminal cases on appeal. The increase during citation number appears to be "real," that is, it is not related to any corresponding increase in concurrence and dissent rate, although opinion length did increase during this period.⁶⁰

The actual decrease in the average number of citations per case in some categories can also be related to the work load of the court. Kagan and his colleagues, in their study of state courts, noted a relationship between the court's workload and its opinion length (which is positively correlated with the number of citations).⁶¹ New York has also experienced an increase in the number of appeals brought and decisions reached.⁶² Thus, the decrease in citations per case can be the result of several factors, including court caseload, and a change in the policy nature of the questions coming before the court.

There may be another factor of great significance in estimating the court's use of sources as authority. Figures 6-8 show the average number of citations per opinion for each of the study years. Here the influence of both category and rate of concurrence and dissent can be seen. This statistic represents the number of citations per opinion; thus, majority, concurring, and dissenting opinions are counted as separate entities within each category. Distinguishing them as such significantly changes the results. In 1963 the court's majority opinions actually exhibited relatively consistent values for average citation per opinion, with the noticeable exception of the criminal category. The average citations per opinion in this category were less than half that of the other categories. Constitutional cases actually had a slightly greater average than the concriminal cases, which had the same average as the negligence cases. The dissent averages are high for

60. *Id.*

61. See Kagan, *supra* note 17, at 992. In the present study, an overall correlation coefficient of 0.91 was found between opinion length and citation number. This indicates a very strong relationship between the two measures. See *infra* Appendix B.

62. See, e.g., J. BELLACOSA, ANNUAL REPORT OF THE CLERK OF THE COURT TO THE JUDGES OF THE NEW YORK COURT OF APPEALS apps. 4B & 5A (1977).

constitutional and concriminal cases, which to a degree supports the hypotheses that these types of opinions are more value-laden.⁶³ The dissent averages here are significantly greater than those in the criminal and negligence categories. The concurrence averages are difficult to characterize, in part because concurrence usage is less than that of the dissents. One anomalous result is the greater citation use in the concurrence of the criminal cases than in any majority opinion type. Concurring opinions in this category appeared to use a large number of sources to support the decisions of the majority.

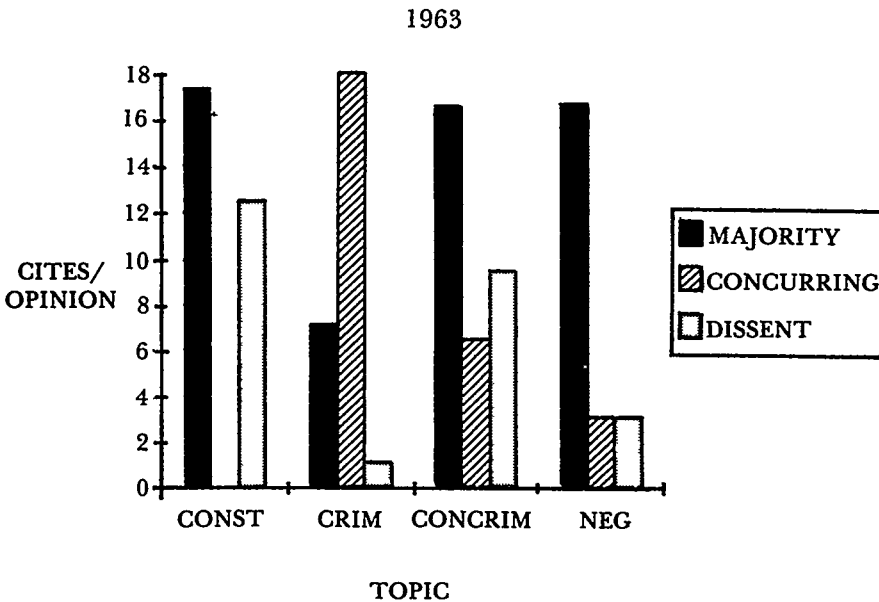


Figure 6: Average Citation/Topic by Opinion Type: 1963

63. See Friedman, *supra* note 8. It seems reasonable to expect that citation practices might follow a similar pattern. Waits hypothesizes that constitutional cases present the most value-laden issues for the courts. See *supra* text accompanying note 34. In this study, concriminal cases consistently exhibited a greater dissent rate, length and citation number than either constitutional or criminal cases. See *infra* Figure 2, and *supra* text accompanying notes 48 & 57. These different objective measures of court behavior can be related to a court's perception of the need to engage in extensive legal reasoning and to the need for legi-

The majority opinions for 1973 all show a great increase in the average number of citations. Concriminal cases assert their dominance in citation number, with constitutional, negligence, and criminal cases following. The dissenting and concurring opinions decreased in importance in terms of inflating the average number of citations per case. The number of citations in the dissenting opinions for concriminal cases remained constant, while decreasing in the other categories. Citation in criminal concurring opinions remained significant, although at lower levels.

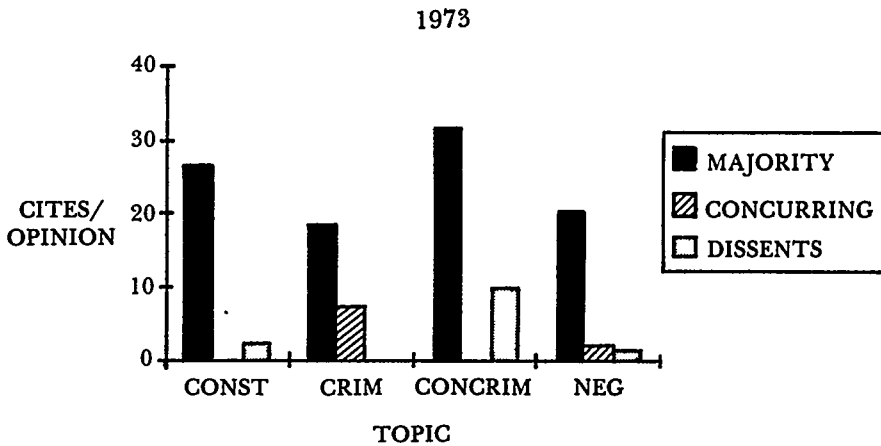


Figure 7: Average Citation/Topic by Opinion Type: 1973

The average number of citations per opinion in the 1983 sample was drastically reduced in every category except the concriminal cases. In the other categories the number of citations was reduced to below 1963 levels. With the decrease in majority citation, the dissent citation rate comparatively increases. This increase is particularly noteworthy in the constitutional sample, where the dissent citation average was greater than the majority citation average.

timization of decisions by reference to other authority. Under this hypothetical relationship, concriminal cases present more value-laden or controversial issues to the court than do cases with criminal or constitutional issues alone. To this extent, Waits' assertions may be refined.

1983

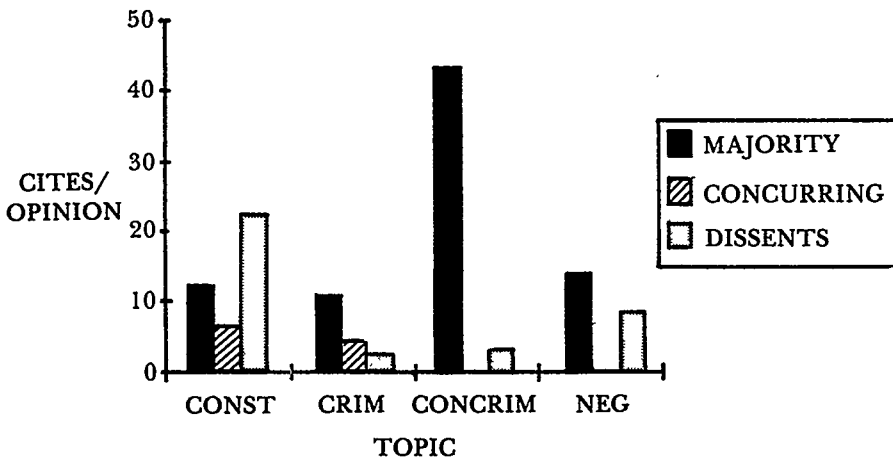


Figure 8: Average Citation/Topic by Opinion Type: 1983

Concriminal citation practice is noteworthy because of the significant increase in majority citation over the three study years. The court cited to more sources of authority to support its decisions in this value-laden category.

The results of this analysis may be compared to those obtained in another study. Merryman, in his study of the California Supreme Court,⁶⁴ computed the average number of citations for majority, concurring and dissenting opinions in both 1960 and 1970.⁶⁵ The general similarity between the results in this study

64. Merryman, *supra* note 13.

65. *Id.* at 392. Note that Merryman's data is for all court cases, is not divided into categories, and thus is not directly comparable with the data derived here. For 1960, he found that majority opinions had an average of 18 citations per opinion, concurring opinions had 8 and dissenting opinions had 12. *Id.* The values for the majority opinions found by Merryman are roughly comparable to those found in this study, in all but the criminal category. It appears that the citation rate for criminal cases is significantly below that of the New York sample average, as well as the average for the California Supreme Court. The average number of citations per concurring opinion in New York is difficult to compare with the values for the Merryman study because of the small number of such opinions in the sample. The Merryman figure does seem roughly comparable to those found in the New York sample. The number of citations found in California opinions in 1970 were: 21 for the majority, 6 for the concurrences and 6 for the dissents. Thus the California figures were higher for the majority opinions and lower for the other types of opinions. *Id.* The average for the New York sample was slightly higher for the majority opinions, and lower

and those in the Merryman study may help in the validation of the sample taken from the New York cases.

This analysis has revealed that the actual trend was for the number of citations to increase slightly in 1973 and revert to generally lower levels in 1983. The average in 1983 may be artificially high due to the influence of the greatly increased number of citations in the concriminal category. This increase obscures the general downward trend of citations per opinion in 1983.⁶⁶ The generally greater citation average in 1973 might be related to a different judicial attitude during that period. One hypothesis would relate an increased citation level to court resolution of socially controversial issues which require more sources for legitimization. This equation of "activism" with citation practice is theoretically tenuous, however, and has been met with mixed support in another study.⁶⁷

Thus far two different factors have been implicated in the use of sources by the court. First, a variation in the total number of citations according to category has been noted. Second, the concurrence and dissent rates have been shown to affect the number of citations. These rates may also be important in that majority, concurring and dissenting opinions may differ in their use of sources as authority. In an activist period, for example, a court may maintain a vigorous minority which emphasizes the use of "traditional" legal sources, such as cases or statutes.

II. THE DATA

Figure 9 shows the percentage of citations that fall within one of five categories for each of the three study years. The predominant source for the court, as one might suspect, is prior case law. Two-thirds or more of the citations in the sample referred to cases. Next in importance, not surprisingly, are statutes, which accounted for approximately one-fifth of all citations. Legal treatises, law reviews, and other sources accounted for the remaining cites (legal treatises at about 5-8%, law reviews at 1-3%, and other sources at from 0.72-3%).

for the concurring and dissenting opinions.

66. See *supra* text accompanying notes 64-65.

67. For the difficulties of determining levels of "activism" from an examination of citation practice, see Landes & Posner, *supra* note 12, at 274-75, 292. For further discussion of the implications of citation practice, see *supra* text accompanying notes 54-68.

CITATION SOURCES/YEAR

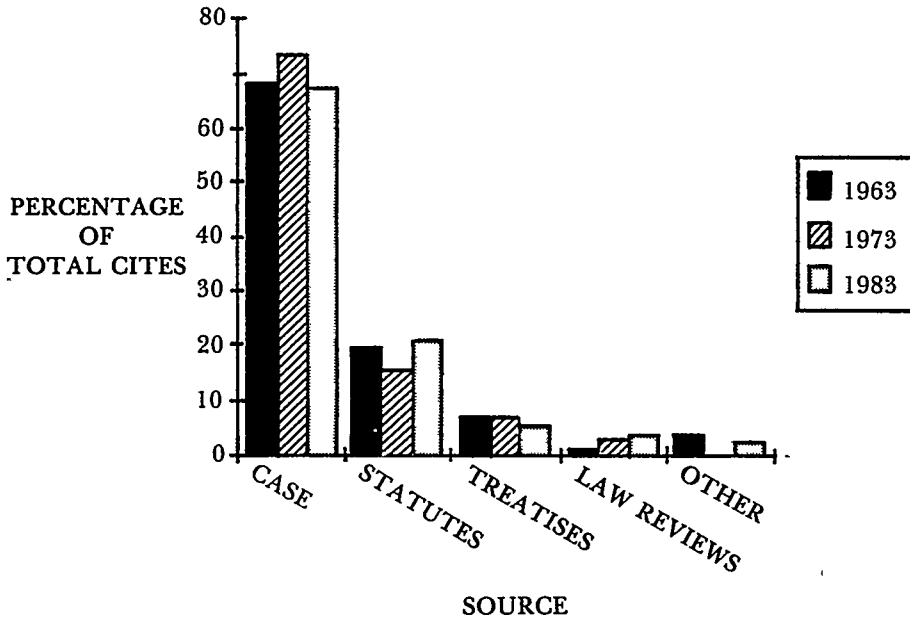
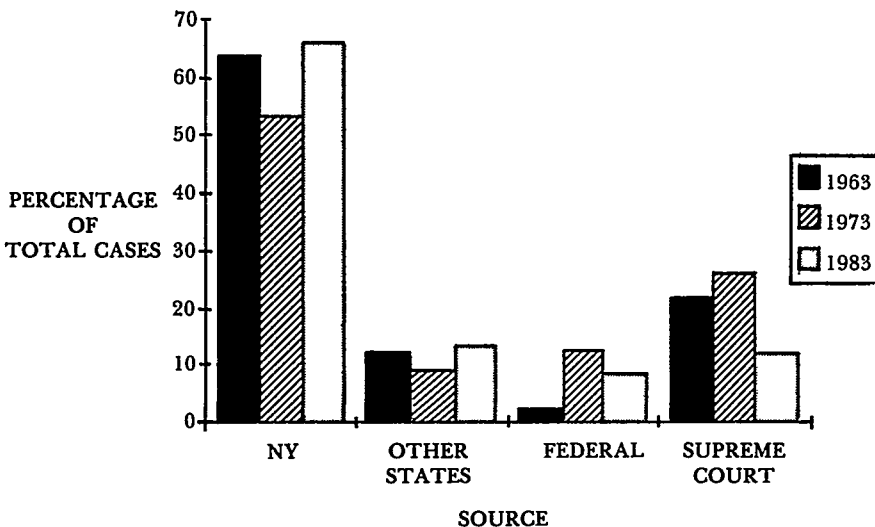


Figure 9: Percentage of Citation Sources/Year

Within the cases category, the majority of cases originated within the state. There were also a significant percentage from other states, federal courts and the Supreme Court (see Figure 10).

CASE SOURCES



The proportion of citation sources is of general interest to a student of the courts. But of even greater practical significance is the proportion of citations from particular sources within categories and within majorities, concurrences and dissents (see Figures 11-13).

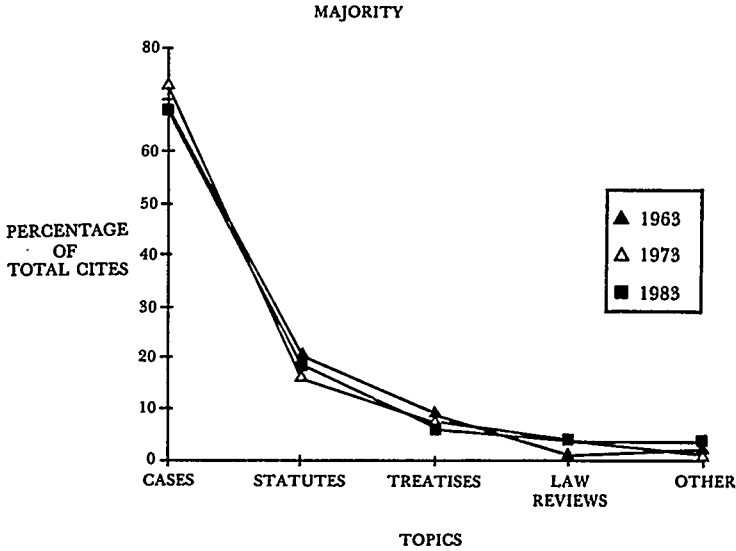


Figure 11: Sources of Citation in Majority Opinions by Year

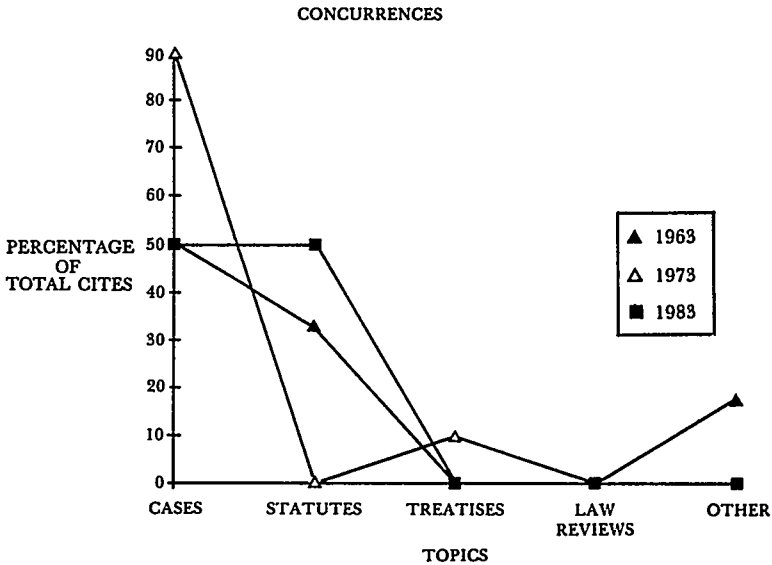


Figure 12: Sources of Citation in Concurring Opinions by Year

DISSENTS

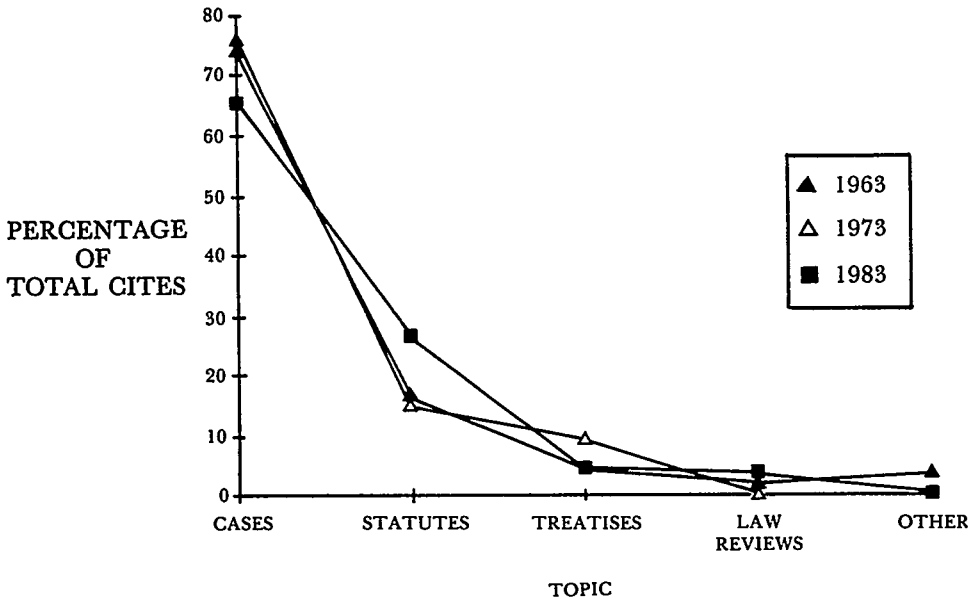


Figure 13: Sources of Citation in Dissenting Opinions by Year

A. Cases

Cases, as the traditional source of legal precedent, make up a majority of the citations made by the court (see Figure 9). In every category and year they outnumber any other source (see Figures 14-16). The same is true of cases analyzed according to the type of opinion (see Figures 17-19). Here, only concurring opinions in 1983 opposed the trend, containing an equal number of statutes (see Figure 16).

1963

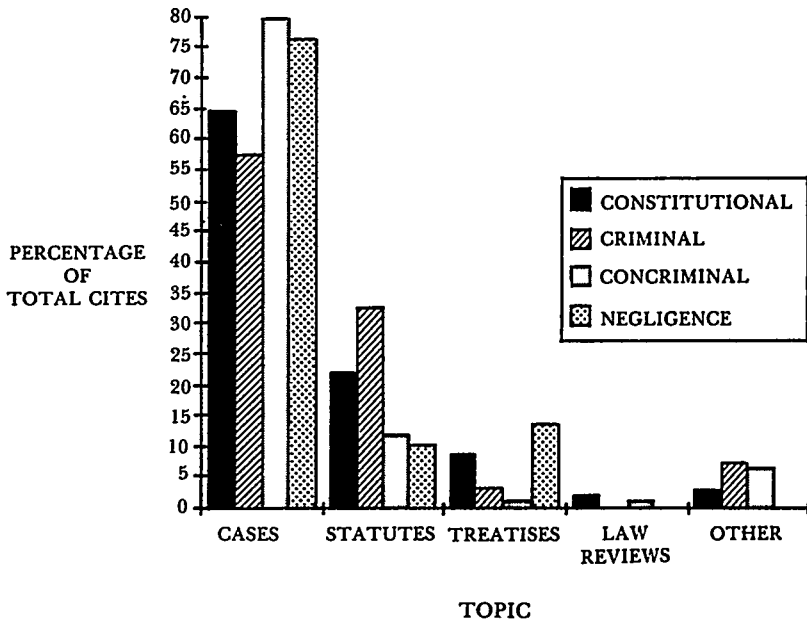


Figure 14: Percentage of Citations/Topic: 1963

1973

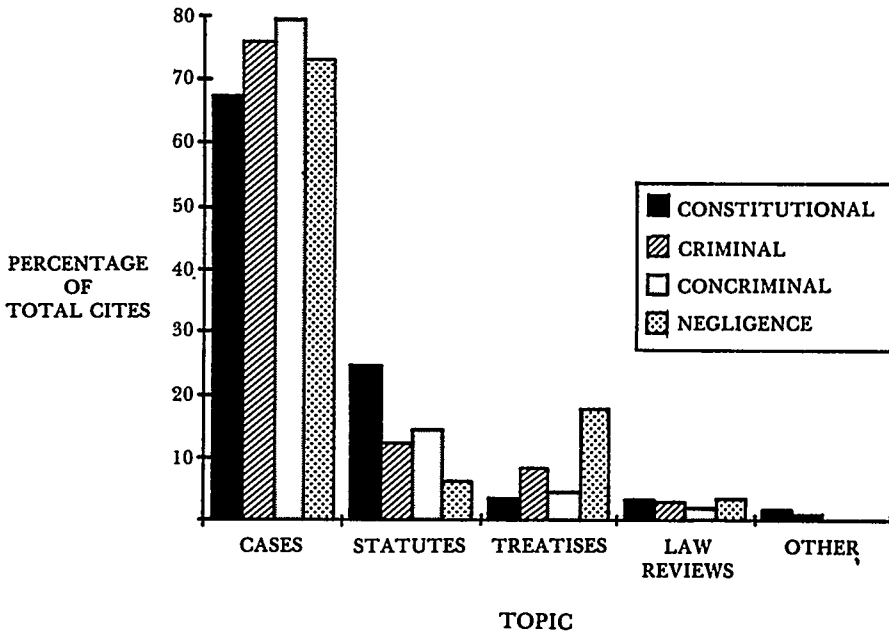


Figure 15: Percentage of Citations/Topic: 1973

1983

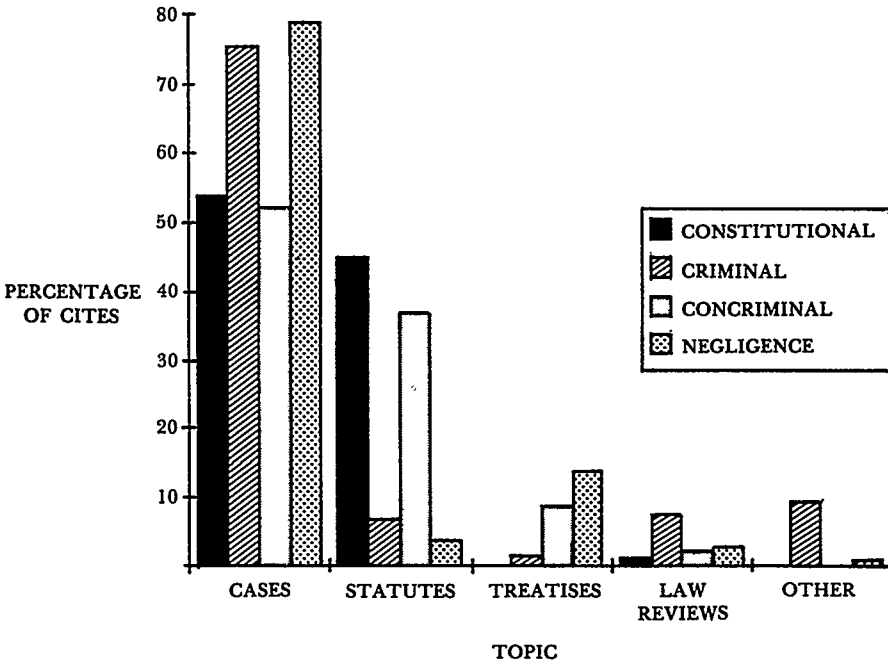


Figure 16: Percentage of Citations/Topic: 1983

1963

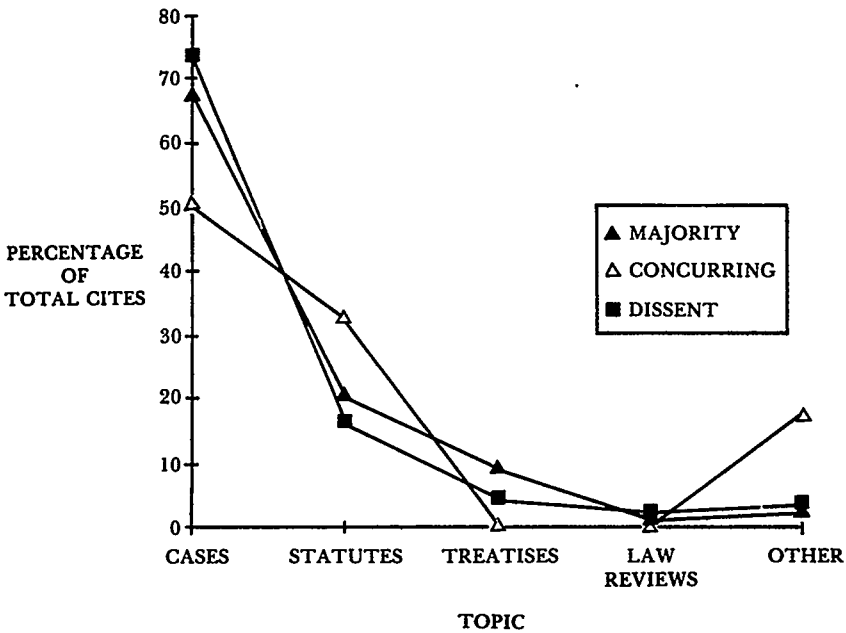


Figure 17: Percentage of Citations/Source by Type of Opinion: 1963

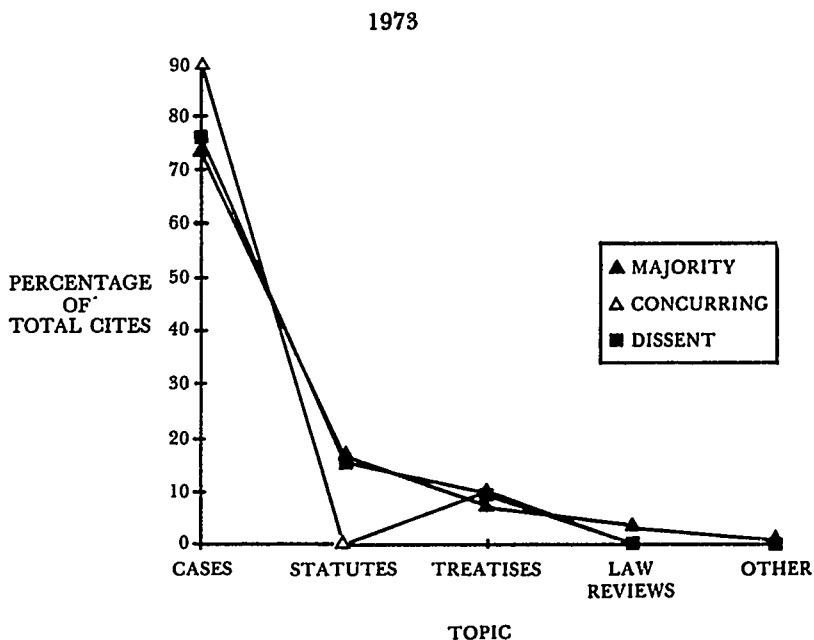


Figure 18: Percentage of Citations/Source by Type of Opinion: 1973

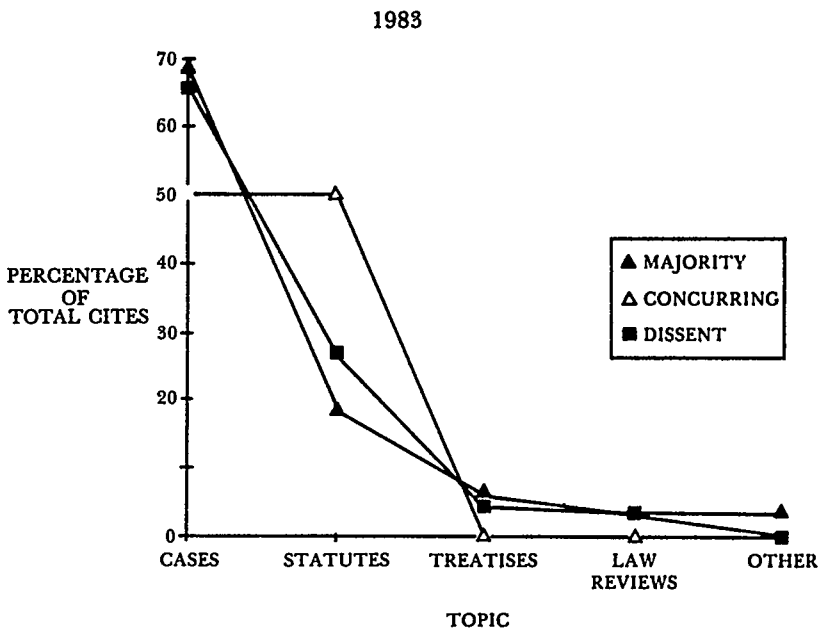


Figure 19: Percentage of Citations/Source by Type of Opinion: 1983

Of further interest is the proportion of cases cited from within the state, or from federal or other state courts. Merryman, in his study of the California Supreme Court, found that a relatively constant two-thirds of all cases cited were from within the state.⁶⁸ New York State cases make up more than half of all citations in our sample (see Figure 10).⁶⁹

Figures 20-22 show the proportion of citations to cases from various sources by year and category. As these figures demonstrate, the proportion of such citations in our sample cases varied considerably. The basic proportion of citation sources seems to conform to that reported by Merryman, with decreasing percentages of cases from the Supreme Court and other state and federal sources. But the New York court in these topic areas seems to cite from other jurisdictions with greater regularity than the California court.

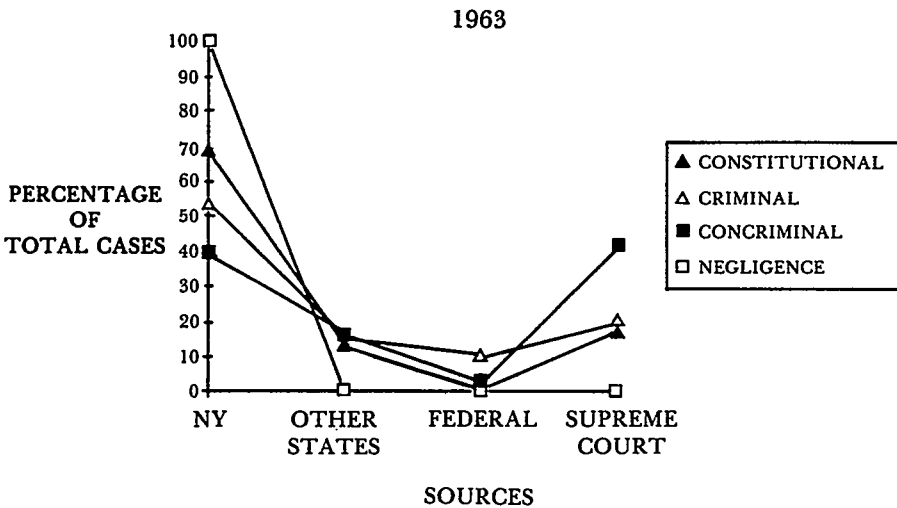


Figure 20: Case Source by Topic: 1963

68. Merryman, *supra* note 13, at 399.

69. See *supra* Figure 10. Comparisons can be made to other studies. Merryman reports that 4.16% of California's citations were from federal opinions, with 14.84% additional citations from the Supreme Court. Merryman, *supra* note 13, at 400. Only 6% of the citations in 1970 were from other states. *Id.*

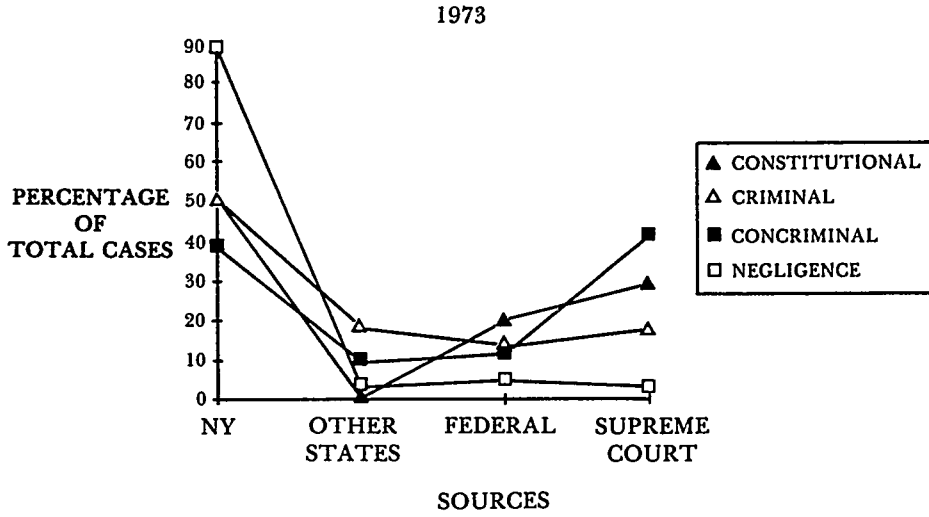


Figure 21: Case Source by Topic: 1973

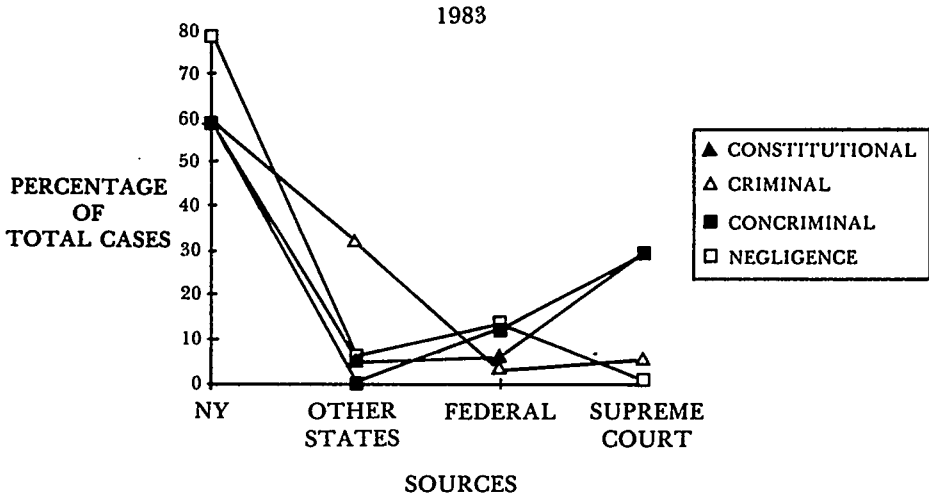


Figure 22: Case Source by Topic: 1983

These statistics indicate the willingness of the New York Court of Appeals to turn to the decisions of other state and federal courts as sources of authority in its opinions. Opinions from Michigan, California, Maryland and New Jersey were the most popular out-of-state citations in the 1983 sample. This frequency of citation may be representative of similar issues confronting these populous or industrialized states, or indicative of similar legal orientations.

B. *Statutes*

Statutes are the next most popular traditional source of judicial authority. They account for just under twenty percent of the court's citations. This is a high percentage in comparison with other state data. A substantial percentage of cases from other states contain citations to neither cases nor statutes⁷⁰. William Reynolds has noted that "[o]ne of the most important jobs of any court is to apply statutes—the expressed desires of a coequal branch of government."⁷¹ Statutes have generally been cited more frequently in concurring opinions, with the exception of the 1973 court.⁷² Citation to statutes was generally lowest in negligence cases,⁷³ which is not surprising given that negligence law has been derived almost exclusively from the common law. Citations to statutes differed greatly among the categories, with constitutional and concriminal cases citing more statutes than the criminal cases.⁷⁴

C. *Legal Treatises*

One of the principle reasons for interest in this source is in determining its acceptability to the court as a source of authority. It is also possible to determine which treatises are held in esteem by the judges, and whether those held in esteem have varied over time. Because of the limitation of this study to the analysis of particular categories, only treatises which relate to the subject matter of these categories are implicated in this aspect of the study.

70. Friedman, *supra* note 8, at 809.

71. Reynolds, *supra* note 14, at 162.

72. See *supra* Figures 20-22.

73. See *supra* Figures 11-13.

74. *Id.* One exception is in the year 1963, during which citation to statutes in the criminal category outstripped citation by constitutional or concriminal categories.

Therefore comparison with other state data must be general in nature. Friedman and his colleagues noted that there is a lot of interstate variability in the use of this type of citation. According to their data, the use has declined somewhat in the past thirty years.⁷⁵ This study shows that, while legal treatises were cited more frequently in the 1973 sample of New York cases, the use of this type of source was still a significant factor in the 1983 cases.⁷⁶

The use of these sources also may be representative of the court's stance in a particular area of law. Such sources tend to represent the law "as it is," in a crystallized form. Thus, they may be used when judges wish to maintain the status quo. Their use has been criticized by commentators as representing a false reliance on an issue of settled law.⁷⁷ Some differences may exist within this group. In Supreme Court opinions, for example, while legal encyclopedias receive negligible attention, and the Restatements minimal attention, the use of legal treatises is high.⁷⁸ Yet the overall characterization of this group as containing a view of the law "as it is" is enough to hold this category together. Citation to this type of source may indicate a more traditional judicial perspective on an issue or a certainty of result. Differences in citation rate may thus indicate differing attitudes, or differing levels of certainty in the result.

In our sample data,⁷⁹ the use of legal treatises is highest in the negligence cases. In 1963 treatises were used more in constitutional opinions than in criminal ones, but by 1983 the number of citations in constitutional cases had decreased to zero. Citation to this source in criminal opinions was at low levels in 1963 and 1983, but slightly higher in 1973.

In contrast, the use of legal treatises has steadily increased in the concriminal cases. It is interesting to note the relationship between the type of opinion and the amount of legal treatise cita-

75. Friedman, *supra* note 8, at 812.

76. See *supra* Figures 11-13 for the percentage of citations to sources by topic; see *supra* Figures 14-16 for the values in majority, concurring and dissenting opinions; see *supra* Figures 20-22 for the opinion type data by year.

77. Reynolds, *supra* note 14, at 153-54. Merryman, in his seminal study of the use of authority, examines court citation to this category and is very critical of the worth of such sources. See Merryman, *supra* note 1, at 629-49.

78. See, e.g., Daniels, *supra* note 3, at 18 (legal encyclopedias), 17 (restatements), and 16-17 (legal treatises).

79. See *supra* note 76.

tion. In 1963 the greatest reliance on such sources was found in majority opinions. Oddly, in 1973 each type of opinion relied approximately evenly on this source of authority for, one would assume, frequently opposing views. In 1983 this trend was continued, with one exception. Here the concurring opinions relied only on cases and statutes as authority supporting the majority decision. The majority and dissenting opinions again relied on treatises to the same extent. In general, the majority opinions relied on treatises to a slightly greater extent than the dissents. This may indicate that the majorities were maintaining the status quo. But the slight differences in citation practices between the majority and dissent in this regard indicate that citation of these sources cannot, in and of itself, establish a conservative tendency on the part of the court.

Figure 23, below, provides a list of the cited treatises. These treatises have been accepted as authority by the court, and may thus be cited with confidence by the practicing attorney. Finding sources, such as the American Law Reports, were cited more frequently in 1963 and 1973 than they were in 1983. Treatises by legal scholars are more frequently cited than general encyclopedic works or finding tools.

FIGURE 23: TREATISES CITED BY YEAR

SOURCE:

1963:	NUMBER OF CITATIONS
A.L.R.	15
L.R.A.	5
Black's Law Dictionary	1
Davis, Administrative Law Treatise	1
Hart and Wechsler, The Federal Courts and the Federal System	1
McQuillan, The Law of Municipal Corporations	1
Restatement of the Law of Restitution	<u>1</u>
	25 Citations

<i>1973</i>	
A.L.R.	6
N.Y. Jur.	5
Richardson, Richardson on Evidence	4
Wigmore, A Treatise on the Law of Evidence	4
McKinney's C.P.L.R.	2
Prosser, A Handbook of the Law of Torts	2
A.L.R.2d.	2
Underhill, A Treatise on the Law of Criminal Evidence	1
Wharton's Criminal Evidence	1
Am. Jur.	1
Carmody-Wait, Cyclopeda of N.Y. Practice	1
Cohen and Karger, The Powers of the N.Y. Court of Appeals	1
C.J.S.	1
Harper and James, The Law of Torts	1
Maguire, Evidence of Guilt	1
Mertens, The Law of Federal Income Taxation	1
Restatement (Second) of the Law of Torts	1
Restatement of the Law of Restitution	1
Weinstein-Koren-Miller, N.Y. Civil Practice	1
	<u>37</u> Citations
<i>1983</i>	
Restatement (Second) of the Law of Torts	6
Prosser, Handbook of the Law of Torts	5
A.L.R.2d.	3
Harper and James, The Law of Torts	2
A.L.R.	1
A.L.R. Federal	1
C.J.S. Corporations	1
Fletcher's Cyclopeda of the Law of Private Corporations	1
McCormick, McCormick's Handbook of the Law of Evidence	1
N.Y. Jur. 2d	1
N.Y. Pattern Jury Instructions	1
McKinney's C.P.L.R.	1
Weinberger, N.Y. Products Liability	1
	<u>24</u> Citations

D. *Law Reviews and Legal Periodicals*

As was the case with legal treatises, one of the principal reasons for interest in this category is in determining their acceptability to the courts as a source of authority. The trend, as reported in other studies, shows an increased use of such periodicals.⁸⁰ Law reviews may be seen as a source of more innovative concepts of law, and provide the possibility of "bootlegging" nonlegal mate-

80. Friedman, *supra* note 8, at 812.

rial into the court opinion.⁸¹ Courts that are more innovative, and have greater discretion, tend to cite to law reviews more frequently.⁸² In the terms of this study's hypotheses, law reviews represent the opportunity to bring less traditional social or value laden material into the court via a "legal" vehicle.⁸³

Not all commentators support the use of law reviews by the courts. Some feel that their influence is too great, and that it, while seemingly nonpartisan, is an influence biased towards special litigants or parties.⁸⁴ This attitude, though rare, coupled with a reluctance to cite nontraditional sources, might affect citation levels.

Law review articles have historically been characterized by a low rate of citation in the court of appeals.⁸⁵ Their highest proportion of citations comes in majority opinions in 1973, and in the majority and dissenting opinions in 1983. This finding provides a degree of support for the earlier conclusion that the 1973 cases exhibited characteristics that might be indicative of a more "activist" court, such as increased citation number.⁸⁶

Once again, opinions that might present opposing views have relied on less traditional sources of citation. A possible explanation is that in these disputes both parties search the available literature for any source, traditional or not, for the support of their view. Differences exist in legal periodicals in terms of their perspective on the law and social problems. One hypothesis for further study is that dissenting and majority opinions cite to different types of periodicals. For example, each may cite in greater percentages to practitioner-focused periodicals or to law reviews. Legal periodical use according to category is relatively consistent. Citation in the 1983 criminal cases provides a contrast however, with an abnormally high percentage of citations to this source. Scurlock, in his study of citation practices in criminal case opin-

81. *Id.* at 814. "Bootlegging" refers to the incorporation of nonlegal knowledge or analysis into a court opinion through reference to a "legal" source. Law review authors can act as the transmitters of such nonlegal knowledge. Watson's theory of judicial decision making is discussed *infra* at text accompanying notes 94-95.

82. *Id.*; see also Kagan, *supra* note 17, at 991-92.

83. Friedman, *supra* note 8, at 814-15.

84. Scurlock, *supra* note 5, at 260; see also Daniels, *supra* note 3, at 15.

85. See *supra* note 76.

86. See *supra* text accompanying note 68.

ions,⁸⁷ argues that such sources are often used to resolve disputes regarding specific issues that are "not covered, or not covered adequately by the cases and statutes, and where non-legal knowledge is indispensable for a proper solution of the case."⁸⁸ The 1983 results provide some support for this hypothesis, since the percentage of legal periodical citations in that year came almost exclusively from a case debating the use of hypnosis to aid victim recall.⁸⁹

E. *Other*

This last category represents the use of more unusual or "non-legal" sources in judicial opinions. Numerous studies have been performed on the Supreme Court's use of such sources in opinions.⁹⁰ The use in state courts has received less attention and is relatively low, at 0.6% of citations in Friedman's state court study.⁹¹

These sources, whatever size component they may be of the court's citations, are important for reasons based on theories of judicial decision making. Waits, for example, noted that the information given to the courts about social conditions must be used in making decisions.⁹² One problem of particular relevance to this study is that of communication—how information about societal conditions or value choices is presented to the court. As Waits observed, "[l]egal rulings must be made with an eye toward societal conditions, but it is much harder to say how judges are supposed to determine what those conditions are."⁹³ Watson has developed a view of legal culture which implies that although any legal change must begin outside the legal culture, it must always be translated through it before an actual change will occur.⁹⁴ Thus,

87. Scurlock, *supra* note 5.

88. *Id.* at 231.

89. See *infra* Appendix A, *People v. Hughes*, 59 N.Y.2d 523, 453 N.E.2d 484, 466 N.Y.S.2d 255 (1983).

90. C. MILLER, *THE SUPREME COURT AND HISTORY* 17 (1969); see also Daniels, *supra* note 3, at 19-21.

91. Friedman, *supra* note 8, at 817. Note that this data represents the average from 1940 to 1970. It should be lower than the average for more recent sample years.

92. Waits, *supra* note 7, at 925-26.

93. *Id.* at 924.

94. Watson, *Legal Change: Sources of Law and Legal Culture*, 131 U. PA. L. REV. 1121, 1156 (1983).

the impetus for change begins in society at large, and it must be brought into the legal culture by lawyers so that lawmakers and judges can act upon it.⁹⁵ Use of these sources by the courts is an example of this process in action.

Another interesting trend observed in the present study was in the lack of reliance upon "other" sources, particularly in the 1973 and 1983 samples. The levels of use in the 1963 sample were much higher. The "other" sources in these opinions tended to consist mainly of legislative history, although newspaper articles and statements of organized societies were also considered. Thus the types of "other" sources used were a mixture of traditional (such as legislative history) and nontraditional (such as academic history books, or newspaper articles) sources. The use of such materials in the 1983 sample was minimal, with the exception of the use of medical journal reports on hypnosis in one criminal case.⁹⁶

CONCLUSION

The court of appeals has exhibited certain patterns in its citation practices, principally in the variation in citation practice between categories of cases. These categories were chosen for study because of the differing types of disputes they presented to the court for resolution. It was hypothesized that citation practice would vary between these categories. Waits' conception of the role of value choices in judicial decisions,⁹⁷ and Watson's view of legal culture,⁹⁸ implicated a relationship between the type of issue before the court, and the sources of information brought into the court to aid in resolution of the dispute.⁹⁹ Certain types of disputes, such as those containing constitutional issues, are more "value-laden."¹⁰⁰ Information about value choices and societal conditions must be brought into the court by some vehicle, either through traditional sources or "extralegal" means.¹⁰¹ Thus, differences in court citation practice can reflect differences in this pro-

95. *Id.* at 1154.

96. *See supra* note 89.

97. *See supra* text accompanying notes 34-37 & 92-93.

98. *See supra* text accompanying notes 92-95.

99. *See supra* text accompanying notes 29-36.

100. *See supra* text accompanying note 34.

101. *See supra* text accompanying notes 92-95.

cess between disputes which present differing degrees of controversy.

The results of this study clearly show differences in objective measures of court behavior between different categories of disputes. Concriminal cases presented the most value laden issues to the court, as measured by opinion length, citation number and citation type. Those constitutional disputes not involving criminal issues followed. To this extent, Waits' assessment of the value attached to different disputes can be refined. Criminal and negligence issues were next in these objective measures of court behavior. One surprising result of this investigation was the high level of citation in negligence cases. A possible explanation was found in the rapidly expanding definition of negligence itself over the term of the study.

In citing to sources, judges do not just seek authority for their decisions; they also legitimize the sources they cite. Data from this study can be used by the practicing attorney who is concerned about the types of sources that seem to hold authority for the court. In particular, it was found that the New York Court of Appeals is not reluctant to cite from the decisions of other jurisdictions. Court citation practices include significant percentages of citations to both legal treatises and law reviews. Other, "extralegal," material is also cited by the court.

The most important result of a preliminary study of this nature is in the avenues for further research it suggests to others. Two aspects of this framework invite further scrutiny.¹⁰² First, the role of the lawyer and law clerk in transmitting value choices and information to the court could be more clearly studied. Court briefs could be compared to court opinions to determine whether there are any significant differences in citation practice, and to test the degree to which the courts are forced, or choose, to go outside the confines of advocate's briefs for authority. Second, the categorization of sources could be more clearly defined. The broad categories of sources used here, for example legal treatises or periodicals, contain disparate types of material. A classification system could be developed which might explain the seemingly contradictory reliance of opposing sides upon the "same" mate-

102. Other students of court behavior have also suggested these and other investigations. See, e.g., T. MARVELL, *supra* note 6.

rial. That is, it may be possible to show that the opposing camps are relying upon different types of material within the same general category.

MARY ANNE BOBINSKI

APPENDIX A

THE CASES:

1. CONSTITUTIONAL LAW

1963

Hartley Holding Corp. v. Gabel, 13 N.Y.2d 306, 196 N.E.2d 537, 247 N.Y.S.2d 97 (1963).

St. Clair v. Yonkers Raceway, Inc., 13 N.Y.2d 72, 192 N.E.2d 15, 242 N.Y.S.2d 43 (1963), *cert. denied*, 375 U.S. 970 (1964).

People v. Johnston, 13 N.Y.2d 66, 192 N.E.2d 11, 242 N.Y.S.2d 38 (1963).

People v. Stover, 12 N.Y.2d 462, 191 N.E.2d 272, 240 N.Y.S.2d 734 (1963).

Courtesy Sandwich Shop v. Port of New York Auth., 12 N.Y.2d 379, 190 N.E.2d 402, 240 N.Y.S.2d 1 (1963).

Bradley v. Waterfront Comm'r, 12 N.Y.2d 276, 189 N.E.2d 601, 239 N.Y.S.2d 276 (1963).

1973

Kesslbrenner v. Anonymous, 33 N.Y.2d 161, 305 N.E.2d 903, 350 N.Y.S.2d 889 (1973).

People ex rel. Calloway v. Skinner, 33 N.Y.2d 161, 305 N.E.2d 716, 347 N.Y.S.2d 178 (1973).

241 East 22nd St. Corp. v. City Rent Agency, 33 N.Y.2d 134, 305 N.E.2d 760, 350 N.Y.S.2d 760 (1973).

Trails West, Inc. v. Wolff, 32 N.Y.2d 207, 298 N.E.2d 52, 344 N.Y.S.2d 863 (1973).

Blye v. Glove-Wernicke Realty Co., 33 N.Y.2d 15, 300 N.E.2d 710, 347 N.Y.S.2d 170 (1973).

Shapiro v. City of New York, 32 N.Y.2d 96, 296 N.E.2d 230, 343 N.Y.S.2d 323, *appeal dismissed*, 414 U.S. 804, *reh'g denied*, 414 U.S. 1087 (1973).

Shelofsy v. Helsby, 32 N.Y.2d 54, 295 N.E.2d 774, 343 N.Y.S.2d 98, *appeal dismissed*, 414 U.S. 804 (1973).

1983

Board of Educ. v. Ambach, 60 N.Y.2d 758, 457 N.E.2d 775, 469 N.Y.S.2d 669 (1983).

Miller v. Coughlin, 59 N.Y.2d 490, 452 N.E.2d 1241, 465

N.Y.S.2d 913 (1983).

Mayflower Nursing Home v. Office of Health Sys. Management, 59 N.Y.2d 935, 453 N.E.2d 528, 466 N.Y.S.2d 299 (1983).

L. Pamela P. v. Frank S. 59 N.Y.2d 1, 449 N.E.2d 713, 462 N.Y.S.2d 819 (1983).

Saumell v. New York Racing Ass'n, 58 N.Y.2d 231, 447 N.E.2d 706, 460 N.Y.S.2d 763 (1983).

People v. Charles F., 60 N.Y.2d 474, 458 N.E.2d 801, 470 N.Y.S.2d 342 (1983).

Hardeman v. Mendon Leasing Corp., 58 N.Y.2d 892, 447 N.E.2d 47, 460 N.Y.S.2d 499 (1983).

United States Power Squadrons v. State Human Rights Appeal Bd., 59 N.Y.2d 401, 452 N.E.2d 1199, 465 N.Y.S.2d 871 (1983).

2. CRIMINAL LAW

1963

People v. Vellucci, 13 N.Y.2d 665, 191 N.E.2d 469, 240 N.Y.S.2d 992 (1963).

People v. Fearon, 13 N.Y.2d 59, 192 N.E.2d 8, 242 N.Y.S.2d 33 (1963).

People v. Van Sickle, 13 N.Y.2d 61, 192 N.E.2d 9, 242 N.Y.S.2d 34 (1963).

People v. Meckler, 13 N.Y.2d 168, 193 N.E.2d 891, 244 N.Y.S.2d 65 (1963).

People v. Cender, 13 N.Y.2d 16, 191 N.E.2d 464, 240 N.Y.S.2d 417 (1963).

People v. Marshall, 13 N.Y.2d 28, 191 N.E.2d 798, 241 N.Y.S.2d 417 (1963).

People v. Kelly, 12 N.Y.2d 248, 189 N.E.2d 477, 238 N.Y.S.2d 934 (1963).

1973

People v. Abdul Sarim Al-Kanani, 33 N.Y.2d 260, 307 N.E.2d 43, 351 N.Y.S.2d 969 (1973), *cert. denied*, 417 U.S. 916 (1974).

People v. Cerami, 33 N.Y.2d 243, 306 N.E.2d 799, 351 N.Y.S.2d 681 (1973).

People v. Fitzpatrick, 32 N.Y.2d 499, 300 N.E.2d 139, 346 N.Y.S.2d 793 (1973), *cert. denied*, 414 U.S. 1033 (1973).

People v. Henson, 33 N.Y.2d 63, 304 N.E.2d 358, 349 N.Y.S.2d 657 (1973).

People v. Townsend, 33 N.Y.2d 37, 300 N.E.2d 722, 347 N.Y.S.2d 187 (1973).

People v. Beaudet, 32 N.Y.2d 371, 298 N.E.2d 647, 345 N.Y.S.2d 495 (1973).

People v. Palermo, 32 N.Y.2d 222, 298 N.E.2d 61, 344 N.Y.S.2d 874 (1973).

1983

People v. Alicea, 61 N.Y.2d 23, 459 N.E.2d 177, 471 N.Y.S.2d 68 (1983).

People v. Canty, 60 N.Y.2d 830, 457 N.E.2d 800, 469 N.Y.S.2d 693 (1983).

People v. Glover, 60 N.Y.2d 783, 457 N.E.2d 783, 469 N.Y.S.2d 677 (1983).

People v. Smith, 59 N.Y.2d 156, 451 N.E.2d 157, 464 N.Y.S.2d 399 (1983).

People v. Hopkins, 58 N.Y.2d 1079, 449 N.E.2d 419, 462 N.Y.S.2d 639 (1983).

People v. Morales, 58 N.Y.2d 1008, 448 N.E.2d 796, 461 N.Y.S.2d 1011 (1983).

People v. Kaminski, 58 N.Y.2d 886, 447 N.E.2d 43, 460 N.Y.S.2d 495 (1983).

People v. Cofresi, 60 N.Y.2d 728, 456 N.E.2d 1189, 469 N.Y.S.2d 75 (1983).

People v. Davis, 58 N.Y.2d 1102, 449 N.E.2d 710, 462 N.Y.S.2d 816 (1983).

People v. Hughes, 59 N.Y.2d 523, 453 N.E.2d 484, 466 N.Y.S.2d 255 (1983).

People v. Tinsley, 58 N.Y.2d 990, 448 N.E.2d 790, 461 N.Y.S.2d 1005 (1983).

3. CONCRIMINAL

1963

People v. Donovan, 13 N.Y.2d 148, 193 N.E.2d 628, 243 N.Y.S. 148 (1963).

People v. Fritch, 13 N.Y.2d 119, 192 N.E.2d 713, 243 N.Y.S.2d 119 (1963).

1973

People v. Bornholdt, 33 N.Y.2d 75, 305 N.E.2d 461, 350 N.Y.S.2d 369 (1973), *cert. denied*, 416 U.S. 905 (1974).

People v. Berck, 32 N.Y.2d 567, 300 N.E.2d 411, 347 N.Y.S.2d 33 (1973), *cert. denied*, 414 U.S. 1093 (1973).

People v. Stridiron, 33 N.Y.2d 287, 307 N.E.2d 242, 352 N.Y.S.2d 601 (1973).

People v. Heller, 33 N.Y.2d 314, 307 N.E.2d 805, 352 N.Y.S.2d 601 (1973), *cert. denied*, 418 U.S. 944 (1974).

1983

People v. Felix, 58 N.Y.2d 156, 446 N.E.2d 757, 460 N.Y.S.2d 1 (1983).

4. NEGLIGENCE

1963

Carradine v. City of New York, 13 N.Y.2d 291, 196 N.E.2d 259, 245 N.Y.S.2d 620 (1963).

Jackson v. Associated Dry Goods, 13 N.Y.2d 112, 192 N.E.2d 167, 242 N.Y.S.2d 210 (1963).

Beauchamp v. New York City Hous. Auth., 12 N.Y.2d 400, 190 N.E.2d 886, 240 N.Y.S.2d 15 (1963).

1973

Kalechman v. Drew Auto Rental, 33 N.Y.2d 397, 308 N.E.2d 886, 353 N.Y.S.2d 414 (1973).

Feblot v. New York Times Co., 32 N.Y.2d 486, 299 N.E.2d 672, 346 N.Y.S.2d 672 (1973).

Rogers v. Dorchester Assocs., 32 N.Y.2d 553, 300 N.E.2d 403, 347 N.Y.S.2d 22 (1973).

Margolin v. New York Life Ins., 32 N.Y.2d 149, 279 N.E.2d 80, 344 N.Y.S.2d 336 (1973).

Sega v. State, 60 N.Y.2d 183, 456 N.E.2d 1174, 469 N.Y.S.2d 51 (1983).

Schumacher v. Richards Shear Co., 59 N.Y.2d 239, 451 N.E.2d 195, 464 N.Y.S.2d 437 (1983).

Chase Manhattan Bank v. Edwards, 59 N.Y.2d 817, 451 N.E.2d 486, 464 N.Y.S.2d 739 (1983).

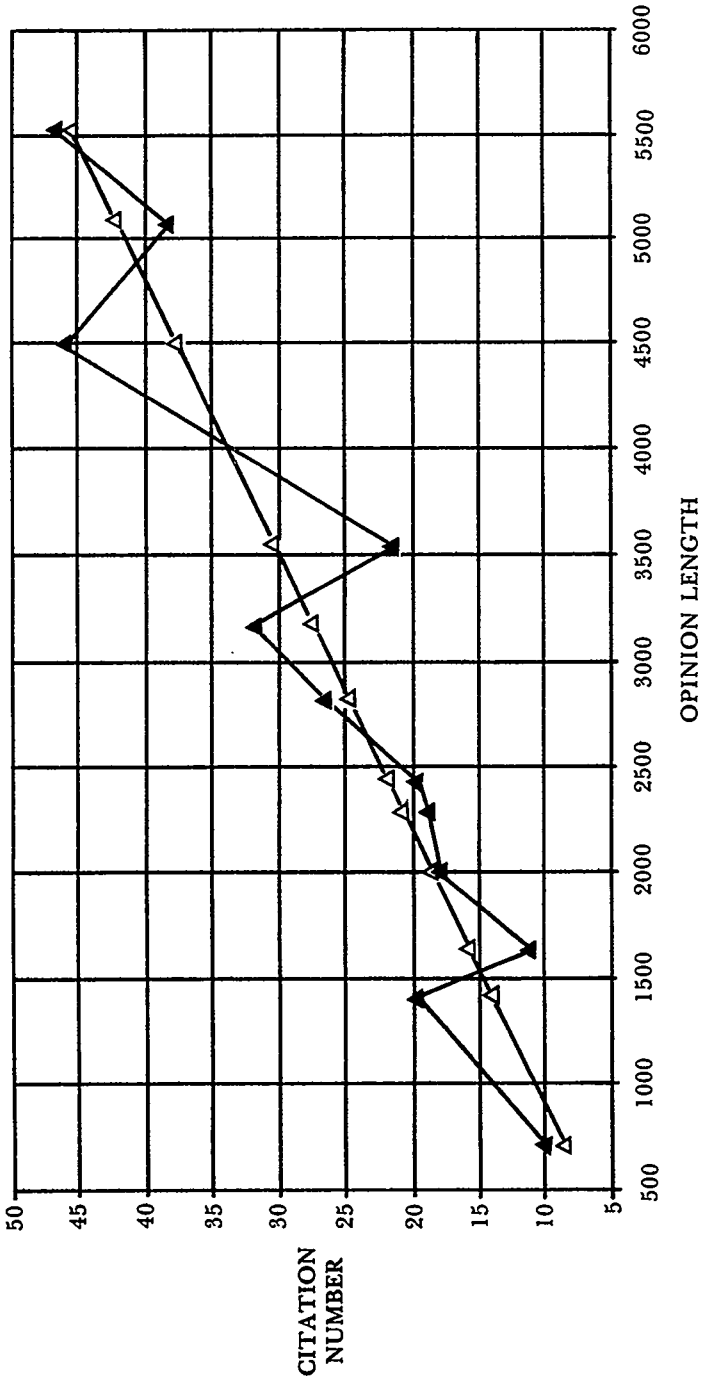
Kusk by Marzalek v. City of Buffalo, 59 N.Y.2d 26, 449 N.E.2d 725,

462 N.Y.S.2d 626 (1983).

De Angelis v. Lutheran Medical Center, 58 N.Y.2d 1053, 449 N.E.2d 406, 462 N.Y.S.2d 626 (1983).

Garret v. Holiday Inns, Inc., 58 N.Y.2d 253, 447 N.E.2d 717, 460 N.Y.S.2d 774 (1983).

OPINION LENGTH AND NUMBER OF CITATIONS



- ▲ OPINION LENGTH AND NUMBER OF CITATIONS
- △ TREND OF OPINION LENGTH AND NUMBER OF CITATIONS

APPENDIX B

