ARTICLES

LOOKING AT A STATE HIGH COURT JUDGE'S WORK[♦]

by
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As part of a larger project concerning one judge's judicial career, this Article explores the work of Justice Alfred T. Goodwin of the Oregon Supreme Court and his colleagues during his nearly ten years of service (1960–1969) on that court. Despite its limited focus—a single court in the relatively limited period of one decade, with primary attention to a single judge—the data presented are useful because of the present paucity of information about state high courts, particularly a state common law high court early in the second half of the twentieth century, before an intermediate appellate court was created in Oregon. Principal attention is given to the process by which cases were decided, including the time from argument to disposition and the use of rehearings; affirmances and reversals of the trial courts; and voting patterns both when the court sat in department and when en banc.

While most trial court rulings were affirmed, this Article examines the court's treatment of trial judges individually, and on a geographical basis. While disagreement within the court was greater when it sat en banc than when it heard cases in department, dissensus was far less common than would be expected in discretionary jurisdiction courts. Dissent, which occurs less frequently in the supposedly less-contentious cases heard in department, is also not random; and alignments among the judges fall into patterns, with a judge more likely to dissent from the work of some colleagues than of others.

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I. INTRODUCTION

We are beginning to learn more about state high courts. Such attention as they have received often deals with the means by which they choose their judges,[1] a focus which has more recently turned to aspects of judicial elections, including contributions to judicial candidates.[2] Scholars have also extended their analysis of judicial voting patterns to state high courts.[3] Also of note are studies more closely related to doctrine, such as the extent of "judicial federalism," in which state courts have used state constitutions to reach results different from U.S. Supreme Court rulings.[4]

Yet there is much we still need to know, particularly about the inner workings of those courts. Intensive studies of a single court, such as that of the Washington Supreme Court, provide some information.[5] Likewise, a focus on a single judge can provide a window into the workings of a court, particularly if that judge's voting, or the rate at which the judge's opinions result in other judges dissenting, show differences from the court's overall rates, thus indicating variation in behavior. Unlike U.S. Supreme Court justices, few judges of state supreme courts have received

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[1] *See, e.g.*, CHARLES H. SHELDON & LINDA S. MAULE, CHOOSING JUSTICE: THE RECRUITMENT OF STATE AND FEDERAL JUDGES (1998).

[2] RUNNING FOR JUDGE: THE RISING POLITICAL, FINANCIAL, AND LEGAL STATUS OF JUDICIAL ELECTIONS 1 (Matthew J. Streb, ed., 2007).

[3] *E.g.*, Paul Brace & Melinda Gann Hall, *The Interplay of Preferences, Case Facts, Context, and Rules in the Politics of Judicial Choice*, 59 J. POL. 1206 (1997).

[4] Barry Latzer, *The Hidden Conservatism of the State Court "Revolution*," 74 JUDICATURE 190, 190 (1991).

[5] CHARLES H. SHELDON, A CENTURY OF JUDGING: A POLITICAL HISTORY OF THE WASHINGTON SUPREME COURT (1988).

attention,[6] unless, like Holmes and Cardozo, they served there before ascending to the nation's highest court.[7]

The increasing, if still limited, attention now given to state courts can cast light on those courts as they operate now, when almost all states have, by adding intermediate appellate courts, adopted a basic three-tier system like that used in the federal courts. Yet for many years, many states had—in addition to a multiplicity of first-instance courts—only trial courts and one appellate court, and their absence from our viewfinder has limited what we know about their functioning. As fully mandatory jurisdiction courts, because no other court existed to which to bring appeals, these courts had to find ways to decide all cases brought to them without necessarily devoting full treatment to each. They therefore often sat in panels (or departments) of less than the whole court for many cases, while sitting as a full (en banc) court for others.

We can add a not insignificant increment to our knowledge through attention to a judge who served on such a court. A study of only one judge and one court over one decade can, given the paucity of our knowledge, nonetheless provide a useful picture of a state common law high court early in the second half of the twentieth century—with the addition it provides to our knowledge hopefully outweighing the fact that this is a single court (and justice) case study.

This Article, undertaken as part of a larger project concerning a judge's state and federal judicial career, presents an exploration of the work of Justice Alfred T. Goodwin of the Oregon Supreme Court and his colleagues during his nearly ten years of service (1960–1969) before he left to move to the federal bench, where he served for two years on the U.S. District Court for the District of Oregon and, starting in 1971, on the U.S. Court of Appeals for the Ninth Circuit, where he is now a senior judge and where, in 1989–1991, he served as the circuit's chief judge.

During Justice Goodwin's service on the Oregon Supreme Court, Oregon had no intermediate appellate court and the Supreme Court had mandatory jurisdiction. Having to dispose of all cases brought to it, the Court heard some cases in department and others en banc, and a theme that recurs several times in this Article is the differences between decision in department and decision en banc. The Article begins with a brief discussion of Justice Goodwin's judicial service before joining the Oregon Supreme Court and his selection to that court, but the work of the Oregon Supreme Court receives principal attention. The range of subject matters on which it ruled and the process by which cases were decided will first be discussed. Its disposition of cases will follow, including the time from argument to disposition, the use of rehearings, its treatment of

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[6] CHARLES H. SHELDON, THE WASHINGTON HIGH BENCH: A BIOGRAPHICAL HISTORY OF THE STATE SUPREME COURT, 1889–1991, 4 (1992).

[7] *See* ANDREW L. KAUFMAN, CARDOZO (1998); G. EDWARD WHITE, JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF, 253–97 (1993).

trial court rulings, and the disposition of cases from individual trial court judges in opinions Justice Goodwin wrote. The extent of the justices' unanimity and disagreement will then be explored for the court as a whole, followed by a look at Justice Goodwin's votes in relation to those of his colleagues, that is, who was found to be voting with or in opposition to which other justices; particular attention is given to Goodwin's interactions with Justice Kenneth O'Connell.

This Article is based on the author's interviews with Judge Goodwin, on an extensive oral history of the judge conducted in 1986 by Rick Harmon for the Oregon Historical Society, and on data gathered by the author from the official case reporters. For some matters discussed, we use all cases decided by the Oregon Supreme Court within the 1960–1969 time frame; for others, given how this project developed with its focus on Justice Goodwin, we use only the cases in which he wrote opinions, some 335 in number, and there we take those cases as a rough surrogate for all those decided by the court. Even when restricting ourselves to this smaller set of cases, we can at least determine if certain patterns exist, although those patterns might be somewhat altered if the cases authored by all the other justices were included.

II. UNTIL THE SUPREME COURT

When Alfred T. Goodwin took his seat as a justice of the Oregon Supreme Court on March 18, 1960, he was already known to his new colleagues. After graduating from high school in central Oregon, he had attended the University of Oregon and, being in the university's ROTC unit, had gone to war in Europe and then in the Pacific. He returned to the University and completed a bachelor's degree in journalism and worked for the Eugene *Register-Guard* before (and during) going to law school at the University. Upon completing his law degree, he joined a small Eugene law firm, with which he practiced for only four years before he was appointed a judge of the state circuit court—the state's general jurisdiction trial court—in Lane County (Eugene) at the age of 32; he served there for over four years before being elevated.[8]

Goodwin's appointment to the Supreme Court came about as a result of the death of Oregon's U.S. Senator Richard Neuberger, a Democrat. Governor Mark Hatfield, a Republican, was required to name someone of the same party as the deceased senator. Not wanting to appoint Senator Neuberger's wife, Maureen, who was going to be a candidate to succeed her late husband at the next election, Hatfield selected widely-respected, and older, Supreme Court Justice Hall Lusk, who, it was clear, would not run for the vacant Senate seat. Governor Hatfield, who had known Goodwin through Young Republicans and by

[8] For a more complete biography, see Stephen L. Wasby, *Alfred T. Goodwin: A Special Judicial Career*, 15 W. LEGAL HIST. 9 (2002).

his repute among the state's judges, appointed him to Justice Lusk's place on the bench.[9] Shortly after his appointment, Goodwin had to run for election to a term;[10] he was elected without opposition, just as he was to a subsequent term.

The Oregon Supreme Court justices knew their new colleague because not only had he argued a few cases before the court, but because they had reviewed his rulings as a circuit judge. He had not, however, served with the justices as a pro tem judge.[11] Before his Supreme Court service, that court had decided sixteen cases in which Goodwin had been the trial judge, covering the range of subjects of the sort a common-law court would decide, such as personal injury or contract actions, in addition to criminal matters, and it had affirmed all of them. After Goodwin joined them, the justices reviewed and issued decisions in eight more of his trial court decisions, although, of course, he did not participate in those cases. Goodwin did not fare as well in these cases, as the court reversed him in three while affirming in four and affirming as modified once. The most significant reversal was the obscenity case of *State v. Jackson*.[12] There, in a widely-noticed decision, Judge Goodwin had invalidated the state's obscenity statute, which lacked a definition, for violating the First Amendment, but the Oregon Supreme Court upheld it by reading a definition into "obscenity"; however, it did so by a vote of only 4–3, with his colleagues dividing evenly and a pro tem judge voting to uphold the statute.[13]

Justice Goodwin was to serve on the Oregon Supreme Court for close to ten years. Of his many rulings (to be examined in this paper principally *en gros*), by far the most important—not only in his own view but in that of his colleagues—was the "Oregon beach case," *State ex rel. Thornton v. Hay*, in which, speaking for a unanimous six-judge court (Justice Arno Denecke concurring separately), he ruled that the State could prevent landowners from enclosing the area of the ocean beach between mean high tide and the visible vegetation line.[14] This ruling

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[9] After his short Senate service, Lusk returned to Oregon and regularly sat with the court.

[10] That Justic Goodwin had no opposition was not unusual at the time either in Oregon or more generally, as few sitting judges up for reelection faced challengers.

[11] This practice happened most frequently when one of the high court's judges were recused or otherwise absent from the en banc court, to avoid a tie in what would otherwise, with the absence, be a six-judge court. Pro tem judges were sometimes also used in department.

[12] 356 P.2d 495 (Or. 1960).

[13] *Id.* This case and Justice Goodwin's obscenity rulings on the Oregon Supreme Court are examined by Paul R. Meyer & Daniel J. Seifer, *Censorship in Oregon: New Developments in an Old Enterprise*, 51 OR. L. REV. 537, 538 (1972). In addition to *State v. Jackson,* the article also mentions *City of Portland v. Welch*, 364 P.2d 1009 (Or. 1961) *modified,* 367 P.2d 403 (Or. 1961), and *State v. Watson*, 414 P.2d 337 (Or. 1966).

[14] State *ex rel.* Thornton v. Hay, 462 P.2d 671 (Or. 1969). Judge Goodwin also thought important the Eugene cross case, Lowe v. City of Eugene, 459 P.2d 222 (Or.

maintained the public's access to the extensive Oregon coastline, and precluded private landowners' blocking of access to beach abutting their property, such as occurred in many other states. Although one of his colleagues later said that Justice Goodwin had developed the ruling "out of whole cloth," that same judge, calling Goodwin "an originator," said it "had to be done."[15]

III. THE OREGON SUPREME COURT: PROCESS

The Oregon Supreme Court in the 1960s could be called a fairly typical state common law court, with a caseload that was "largely what we call private law business . . . largely property and contract and lease and tort controversies . . . ."[16] In the 1960s, the court did begin to see a growth in administrative law through government agency cases, and there was a corresponding decrease in private law appeals. The court was not a leader in constitutional matters; its reputation in that regard, particularly for deciding cases on the basis of the state rather than the federal constitution, did not come until Hans Linde joined the court. In the 1960s, however, the court did begin to contend with new doctrine in criminal procedure developed by the Warren Court, such as applying the 1967 *In re Gault* ruling on rights of juveniles,[17] but it was not at the forefront in adopting these rulings. Indeed, one commentator called one of the court's cases "another example of the deprivation of the *Miranda* rights through a constricted view of custodial interrogation."[18] As Justice Goodwin himself later put it, he and his colleagues were "foot dragging . . . in following the Warren Court. We were not eagerly picking up the clues that the Warren Court was sending us . . . and running with their

1969). For mention of this case, see the discussion of time to disposition on rehearing, *infra* at 1151.

[15] Interview with Ralph Holman, retired Justice, Oregon Supreme Court, in Salem, Or. (October 17, 1994) (on file with author). It has been suggested that in a later case, another justice of the Oregon Supreme Court provided more solid jurisprudential footing for the ruling, which Judge Goodwin has been said to acknowledge. (Private communication to author).

The Oregon beach ruling came before the U.S. Supreme Court's development of modern-day "takings" law, and Justice Scalia was later to criticize it in a dissent from the Supreme Court's denial of review in a latter-day version of the dispute. Stevens v. City of Cannon Beach, 510 U.S. 1207, 1212 (1994) (Scalia, J., dissenting) (*denying cert.* to 854 P.2d 449 (Or. 1993)).

[16] Audio tape transcript: Rick Harmon, Oral History Interviews with Alfred T. Goodwin, Oregon Historical Society at 279–80 (May 10, 1985–Sept. 3, 1986) [hereinafter Goodwin Oral History].

[17] *In re* Gault, 387 U.S. 1 (1967).

[18] George M. Platt, *Criminal Procedure*, 49 OR. L. REV. 287, 298 (1970). The case discussed is *State v. Travis*, 441 P.2d 597 (Or. 1968). In *Travis*, Justice O'Connell's dissent expressed a more positive view of *Miranda v. Arizona,* 384 U.S. 436 (1966). *See Travis*, 441 P.2d at 600.

suggestions. We were almost forced every step of the way."[19] Eventually and "gradually," he said, the court picked up on what the Warren Court wanted, "but it was not a quick, easy transition."[20] More generally, it has been suggested that, on a court with mandatory jurisdiction, there is not much time to write new doctrine, although some scholarly judges do write some "interstitially."[21]

Scholars of the courts tend to overemphasize constitutional rulings. The Oregon Supreme Court did have search and seizure cases, some cases on regulation of obscenity, limits on public employees' off-duty activity, regulatory matters like limits on advertising of drugs and professions (like dentistry), and election matters—but mostly under state law. However, all in all, it did not have many constitutional questions, although it did have public law questions in the form of regulatory agency questions such as rate regulation. A considerable amount of the court's attention was devoted to torts, through cases stemming from car accidents or car-train collisions; here we find issues of contributory negligence, assumption of risk, and extrahazardous activity[22] (such as crop spraying in what was an early environmental case),[23] as well as nuisance, stemming from complaints about excessive noise. Also injury-related were workmen's compensation cases, although these were part of the Court's work in reviewing agency determinations; that work also found the Court dealing with utility rates. There were domestic matters, including divorce, custody, and adoption. Justice Goodwin compared the court to the U.S. Supreme Court when he said that "our Court functions at a somewhat lower level of abstraction, and deals with a more prosaic type of raw material."[24]

A. His Colleagues

Selection to the Oregon Supreme Court was formally by nonpartisan election to a designated position for a term of six years, but many justices, like Justice Goodwin, reached the bench by appointment to a vacancy, with election to follow. The court's chief justice was selected from within the court. The chief justice had been the oldest judge with the least time left before reaching mandatory retirement age, but, starting in 1959, the chief justice was selected by his fellow judges for a six-year term, because

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[19] Goodwin Oral History, *supra* note 16, at 271.

[20] *Id.*

[21] Personal communication to author (on file with author).

[22] *See generally* Frank R. Lacy, *Torts—1961 Oregon Survey*, 41 OR. L. REV. 217 (1962).

[23] Loe v. Lenhardt, 362 P.2d 312, 314 (Or. 1961); Lacy, *supra* note 22, at 233–34. *See also* Charles J. Merten, Recent Case, Loe v. Lenhardt, *362 P.2d 312 (Or. 1961)*, 41 OR. L. REV. 264 (1962).

[24] Letter from Alfred T. Goodwin, to William Frye, Lane County District Attorney (Feb. 23, 1965) (on file with author).

the two-year term had provided no consistency.[25] During Justice Goodwin's tenure, William McAllister was chief justice, followed by William Perry, with the justices returning McAllister to the position because he wrote few opinions (he was a perfectionist), and "he had a lot of leadership ability and he was a good detail man and he liked administrative work."[26] His colleagues felt the court would get more opinions from Perry, who wrote more, and good leadership by restoring McAllister: "[W]e figured as long as he's not going to write a lot of opinions anyway, he might as well harness the talent that he has for administration."[27]

Through the mid-1970s, a period extending somewhat beyond Justice Goodwin's service, the Oregon Supreme Court had had only sixty-nine different justices, thirty-five of whom served multiple terms. The average length of service was "slightly over nine years,"[28] with George Rossman having served the longest (thirty-seven years), and Hall Lusk, to whose seat Justice Goodwin was appointed, having served over twenty-two years, not counting his post-Senate, part-time service.[29] The justices serving on the Court when Goodwin joined it were, in addition to McAllister and Perry, George Rossman, Gordon Sloan, Harold Warner, and Kenneth O'Connell, who had been Goodwin's professor at the University of Oregon Law School and who went on the court roughly two years before Goodwin. During Goodwin's tenure, Ralph Holman and Arno Denecke joined the court, and while O'Connell was on sabbatical at the Center for the Study of the Behavioral Sciences at Stanford, circuit judge Herbert Schwab, later chief judge of the Oregon Court of Appeals, joined the court on a regular basis. Also serving was Justice Hall Lusk, who returned to serve on the court after his appointed term in the U.S. Senate came to an end.

B. Mandatory Jurisdiction and How the Court Sat

The Oregon Supreme Court was the state's only appellate court until 1969, when the intermediate appellate court, the Oregon Court of Appeals, was created. Thus during Justice Goodwin's service, the Oregon Supreme Court was a mandatory jurisdiction appellate court, which had to hear all cases brought to it. As well, the court had to consider all assignments of error, even if the justices indicated which issues were "principal" and resolved them in such a way as to dispose of the case; in

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[25] Holman interview, *supra* note 15.

[26] Goodwin Oral History, *supra* note 16, at 258.

[27] *Id.* at 260. At a different time, Judge Goodwin observed that Judge McAllister "went to all the schools at NYU; he came back with good ideas." Interview with Judge Alfred T. Goodwin in Pasadena, Cal. (Jan. 15, 1996) (on file with author).

[28] Sherry Smith, *An Historical Sketch of Oregon's Supreme Court*, 55 OR. L. REV. 85, 95 (1976).

[29] *Id.* at 96.

such situations, they could give less attention to the other issues, although they would have to be attended to in some way. Because there had been no previous appellate review of the trial transcript, the justices were more likely to examine the trial transcript directly.

How did the Court deal with having to decide all cases brought to it? It did not resort to unpublished dispositions, as have the U.S. Courts of Appeals, so its principal means was to have some cases decided by less than the full complement of justices. Using a suggestion made by one of the court's members who had been to an appellate judges seminar, the decision was to made to use departments of four or five judges—and, in the last years of Justice Goodwin's service, only three judges—for easier, routine, lightweight, or "cookie-cutter" cases, such as municipal drunk driving or State Industrial Accident Commission cases.[30] The chief justice decided whether a case would be decided in department. While dissents were filed in some of these cases, if disagreement over a case developed within a department, the case might be reheard en banc without the department issuing an opinion.

The court of all seven justices sat en banc for the more important cases, "any with precedent value or disagreement,"[31] as well as some of those in which judges sitting in a department had divided. In addition, when the court held its annual one-week sitting at Pendleton, in eastern Oregon—later eliminated with changes in transportation—all cases there were heard en banc.[32] After the Oregon Court of Appeals began to function, almost all Oregon Supreme Court cases were decided en banc.

C. Process

The court "was burdened with a tremendous backlog of cases,"[33] and this was one reason why some appeals from Goodwin's trial rulings were not decided until after he had sat on the court for a while. Indeed, when the docket was current in 1961, it was the first time in years that the court had eliminated its backlog. Under Chief Justice Rossman, briefs had been placed in a stack in the Clerk's office. To prevent judges' picking and choosing the "best" cases, a judge's clerk was to take the bottom one, but judges found ways to avoid cases with long records, so that there were

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[30] Goodwin interview, Jan. 15, 1996, *supra* note 27. Some judges thought five-judge panels were appropriate for light-weight cases; others suggested three judges. When asked about four-judge departments, Judge Goodwin said they "were probably five-judge panels with a recusal but no replacement of the recused judge because it was not important."

[31] *Id.*

[32] The court there heard cases that originated east of Hood River, with people from Madras, Bend, and Klamath Falls having the option of having their cases heard in Salem. Those from eastern Oregon who wanted a speedy appeal could also have their cases heard at Salem.

[33] Kenneth J. O'Connell, Remarks at Law—Related Education Project Banquet Honoring Judge Alfred T. Goodwin (on file with author).

long delays in their disposition. As chief justice, McAllister assigned cases, and in the process kept workload even.[34] An observer has also suggested that the speed with which Justice Goodwin could produce opinions helped reduce the backlog.[35]

The court decided only a few cases on the briefs, and even when the court did so, it might allow oral argument "to see if counsel could change our mind."[36] In most cases, argument was held prior to assignment, which might go to the justice who had asked more questions from the bench, particularly in public law cases. For example, Justice Goodwin wrote for the court in *State v. Buchanan*, on whether a university-newspaper editor could be held in contempt for refusing to provide information about on-campus criminal activity (drug use) that had been the subject of an article,[37] because he "expressed strong views in conference" with which the chief justice "could agree and which were well stated," and not because he had been a reporter.[38]

For private law cases, however, assignment might be to whoever had developed experience on the subject, so part of the basis for assignment was a justice's expertise. Justice O'Connell, who had taught property, tended to be assigned those cases and those involving administrative law, as well as those involving state post-conviction remedies, on which he was said to be a pioneer, while Justice Arno Denecke became an expert on insurance, and Justice Ralph Holman received cases involving *res judicata* issues.[39] As a later chief justice put it, "You get to know that certain judges wrote on a topic and did a good job, so you would give them the subsequent cases on that topic."[40] Another judge suggested that a good chief justice, although using judges' expertise, "would assign every third or fourth case in a subject area to someone else, to keep [the judge] from being locked in."[41]

After the justice with the case assignment had prepared a draft opinion, it was discussed during the court's weekly conference, although a justice often conveyed "major suggestions" about an opinion to the other justices the night before because "it was considered rude to spring changes" at the conference; minor editorial suggestions would be

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[34] Paul W. Harvey, Jr., *Conference System Speeds High Court*, SALEM CAP. J., June 27, 1961, at § 1, 7.

[35] O'Connell, *supra* note 33.

[36] E-mail from Alfred T. Goodwin, to Stephen L. Wasby (Oct. 2, 2007) (on file with author).

[37] 436 P.2d 729 (Or. 1968). *See* James E. Beaver, *The Newsman's Code, The Claim of Privilege and Everyman's Right to Evidence*, 47 OR. L. REV. 243, 244 (1968).

[38] Interview with Alfred T. Goodwin, in Sisters, Or. (Oct. 12, 1999) (on file with author).

[39] Goodwin interview, Jan. 15, 1996, *supra* note 27; Holman interview, *supra* note 15.

[40] O'Connell, *supra* note 33.

[41] Holman interview, *supra* note 15.

brought to the conference. The "Tuesday Conference" was the focus of the justices' grappling with cases, as to "both substance and form"; it was "where judicial philosophy would get ventilated,"[42] and "criticism was sometimes harsh, and on occasions petulant."[43] At times the conference was also a venue for discussing the questions contained in some cases yet to be argued, particularly "[i]f the case was likely to be given short shrift."[44] The conference could also designate a case as "per curiam" (rather than a signed opinion), "but the recommendation of the author was important" in this decision.[45] Such a designation was used in lawyer discipline cases, for example, in part because of judges' re-election concerns.

Far from all judicial interaction took place at the conference. This was because the judges were in close physical proximity to each other, with their chambers partially encircling the courtroom in horseshoe fashion on the third floor of the court building. The chambers fronted a dark corridor, which was locked to the outside, thus providing a "kind of monastic seclusion."[46] In this setting, a justice "would walk down the hall with opinion in hand and ask to chat"—something that also "was a tradition in a collegial court"—and a justice might sometimes learn that the writing judge had not realized there was a problem with the opinion. This visiting among chambers to discuss opinions indicates that "changes and fine-tuning" of opinions did not end with the Tuesday conference, as the writing justice "would think about it, and prepare a new version."[47]

While we cannot see inside the Oregon Supreme Court's conference in the way that the U.S. Supreme Court justices' docket books, where they recorded their colleagues' statements and votes, allow us to know what transpired there, we do have some sense from Justice Goodwin's later remarks. Justice O'Connell, who has been described as using a blackboard to diagram cases for his colleagues in conference,[48] has been called the court's "intellectual leader."[49] This leadership appeared in several substantive areas. In terms of the court's slow movement into the Warren Court era in criminal procedure, noted above, O'Connell led in

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[42] Interview with Alfred T. Goodwin, n.d. (on file with author).

[43] O'Connell, *supra* note 33.

[44] Goodwin e-mail, Oct. 2, 2007, *supra* note 36.

[45] E-mail from Alfred T. Goodwin, to Stephen L. Wasby (Nov. 9, 2006) (on file with author).

[46] O'Connell, *supra* note 33.

[47] Goodwin interview, n.d., *supra* note 42 .

[48] "The former professor would take off his coat and go to the blackboard with chalk in hand. He would do everything but call on the other justices to recite. Eventually the justices would vote, and usually the O'Connell position became the position of the court." Alfred T. Goodwin, *Chief Justice O'Connell: A Colleague Looks Back*, 56 OR. L. REV. 183, 187 (1977). *See also* Goodwin Oral History, *supra* note 16, at 281, 291.

[49] Goodwin interview, Jan. 15, 1996, *supra* note 27.

reforming post-conviction remedies, first by advocating a statute which facilitated bringing challenges to convictions more quickly to the court.[50] Another area was administrative law, which the other justices did not know and which O'Connell taught them to use.[51] And a third was torts, where his getting the court to reexamine "proximate cause" (see further discussion below) has been said to be an instance "of the way intellectual leadership can bring out the best in the members of a collegial court. [He] had his judicial siblings asking the right questions, and digging for the answers."[52]

D. Clerks

The justices of the Oregon Supreme Court did have law clerks, but there were no staff attorneys attached to the court as a whole, as that is a more recent development. At the time Justice Goodwin joined the court and for a while thereafter, those who wished to be clerks applied to the court, and if they were accepted, they were assigned to a justice; thus one of Justice Goodwin's clerks met him for the first time only after he arrived in Salem.[53] Sometimes there was more direct involvement by the justice in clerk selection, as when the second of two brothers to clerk for him was suggested by the first. Then those seeking clerkships began to write letters of application to individual justices, and the practice of applying to the court became displaced.[54] As Justice Goodwin observed, "People applied directly to me—I was listed in the directory." He would, he said, "look at those who wrote to the Clerk of Court but was not impressed by

[50] Goodwin, *supra* note 48, at 186. Of interest is Justice Goodwin's observation that, as to post-conviction remedies, he was "clueless" and "didn't know there was a problem," Goodwin interview, Jan. 15, 1996, *supra* note 27, until educated by O'Connell on the matter, and then by his persuasive abilities in conference, which "frequently made the difference in Oregon's willingness to follow the lead of the Supreme Court in bringing to indigent criminal defendants the quality of procedural justice that had always been available to the affluent." Goodwin, *supra* note 48, at 186. Justice O'Connell's efforts in this regard also made "the business of [the Oregon Supreme Court's] keeping up with the Warren Court . . . less traumatic than it might have been" otherwise. *Id.* at 185.

[51] Goodwin Oral History, *supra* note 16, at 284.

[52] Goodwin, *supra* note 48, at 189.

[53] Justice Goodwin "inherited" his first clerk from Justice Lusk when the latter was appointed to the Senate. In addition, Justice O'Connell had hired an extra clerk, knowing someone would use that clerk, and O'Connell, who had visibility, directed the next clerk to Justice Goodwin.

[54] For more on Justice Goodwin's selection of clerks, including those who served him in the federal courts, see Wasby, *supra* note 8, and for material on clerks on state high courts, see Rick A. Swanson & Stephen L. Wasby, *Good Stewards: Law Clerk Influence in State High Courts*, 29 JUST. SYS. J. 24 (2008).

While he served on the Oregon Supreme Court, Justice Goodwin had two clerks each from Stanford and NYU, and one each from the Universities of Michigan, Pennsylvania, Virginia, Willamette, Yale, and the University of California at Los Angeles.

them." There was, he said, a "run of applicants" from leading law schools, "as a result of word-of-mouth from law clerks who would talk to students a year behind them."[55]

Those who clerked for Justice Goodwin agree about their tasks for him. They agreed that their role was principally to review the briefs, to verify citations or references to the record or to determine that the authorities cited were accurately stated, and at times to read the transcript. "Cite-checking was a big part of the job," said one. Sometimes the research would extend to seeking out other authorities, and there might be "additional legal research on trouble issues." As one stated it, "He told me what to research and I did it." The clerks would present written memos to the justice to convey their conclusions and any suggestions they might have, or they might also discuss what they had discovered. One clerk suggested that the justice determined for each case the role he wished the clerk to play, and another observed that the justice "delegated a fair amount of research and brief reviewing."

Justice Goodwin wrote his own opinions—at a stand-up desk—so opinion drafting was not a major role for his clerks, although on occasion they might be asked to draft portions of an opinion; it was more likely they would be asked to review and critique the justice's draft opinion. However, "by and large he was the sole author," and because he was "such a good writer," a clerk's language did not appear often in his opinions, although a few of the clerk's phrases might find their way into an opinion, or their suggestions were sometimes included in opinions "in nuances," or where they had found some authority or line of reasoning not in the briefs, "this would find its way in."

IV. THE COURT'S DISPOSITIONS

In this Section of the Article, we explore the post-argument time it took the Oregon Supreme Court to rule in a case, an important part of the total "time to disposition," and then we examine the high court's treatment of the trial courts.

A. Time to Disposition

The earlier-noted suggestion that going into the 1960s, the Oregon Supreme Court took a long time to dispose of some cases and thus had a backlog prompts an examination of the time the court took to dispose of cases once it had heard argument.[56] For this, we use the roughly 335 cases in which Justice Goodwin wrote the court's opinion, and present

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[55] Goodwin interview, Jan. 15, 1996, *supra* note 27.

[56] Without data prior to 1960, we cannot determine here whether there was a reduction in time to disposition from the 1950s to 1960s or, if there was, the extent of that reduction.

only a partial examination of "time to disposition." Although such time is usually measured from the lower court judgment or the filing of the notice of appeal until final disposition in the appellate court,[57] here we have data only from argument to filing of the initial opinion in a case; thus no measure of the time from filing of the appeal or from filing of appellate briefs to disposition is included. Included are cases heard initially in department and then reheard en banc, where the department issued no opinion, so that the en banc ruling was the court's first. (For rehearing, see below.) We wish particularly to see if there were differences in time to disposition for department-heard and en banc-decided cases and also for unanimous decisions and those with a dissent.

The Oregon Supreme Court disposed of many cases expeditiously after argument. A few cases actually came down the same day they were argued; this was "unusual . . . but it did happen," as it would be possible for them to be filed the same day if they were only a page or two long.[58] Some cases had to be decided very quickly because of the press of circumstances, as when election issues were involved. Thus the ruling in one case involving the rules for initiative measures was handed down the day after argument; a petition for mandamus to three judges sitting en banc in Lane County concerning the election of a coroner came down on the fourth day after argument; and another, on signatures on an initiative petition, came down eleven days after argument.[59] Overall, somewhat under one-third (29.9%) of the cases were decided within one month of argument, which is relatively quickly, and 43% were decided in between five and eleven weeks (see Table I). However, it took three months or more to decide the remaining one-fourth (26.9%). Dispositions in all but a small number of cases were handed down within six months of argument, but it took the court more than a year to conclude resolution of two cases. As the 1960s proceeded, the court took longer to dispose of its cases. Thus, while 39.4% of cases decided between April 1960 and February 1964 were decided within a month, in the period of late November 1967 through early October 1969, only one-sixth were decided that rapidly, and the proportion for which the court took at least three months to disposition had grown from one-fifth (20.5%) to two-fifths (40.3%).

If we separate cases decided by department from those handed down by the en banc court, we find that departments disposed of cases more rapidly. This result is not surprising, as departments heard the more routine cases while the more complex were heard en banc. While

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[57] *See* STEPHEN L. WASBY, THOMAS B. MARVELL & ALEXANDER B. AIKMAN, VOLUME AND DELAY IN STATE APPELLATE COURTS: PROBLEMS AND RESPNONSES 27 (1979).

[58] Goodwin e-mail, Oct. 2, 2007, *supra* note 36.

[59] Schnell v. Appling, 395 P.2d 113 (Or. 1964); State *ex rel.* Appling v. Chase, 355 P.2d 631 (Or. 1960); Columbia River Salmon & Tuna Packers Ass'n v. Appling, 375 P.2d 71 (Or. 1962).

departments completed work on two-fifths (40.9%) of their cases within one month, the en banc court disposed of only half that proportion (20.7%) in the same time. Departments consumed three months or longer in only 11% of their cases, while the en banc court took that long in almost four times the proportion (40.2%).

	1 month	5–11 weeks	3+ months	Total
		Department		
Unanimous	62	66	16	144
	(43.0%)	(45.8%)	(11.1%)	
With dissent	1	8	1	10
	(10.0%)	(80.0%)	(10.0%)	
		En banc		
Unanimous	35	57	42	134
	(26.1%)	(42.5%)	(41.3%)	
With dissent	3	15	32	50
	(6.0%)	(30.0%)	(64.0%)	
		All Cases		
Unanimous	97	123	58	278
	(34.8%)	(44.2%)	(20.9%)	
With dissent	4	23	33	60
	(6.7%)	(38.3%)	(55.0%)	
Total	101	146	91	338
	(29.9%)	(43.2%)	(26.9%)	

Table 1. Time to Disposition

Note: Time is from initial argument to court's initial filed decision. Includes only cases in which Justice Goodwin wrote an opinion.

Change over the decade was also found separately for en banc and department cases. For en banc cases over the three periods, the proportion of cases decided within one month dropped from 27.8% to only 8.5%, while the proportion taking at least three months fell slightly from 40.7% to 34.9% before rising to almost half (48.9%). Whereas departments had resolved almost half (47.9%) of their cases in less than a month from 1960 through early 1964, the proportion receiving such prompt resolution dropped to under one-third (32.0%), and the proportion taking at least three months for disposition rose from a very small 5.5% to almost one-fourth (24.0%).

Also not surprising is that cases in which justices dissented took longer to decide than did unanimous rulings. Only 6.7% of all cases decided with dissent were completed in one month, compared with over

one-third (34.8%) of unanimous cases; over half (55.0%) of cases with dissents took at least three months to decide, while unanimous courts took that long with only one-fifth (20.9%) of cases. These patterns recur separately for department and en banc cases. A unanimous en banc court disposed of cases far more rapidly than when there was a dissent. Over one-fourth (26.1%) of unanimous en banc cases were handed down within a month, while 31.3% took three months or more, but only one-tenth of en banc rulings with a dissent were handed down in a month and 64% of such rulings took at least three months.[60]

B. Rehearing

We also need to see the length of time to disposition when the court reheard a case. In addition to cases initially heard en banc being reheard en banc, a case initially heard in department, if reheard before disposition, was always reheard en banc.[61] As well, when the losing party petitioned for rehearing of a department-decided case, the en banc court would rule on the petition.[62] *Rehearing* meant *reconsideration* but did not always mean that a case would be *reargued*, as the justices, on receiving a petition for rehearing, may have felt that they had sufficient information on which to base a ruling. Although division in a department might lead to en banc reargument before issuance of a disposition, in such a situation, the en banc court was not necessarily divided, although it could be, as two 1969 cases on jury instructions in personal injury cases illustrate.[63] And one finds instances in which a unanimous vote in department was followed by a unanimous vote in the full court on rehearing.[64] Likewise, even if the initial en banc court was divided, it might be unanimous on rehearing, because the justices who initially dissented did not feel rehearing was necessary.[65]

Rehearing was denied in most instances, and, in those few instances in which a rehearing was granted, seldom did the result change. There were, however, cases in which, while the en banc court formally denied rehearing, the justices would modify opinion language or provide a

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[60] There were too few department cases with dissents to provide much of a picture, but all but 11.1% of unanimous cases from departments were decided within eleven weeks.

[61] *See, e.g.*, Prall v. Gooden, 360 P.2d 759 (Or. 1961).

[62] *See, e.g.*, Rohner v. Neville, 365 P.2d 614, 614–15 (Or. 1961), *reh'g denied*, 368 P.2d 391, 391–92 (Or. 1962).

[63] Baxter v. Baker, 451 P.2d 456, 458, 464 (Or. 1969); Martin v. Hahn, 451 P.2d 465, 468 (Or. 1969). These cases were argued on consecutive days in department and reargued on the same day en banc. Both resulted in 4–3 votes.

[64] *See, e.g.*, Dowell v. Mossberg, 355 P.2d 624 (Or. 1960), *withdrawn*, 359 P.2d 541 (Or. 1961), where both rulings were unanimous (5–0, 7–0).

[65] *See* Berry v. State Tax Comm'n, 397 P.2d 780 (Or. 1964) (5–2 decision), *reh'g denied*, 399 P.2d 164 (Or. 1965) (7–0 decision).

statement adding language to what had originally been said.[66] There were, nonetheless, some instances where a change of result did occur.[67] In one, a condemnation case, the department had voted 4–0 to reverse the trial court but the en banc court, dividing 4–2, instead affirmed.[68] Most notably, in *Lowe v. City of Eugene*, the long-running case in which the presence of a cross on a Eugene hilltop was challenged, the court shifted from a 4–3 ruling sustaining the cross to a 5–2 ruling going the other way to find a violation of separation of church and state.[69] Justice Goodwin said for him this was "the most interesting case in terms of dissents and flip flops."[70]

How long did it take to dispose of cases with rehearing? Of sixteen cases from the 1960s initially heard in department and then reheard en banc and six cases initially heard by the en banc court in which there was rehearing or a ruling denying rehearing but modifying the opinion, the amount of time from initial argument to final disposition was roughly the

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[66] *See* State v. Kerekes, 357 P.2d 413 (Or. 1960), *modified on reh'g*, 358 P.2d 523 (Or. 1961) (adhering to original opinion, as modified); City of Portland v. Welch, 364 P.2d 1009 (Or. 1961), *modified on reh'g*, 367 P.2d 403, 404 (Or. 1961).

[67] *See* Savage v. Peter Kiewit Sons Co., 432 P.2d 519 (Or. 1967), *modified on reh'g*, 437 P.2d 487 (Or. 1968) (reinstating a case against one defendant, both rulings unanimous).

[68] State Highway Comm'n v. Fisch-Or, Inc., 399 P.2d 1011 (Or. 1965) (Goodwin, J., for the court), *reh'g granted*, 406 P.2d 539 (Or. 1965) (Goodwin, J., dissenting).

[69] Judge Virgil Langtry, sitting pro tem, wrote for the majority in *Lowe v. City of Eugene*, with Justice Goodwin dissenting for himself and Justices McAllister and O'Connell; on rehearing, Justice Ralph Holman, who had returned to the court and now sat in place of the pro tem judge, was in the majority, as was one justice who switched sides. Lowe v. City of Eugene, 451 P.2d 117 (Or. 1969), *withdrawn*, 459 P.2d 222 (Or. 1969), *reh'g denied*, 463 P.2d 360, 361 (Or. 1969), *cert. denied*, 397 U.S. 1042 (1970) (city purpose of enhancing commercial exploitation of Christian holidays improper where real purpose was to conform to majority view about preferred position for preferred religious symbol).

This did not end the convoluted history of this controversy. Several years later, the Oregon Supreme Court changed positions. Overturning a ruling by the Oregon Court of Appeals that the city charter provision turning over the cross as a veterans memorial did not alter the earlier *Lowe v. City of Eugene* ruling, the high court allowed the cross under the "changed circumstances" created by labeling it as a war memorial. Eugene Sand and Gravel, Inc. v. City of Eugene, 558 P.2d 338 (Or. 1976), *cert. denied*, 434 U.S. 876 (1977). In correspondence with Oregon Court of Appeals Judge Herbert Schwab, who had written the opinion for his court, Judge Goodwin said, "Your opinion was just right," and also observed, "The uprooting of that mysterious stick has been quite a project, hasn't it?" Letter from Alfred T. Goodwin, to Herbert Schwab, (Aug. 18, 1976) (on file with author).

When the issue later moved to federal court, the Ninth Circuit overturned District Judge Michael Hogan's grant of summary judgment to the city on the basis that the cross had a secular purpose, did not advance religion, and involved no excessive entanglement, and ruled that, despite the "war memorial" claim, the cross was impermissible governmental endorsement of Christianity. Separation of Church & State Comm. v. City of Eugene, 93 F.3d 617, 619–20 (9th Cir. 1996).

[70] Goodwin Oral History, *supra* note 16, at 267.

same for the two categories of cases. For those first heard in department and then reheard en banc, the average length of time to final disposition was 7.4 months, but some consumed as little as three months or less while the longest time was just short of a year. In cases heard, and then reheard en banc, ultimate disposition either came quickly—roughly three months "from start to finish"—or took a very long time, with three cases taking eleven months or more; the longest extended for one year, two months. The average time, however, was 7.3 months, very close to the mean for cases heard in department and reheard en banc.

C. Dispositions

How did the Oregon Supreme Court treat the rulings of the lower courts? Again using the cases in which Justice Goodwin wrote for the court, we look first at overall patterns and then present data on how the high court treated *individual judges*. The overall picture is simple: the justices affirmed more than three-fifths (62.4%) of the rulings appealed to them. Departments affirmed at only a slightly higher rate (64.7%) than the en banc court (60.3%) (see Table 2).

	Department	***En Banc***	***Total***
Affirm	101	108	209
	(64.7%)	(60.3%)	(62.4%)
Overturn*	55	71	126
	(35.3%)	(39.7%)	(37.6%)

Table 2. Dispositions

Note: Cases in which Justice Goodwin participated.

** Includes reversal (in whole or part), vacate, and vacate and remand.*

Almost two-thirds (64.4%) of affirmances were unanimous, while only one-third of reversals (35.6%) were. This relationship held for en banc cases: three-fourths (74.8%) of those affirmances but only one-fourth (26.8%) of reversals were unanimous, while for department cases, very few of which had dissents, only a slightly greater proportion of affirmances than reversals were unanimous (96.0% and 90.9%, respectively).

D. Individual Judges

Even in a state with relatively little population and with many small counties, it is likely that many trial judges will have their rulings reviewed by the state supreme court, especially when, as was true in Oregon during the 1960s, there was no intermediate appellate court. Of course, judges from the seat of the state capital (Salem, Marion County) and from the largest cities (Portland, Multnomah County, and the much smaller

Eugene, Lane County) would likely have more cases reviewed by the high court. In some courts, the identity of the judge whose ruling is being appealed has been said to have an effect on the appellate outcome, as most appellate judges form impressions of the relative quality of those whose work they are reviewing.[71]

At least to some extent, the identity of the trial judge also seemed to matter for Justice Goodwin.[72] One could see this in his later remarks, for example, about an unnamed judge who "would let prestigious lawyers talk him into things," and about two specific judges from less populated counties, who were "disappointing as judges, but fortunately . . . they had little business, and thus did little harm," as well as in his remark that "[t]here were some [judges] where the name on the front of the case was reversible error."[73] On the other side of the ledger, he found most Oregon judges to be "good lawyers, not very political," who "honored their profession."[74]

Justice Goodwin wrote the opinion in only one appeal from each of thirteen different circuit judges, also true for most pro tem circuit judges, and he wrote only two to four appeals from fifteen other circuit judges. There were, however, more than thirty judges from whom at least five cases reached the court and in which he wrote opinions; for six of those judges, he wrote in opinions from at least ten rulings. The data reveal considerable variation in the treatment the lower court judges received.

For four of the six judges whose cases were most often reviewed, affirmances clearly exceeded reversals. Thus Goodwin's rulings affirmed Judges George Jones and Val Sloper nine times while overturning each only twice; it was nine and three for Judge J.J. Murchison, while Goodwin opinions affirmed Judge William W. Wells of Umatilla County seven times and overturned him only three times. The other two judges of the six were reversed somewhat more often than they were affirmed; Justice Goodwin affirmed Judge Virgil Langtry six times and overturned his rulings in seven cases, while Judge J.S. Bohannon was overturned in six of ten cases. The combined record for these six judges was 44–23, an affirmance rate of 65.7%, slightly more than the affirmance rate for all cases in which Justice Goodwin wrote for the court.

As for the twenty-six lower court judges for whom Justice Goodwin wrote for the Court in reviewing from five through nine opinions each, their cumulative record was 65.9%, almost exactly the same as those reviewed most frequently; twenty judges had a "winning record," while

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[71] As to U.S. Supreme Court certiorari grants, see H.W. PERRY, JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT 126–27 (1991).

[72] Thus other justices writing for the court might have treated cases from these judges differently.

[73] E-mail from Alfred T. Goodwin, to Stephen L. Wasby (Oct. 15, 1996) (on file with author).

[74] E-mail from Alfred T. Goodwin, to Stephen L. Wasby (Oct. 8, 2007) (on file with author).

only six were overturned more frequently than affirmed. Coming out the best were circuit judges Edwin Allen, Winston Bradshaw, William Fort, Ralph Holman, and Wendell Tompkins—each affirmed by Justice Goodwin in five cases while being reversed once.[75] Six more were affirmed four times and overturned only once.[76] Judge Edward Leavy, who later joined Goodwin on the federal bench, was affirmed six times and overturned only twice.[77] Of the six judges Goodwin overturned more frequently than he affirmed in his opinions, all but one were reversed in only one more case than they were affirmed (e.g., three affirmances, four reversals). The exception was Judge James Crawford of Multnomah County (two affirmances, five reversals). It is interesting that Judge Goodwin had been sent by the chief justice to help learn the trade from Judge Crawford.[78]

In terms of the treatment lower court judges received, did it matter *where* they were located? Of particular interest from a state government perspective would be cases from Marion County, as cases involving state government would be filed at Salem, the seat of state government. The cumulative affirmance rate for judges there was 64.3%, only marginally above the overall affirmance rate for all judges. By contrast, cases from judges sitting in Lane County, which contained Eugene, the site of the University of Oregon and the state's second-largest city, and where Justice Goodwin had sat as a circuit judge, were affirmed by Justice Goodwin over seventy percent (71%) of the time when he wrote for the court.

Of course, by far the largest number of cases came to the Oregon Supreme Court from Multnomah County, which contains Portland. The judges trying these cases did noticeably *less* well on appeal than did lower court judges overall when Justice Goodwin wrote for the court, as he did in over 120 cases from thirty-three different judges, although for many of those he wrote on only one appeal. For judges from whom Justice Goodwin heard a number of cases, some did well while others had "losing balances." Among those overturned more than affirmed were: James Crawford, noted above, who did least well; Dean Bryson (two affirmed, four overturned), who was later to defeat one of Justice

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[75] Allen and Fort were from Lane County (Eugene), where Goodwin had sat as a circuit judge and Fort had been his colleague. Holman was later to sit with Goodwin on the Supreme Court. The five circuit judges later to serve on the Oregon Supreme Court had a cumulative record of being affirmed in opinions by Justice Goodwin close to seventy percent of the time (69.2%). In addition to Holman, Goodwin was also to sit with Arno Denecke, whom he affirmed four times and did not reverse.

[76] Judges Avery Combs, Robert Foley, Edward Kelly, E.K. Oppenheimer, Charles W. Redding, and Arlie Walker.

[77] Leavy was one of several judges of whom Judge Goodwin later said he had had a positive reaction in reviewing their cases. Goodwin interview, Jan. 15, 1996, *supra* note 27.

[78] It is interesting that some years later, Judge Goodwin recalled having had a positive reaction to Judge Crawford, among others. *Id.*

Goodwin's colleagues for reelection;[79] Paul Harris, Alfred Sulmonetti, and Herbert Schwab (3–4 each);[80] and Virgil Langtry, the source of the largest number of cases in which Goodwin wrote opinions (six affirmed, seven overturned). Those Multnomah County judges with "winning records" included Winston Bradshaw (5–1), Alan Davis (6–3), and J.J. Murchison (9–3), along with several who were affirmed four times with either no reversals or only one, including Judges E.K Oppenheimer and Charles Redding (4–1 each) and Justice Goodwin's future colleague Arno Denecke (4–0).

We do not know how the state's trial judges felt about Justice Goodwin's appellate review of their rulings, but we do have the views of one judge as to a case in which Justice Goodwin reversed him in a vagueness challenge to Portland's nude dancing ordinance. Judge James Burns (later, as a federal district judge, a colleague of Judge Goodwin) had invalidated the ordinance, in a "big long wordy opinion based on the U.S. Supreme Court," whose rulings "cast doubt" on the ordinance.[81] In *City of Portland v. Derrington*,[82] the Oregon Supreme Court reversed and remanded with instructions, with Justice Goodwin writing, in what Judge Burns called a "flick of the wrist," to say the ordinance dealt with conduct, not expression. As Judge Burns said he later told Goodwin, "You made it sound easy," and he characterized Goodwin's opinions as "getting to the issues, getting in and out in three to four pages rather than rambling for ten, fifteen, or twenty pages."[83]

V. UNANIMITY AND DISSENT

In this period, what were the vote divisions on the Oregon Supreme Court? How frequent was dissent, and were justices likely to dissent alone or to join others? Does one find, as expected, that dissent is more frequent in cases decided en banc than in those decided in departments? We look first at *all* decisions during the 1960–1969 period in which Justice Goodwin sat and then look more closely at cases in which he wrote the opinion of the court.

For all cases decided during Justice Goodwin's service, regardless of whether he participated in them,[84] there were dissents in fewer than 10%

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[79] L. Harmon Ziegler & Barbara Leigh Smith, *The 1970 Election in Oregon*, 24 W. POL. Q. 325, 333–34 (1971).

[80] These data contradict Judge Goodwin's later observation that those who had sat with the Oregon Supreme Court "were presumed to be free from error," with Schwab and Harris specifically named. *Id.*

[81] Interview with James Burns, Senior U.S. District Judge, in Portland, Or. (Oct. 25, 1994) (on file with author).

[82] City of Portland v. Derrington, 451 P.2d 111, 115 (Or. 1969).

[83] Burns interview, *supra* note 81.

[84] In addition to cases in departments in which he did not sit, he also recused himself in a few cases—several because his brother, Jim, in practice in Oregon City,

of the cases (see Table 3). Perhaps not surprisingly, there was a much smaller proportion of cases with dissents when the cases were decided in department (only 2.3%) than when the court sat en banc to decide a case (more than a sixth: 17.3%). A dissent in a department-decided case was likely to be solo; only one of thirty-four department cases with dissents had a 3–2 vote, and most (two-thirds) were 4–1 decisions. This is not surprising, as there could be no more than one dissent in three-judge departments, which accounted for only 6.5% of all department rulings but which were used more frequently toward the end of the decade, and, in a four-judge department (14.4% of department cases), a 2–2 vote would likely mean no disposition plus rehearing by the full court. In the en banc cases with dissents, those with one, two, and three dissenting votes were roughly equal in proportion.

	Department	***En Banc***	***Total***
Unanimous	1,459	1,021	2,480
	(97.7%)	(82.7%)	(90.9%)
With Dissent	34	214	248
	(2.3%)	(17.3%)	(9.1%)
Total	1,493	1,235	2,728

Table 3. Unanimity and Dissent

Note: All cases decided during Justice Goodwin's tenure.

Only 3.3% of department and en banc cases in which Justice Goodwin did not participate had dissents. By contrast, the proportion when he participated but did not write for the court was 9.7%, but when he wrote the court's opinion, dissents occurred in over one-sixth of the cases (18.1%)—substantively significant differences. However, because there are relatively few department-decided cases with dissents, it is important to look at them separately from en banc rulings. The proportion of all department cases with dissents is small, but Justice Goodwin's writing the department's opinion was more than three times as likely to prompt a dissent as were cases when he did not participate (6.3% as against 2.0%); only 1.6% of those in which he participated but was not the author had dissents. The same pattern is even more evident in en banc cases, where dissents are more likely, occurring roughly one-sixth of the time (17.3%). There were dissents in almost one-fifth (19.2%) of en banc rulings in which Justice Goodwin did not participate and in almost one-sixth (15.2%) of cases in which he participated but

had argued, e.g., *Thomas v. Foglio*, 358 P.2d 1066, 1067 (Or. 1961), and once when the firm of his brother-in-law, Stanley Urbigkeit, appeared for one of the parties. He participated in all but one-fourth of the cases the court decided during this period.

some other justice wrote, but over one-fourth (28.1%) of the cases carried dissents when he wrote for an en banc court.

For all en banc cases in which Justice Goodwin participated, there was a slightly higher proportion of those with two dissenting votes than of solo dissents (36.3% compared with 33.3%), perhaps because in a seven- (or six-) judge court, one might be more willing to dissent if one had social support within the court, and the proportion of cases with three dissenting votes is slightly smaller (30.4%). However, when Justice Goodwin wrote the opinion and there was a dissent, fewer cases have only one dissenting vote, and three dissents are more likely than in cases in which he participated but did not vote (34.6% and 28.9%, respectively).

A. Reasons for Consensus

There is no immediate apparent explanation for why Justice Goodwin writing an opinion might increase the occurrence of dissent. We can, however, speculate as to why the Oregon Supreme Court's overall rate of internal disagreement was so limited. Among the reasons suggested is that as a mandatory jurisdiction court having "to hear everything that came in," the court received a large proportion of routine cases, which don't lead to much disagreement: "A lot of the cases were just enforcing timber contracts or railroad crossing collisions or run of the mill landlord and tenant disputes."[85] As Justice Goodwin was to say later, "There are few bases for dissent in whiplash cases."[86] If the court had been able to select its cases, disagreement would be greater; the divisive cases that might be chosen "were the exception rather than the rule."[87] "In a state court," said Justice Goodwin, "you don't get much of that kind of ideological opportunity [that you see in the U.S. Supreme Court] to divide because you don't select your cases."[88] It has also been suggested that selection by nonpartisan election results in less division, even when—as often happened in those years—the justices reached the court initially by gubernatorial appointment. Whatever "partisan label" they might carry at the beginning, over time they would move toward a consensus; it's a matter of "legal culture."[89]

When the court did have—"from time to time, but not very often"—cases like those on church–state relations or obscenity, or the proper extent of local regulation of business, which were "kind of divisive,"[90] a

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[85] Goodwin Oral History, *supra* note 16, at 248.

[86] Goodwin interview, Oct. 12, 1999, *supra* note 38.

[87] Goodwin Oral History, *supra* note 16, at 248–49.

[88] *Id.* at 248. Comparing the extent of unanimity on the Oregon Supreme Court before the creation of the Oregon Court of Appeals with that after the intermediate court of appeals was in place, and the Supreme Court became increasingly a "certiorari court," is beyond the scope of this study.

[89] Personal communication to author (on file with author).

[90] Goodwin Oral History, *supra* note 16, at 251.

liberal–conservative alignment among the justices would be more likely. And these public policy questions did stimulate a different type of ideological division on the extent of review in which the justices should engage, whether the court should "leave it alone and let the legislature do whatever it wants" or should limit the legislature; whether one should have "an active kind of judicial review of legislative or regulatory action [or] . . . a less aggressive kind of scrutiny."[91] Yet, there was something approaching a consensus that the justices should "follow the law even if [the individual judge] didn't like it,"[92] and "all trusted each other to be intellectually honest in following precedent as we understood it."[93] The result was that the court did not engage in "a lot of individual grandstanding and trying to rewrite the law" as one could see on the federal appellate courts, but instead, "you just deal with the law that you find in the books, either the legislative law or the legal precedent."[94]

A related aspect of the court's homogeneity of view about judging was that many of the court's members had been to the Robert Leflar-taught seminars at the Institute for Judicial Administration at New York University, and as a result "took the position that it was not good form, not necessary, . . . not good" to write separately.[95] That a number of the justices had been trial judges, particularly later in Justice Goodwin's tenure when Justices Denecke and Holman joined the court, meant that they "had gotten over ego matters," particularly when the matters before the court were simply not earth-shaking.[96]

Another part of the mindset that served to limit division was that the justices, while aware that they differed in terms of being "liberal" or "conservative," and were "ideologically all over the place," with "different views of what's appropriate social policy,"[97] were highly homogeneous in a number of ways, so that one started with a "high percentage of consensus and a willingness to agree."[98] All were either Oregon natives or had long resided there, had been appointed by a governor, and were "from the same lawyer pool, with common understood Oregon cultural values (concerning matters like timber, fish, and the Cascade Mountains) that did not require expression."[99]

Still another factor increasing unanimity was the court's size, because it was thought to be easier to obtain agreement, even on controversial cases, on a smaller court of seven members than on a larger one, where

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[91] *Id.* at 252.

[92] *Id.* at 254.

[93] *Id.* at 256.

[94] *Id.* at 254.

[95] Goodwin interview, Jan. 15, 1996, *supra* note 27.

[96] Justice Goodwin was to say later in this regard: "Two million Chinese will neither know nor care if you dissented." *Id.*

[97] Goodwin Oral History, *supra* note 16, at 248.

[98] Goodwin interview, Oct. 12, 1999, *supra* note 38.

[99] *Id.*

they would be "a less homogeneous set of judges."[100] This small court's membership was also stable. As one judge noted, "The best court is one which stays together for a long time," so that "lines of power and expertise are laid out" and "you know almost instinctively where people stand on close cases; and you know whether someone is likely to change his mind on an issue."[101]

VI. SOME PATTERNS OF AGREEMENT

Given that the Oregon Supreme Court in the 1960s had a high rate of consensus, especially in its department-decided decisions, were some justices more likely to join with particular colleagues and less likely to join others? We do see some patterns, although not the alignments sometimes visible on the U.S. Supreme Court, where clear blocks of four justices have opposed each other and there has been a "swing" justice; the disagreement, while much less than that in the nation's high court through the years, is more fluid in who joins whom. Because the present study does not cover all cases, we cannot present patterns for all the justices. However, if the votes of the one judge on whom we focus attention reveal some patterns, and particularly if that judge agrees more with some colleagues than with others, we could reasonably speculate that similar variation would take place for the other members of the court.

With relatively few instances of "separate" voting and opinion-writing, we focus on the justice's concurring opinions; his majority votes in closely-divided (4–3) cases; and his dissenting votes and opinions, as particularly useful in revealing patterns of judicial interagreement.

A. Concurring Opinions and "Casting" Votes

Justice Goodwin wrote only nine concurring opinions during his almost ten years on the court. Three (two solo) came in department cases, in neither of which there was a dissent, while six (four solo) were in en banc rulings, in all of which some other justice dissented from the majority opinion. His concurring opinions in en banc cases were each to a different justice's majority opinion. In two cases, one of which was a 5–2 vote and another was a 4–3 vote, his concurring opinion left the court with only a plurality opinion by Justice Denecke rather than a majority opinion.[102]

Such a majority vote in a 4–3 case leads us to the justice's alignments in the twenty-six cases when he was in a 4–3 majority but did not write for

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[100] *Id.*

[101] Holman interview, *supra* note 15.

[102] *See* State v. Parker, 384 P.2d 986, 1000 (Or. 1963); Friendsview Manor v. State Tax Comm'n, 420 P.2d 77, 83 (Or. 1966).

the court, and in which it could be said that he was the determining (or "casting") vote. In such situations, he always joined Justice Lusk (7 of 7 cases), but he both joined and differed from others in this situation. He was in relatively few such cases with two justices, with whom he pretty much "split evenly"—Warner (3–3) and Rossman (5–7)—while Holman voted on the opposite side from Goodwin more than he joined with him (4–7). As to the justices with whom he was in a greater number of such cases, there were three justices he joined more often than opposed: Perry (with 15, in opposition 10), Denecke (10–8), and McAllister (13–12). On the other hand, Justices Gordon Sloan (7–17) and Kenneth O'Connell (10–14) were on the opposite side of these cases more frequently, somewhat expected given other indicators of agreement and disagreement.

B. Goodwin, Dissenting

Justice Goodwin wrote more dissenting than concurring opinions, although not a large number—only twenty-one. *None* were in department, where there were fewer than ten dissenting votes *against* his own opinions, principally three by Justice Perry and four by Justice Sloan, with whom he voted quite frequently overall. Of the twenty-one dissenting opinions Justice Goodwin wrote to an en banc ruling, the largest number (five) were solo, while he was joined by one colleague in seven cases and by two other dissenters in six cases.

Who wrote when Justice Goodwin dissented? Excluding a *per curiam* majority and two opinions by pro tem justices, there were eighteen such cases. Goodwin never once dissented to an opinion by Justices Rossman, McAllister, or Sloan; indeed, he cast no dissenting votes against McAllister opinions and only one to a Sloan opinion. While dissenting from three opinions by Justice Perry, he dissented most frequently from opinions by Justice O'Connell, his former professor; doing so six times as well as casting dissenting votes against two other O'Connell opinions. (See further discussion of O'Connell-Goodwin disagreement below.) He also dissented to opinions by the two justices who came on the court after him—Denecke (three dissenting opinions, three more dissenting votes) and Holman (four opinions, three more votes).

Next, we look to see how often any justice joined Justice Goodwin in dissent, either joining a Goodwin dissenting opinion or having Goodwin join one of his own.[103] All members of the court were less likely to agree with Justice Goodwin's dissents than he was to agree with his colleagues' dissents. Again we find Goodwin, when in dissent, most frequently with Justices McAllister (eleven cases), Perry (eleven), and Sloan (twelve), and only slightly less with Justice O'Connell (nine). Those most frequently in

[103] When Goodwin dissented and another justice also cast a dissenting vote, in only one case was Goodwin's dissent not joined.

opposition to Goodwin in these divided rulings were Justices Denecke (twenty-seven instances), O'Connell (twenty-five), Perry (twenty-four), and McAllister (twenty-one). When we combine these frequencies, for the six justices with whom Justice Goodwin participated most regularly, Holman joined Goodwin in dissent only *once* while the two justices were opposed in cases with dissents eighteen times (1-18), while there were three cases in which Denecke and Goodwin dissented together but twenty-seven with dissents in which they were on opposite sides (3–27). In these cases, Goodwin's inter-agreement with Justice O'Connell was somewhat higher (9–25). The three justices again shown to be in agreement with Goodwin most frequently are McAllister (11–21), Perry (11–24), and Sloan (12–22). The two justices with whom Goodwin participated somewhat less often were far more frequently opposed to, than joined with, Goodwin in these cases with dissents: Chief Justice Rossman (1–11) and Justice Lusk (1–9).

C. Dissenting from Goodwin

Having examined Justice Goodwin's relatively few dissents, we should also look at his majority opinions which drew dissent to see how many dissenting votes they prompted and whether some justices were more likely than others to dissent from his rulings. There were roughly equal numbers of solo dissents, two dissenting votes, and three dissents; in three of the latter 4–3 divisions, other justices' separate concurrences left Justice Goodwin with only a plurality rather than a majority opinion.[104] And some were definitely more likely to dissent than were others from his opinions. Apart from Justice Harold Warner, who neither wrote a dissenting opinion nor cast a dissenting vote to any Goodwin opinion, of the eight different justices who wrote opinions dissenting from Goodwin's opinions for the en banc court, four dissented from him minimally: McAllister, later colleague Holman, and Lusk, upon returning from the Senate. George Rossman, who also voted against Goodwin's position in three cases but did not write the dissent, wrote three opinions dissenting from Goodwin's rulings, one solo and another of which was one of two dissenting opinions in the same case. McAllister and Holman each wrote only one dissenting opinion from a Goodwin ruling (both were one of two dissenting opinions in a case), while casting few other dissenting votes—McAllister, two, and Holman, one. Justice Lusk wrote three opinions, and one other vote, dissenting from Goodwin's views (one opinion was one of two dissenting opinions in a case).

Four justices—Sloan, Perry, O'Connell, and Denecke, the last of whom came to the court later in Goodwin's tenure—dissented from

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[104] Cameron v. DeBoard, 370 F.2d 709, 719 (Or. 1962) (Rossman, J., concurring); Price v. Gatlin, 405 P.2d 502, 503 (Or. 1965) (Holman, J., concurring in result); State v. Oman, 457 P.2d 496, 497 (Or. 1969) (O'Connell, J., specially concurring).

Goodwin opinions more frequently, and three of the four (Sloan, Perry, Denecke) had similar patterns of dissents from Goodwin opinions, so voting in 17–20 cases each while writing dissenting opinions in fewer than ten cases each (Sloan, seven; Perry and Denecke, nine each), with solo dissenting opinions to Goodwin opinions in only a few cases (Denecke, two; Sloan, three; and Perry, five). The justice most frequently opposing Goodwin was his former law professor, Kenneth O'Connell, who wrote twenty-two opinions dissenting from his former student's opinions, five of which were solo dissents, and in all but three of which O'Connell wrote the only dissenting opinion. O'Connell cast an anti-Goodwin dissenting vote in five other cases, that low number not surprising given O'Connell's high number of dissenting opinions.

D. The Role of Ideology?

The picture of Justice Goodwin's concurring opinions and the relationships related to dissents is sufficiently variegated that no single factor like ideology serves to explain it. However, it is interesting to see whether it might provide a partial explanation, at least in the terms Justice Goodwin himself used to classify the judges. Both Justice Sloan and Justice O'Connell were appointed by Democratic governors, which perhaps helps to explain why they were thought to be the most liberal members of the court. Justice Goodwin himself called O'Connell, a prime mover in getting the court to address Warren Court criminal procedure rulings, the court's "most consistent liberal."[105] At the other end of the spectrum, Justices Rossman and McAllister were the "most traditionally conservative." Justice Goodwin placed himself between Justice Sloan, more liberal, and the moderately conservative Republicans Justices Perry and Warner, while also putting himself in the court's center with Justices Denecke and Holman as "all pretty close together" but with Holman more conservative, and Denecke more liberal, than himself in some ways.[106]

Another way of casting some light on Justice Goodwin's ideological position in the Oregon Supreme Court is to see what types of litigants he might be more likely to favor. When he wrote for the court, did he favor individuals, businesses, or governmental units? A very rough categorization of cases by the type of party shows that where an individual faced a business, his opinions were divided about evenly between the two, although a few more cases favored the business. In the small set of roughly a dozen cases involving business against the government, more of his rulings favored the government than business. In cases involving the individual against the government, in both civil suits and criminal

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[105] Goodwin Oral History, *supra* note 16, at 252–53.

[106] *Id.* at 257.

cases (including habeas rulings), Justice Goodwin's rulings favored the government twice as often as they did the individual.

Considerable further work to categorize the parties is necessary, and excluded here are cases involving one business against another and the many cases involving individual versus individual, including auto accident cases involving host and guest and matrimonial matters, including divorce, custody, and alienation of affections. (In divorce and custody cases, Justice Goodwin split about evenly in decisions favoring the wife and those favoring the husband.)

E. More on O'Connell and Goodwin

Further examination of the O'Connell-Goodwin judicial relationship is prompted by their earlier professor-student relationship and prolific opinion-writing, as well as their frequent disagreement in cases, relatively high for this court. The two were said to get along, but one colleague said that while that was true "on the surface," at the same time "there was an undercurrent," with "some rifts but not dislike."[107] More importantly, differences in approach and doctrine help explain why they appeared on opposite sides of a number of cases. As to their approach to judicial decisions, Justice O'Connell was later to say that Justice Goodwin was "a little bit more precedent-minded"—"not hide-bound, but less inclined to depart from precedent"—and (thus) "more conservative with respect to the decision-making process," while he himself was the most likely justice to start from scratch. Or as their colleague Justice Holman put it, Justice O'Connell was "the theory man" while Justice Goodwin was "inclined to be practical."[108]

Justice O'Connell captured the difference in one of his dissents to a Goodwin opinion on criminal procedure. Saying that Goodwin's "majority opinion simply recites certain technical rules of criminal procedure and concludes that these rules must be applied in the present case," he called that "the pattern of decision characteristic of the cases of an earlier day when the law of criminal procedure was a body of hyper-technical rules." Instead, O'Connell felt that "[t]he better reasoned cases today attempt to rid the law of these technical encumbrances," an "enlightened view" he had hoped his colleagues (including Goodwin) would adopt.[109]

The differences between the two were also apparent in a case in which Goodwin wrote for the court over O'Connell's solo dissent to uphold a conviction against a challenge to a search,[110] but which Goodwin later used as an example of the court's "judicial foot dragging"

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[107] Holman interview, *supra* note 15.

[108] *Id.*

[109] State v. Russell, 372 P.2d 770, 773 (Or. 1962) (O'Connell, J., dissenting).

[110] State v. Chinn, 373 P.2d 392, 401 (Or. 1962) (O'Connell, J., dissenting).

on criminal procedure, which "continued to inhibit the setting aside of convictions of obviously guilty felons."[111] In later writing to a law student preparing a law review note on the case, Goodwin said he (and the rest of the majority) "did not want to restrict the statute" by ruling the objects to have been seized illegally, and he had found "no particular reason to turn a guilty man loose just to dramatize the need for legislative attention to the matter of the statute's reach."[112]

Further indications of their differences on criminal procedure are seen in two cases. One involved the question of whether someone was "in custody" for purposes of the warnings required by *Miranda v. Arizona*, where Justice Goodwin, writing for the Court, found the defendant not in custody, while Justice O'Connell dissented.[113] The other involved a warrantless automobile search, in which Goodwin, writing for the Court, upheld a stop for a taillight violation and subsequent search of a truck, where a dead deer was found, when the deputy knew the driver was a poacher. O'Connell was again in solo dissent.[114] The taillight case was an instance to which Goodwin later referred where O'Connell's "trenchant dissents were often as not vindicated by the federal courts" on habeas, [115] as the federal district court did grant habeas upon invalidating the search.[116]

There were other doctrinal differences between Goodwin and O'Connell, on issues large and small. While O'Connell definitely was more liberal on criminal procedure, in part because he paid closer attention to defects in criminal trials, he was not necessarily a liberal when it came to the scope of the criminal law, as he would allow the law to reach instances which a narrow reading of a statute would not permit.

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[111] Goodwin, *supra* note 48, at 186.

[112] Letter from Alfred T. Goodwin to Carroll J. Tichenor (May 9, 1963) (on file with author).

[113] State v. Travis, 441 P.2d 597, 599 (Or. 1968). *See also* Johnson v. Hansen, 389 P.2d 330, 331, 333 (Or. 1964)(a case on questioning during voir dire, where O'Connell filed a special concurrence).

[114] State v. Krogness, 388 P.2d 120, 128 (Or. 1963), *cert. denied*, 377 U.S. 992 (1964).

[115] Goodwin, *supra* note 48, at 186.

[116] United States *ex rel.* Krogness v. Gladden, 242 F. Supp. 499, 502 (D. Or. 1965). *See also* James W. Korth, Note, *Search and Seizure Incident to Traffic Violations*, 4 Willamette L. Rev. 247 (1966). Justice Goodwin later observed that state judges "didn't take it personally" when, during the Warren Court criminal procedure revolution, a federal district judge would set aside Oregon Supreme Court rulings overtaken by that revolution. Goodwin interview, Oct. 12, 1999, *supra* note 38. However, Goodwin did express sensitivity when *Parker v. Gladden*, 407 P.2d 246 (Or. 1965), a ruling by Justice Denecke which he had joined, was reversed by the Supreme Court two years later. Denying post-conviction relief, the Oregon Supreme Court had found no denial of a constitutionally correct trial in a court bailiff's comments to the jury. *Id.* at 250. But the U.S. Supreme Court found a violation of the Sixth Amendment right to an impartial trial and reversed per curiam. Parker v. Gladden, 385 U.S. 363, 364 (1966).

On matters other than criminal procedure, an example of their differences was Goodwin disallowing unemployment compensation for striking employees while O'Connell dissented in part.[117] On the unauthorized practice of law, O'Connell was more protective of lawyers, while Goodwin was said to be more in tune with current business practices.[118] The application of choice-of-law rules also saw Goodwin and O'Connell disagreeing in some cases, but they agreed in others. In a 1963 case, Goodwin joined an O'Connell dissent applying Oregon's spendthrift statute,[119] but the following year, when the majority applied that statute even to out-of-state creditors in the court's leading case of *Lilienthal v. Kaufman* (1964), Goodwin dissented while O'Connell, in the majority, wrote an opinion concurring specially. The two justices were back together again when, in 1968, Justice Goodwin wrote for a unanimous Court to allow damages in excess of Oregon's $25,000 wrongful death limitation where the death occurred in California, which did not limit damages.[120]

Of particular note are their differences over torts, where they disagreed on a number of matters:[121]

- on whether contributory negligence is for the jury (O'Connell argued in the particular case that it was a matter of law);[122]
- on whether there was a failure of proof as to a defect in a wheel;[123]
- on an instruction as to lost wages as special damages;[124]
- on whether a statutory violation was negligence per se (O'Connell argued for abolition of the rule);[125]
- on recovery against a non-negligent wholesaler for economic loss resulting from manufacturer defects, where privity was an issue

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[117] Cameron v. DeBoard, 370 P.2d 709, 711 (Or. 1962).

[118] *See* Oregon State Bar v. Sec. Escrows, Inc., 377 P.2d 334, 340, 341 (Or. 1962) (Goodwin, J., for the court) (O'Connell, J., dissenting).

[119] Olshen v. Kaufman, 385 P.2d 161, 170–72 (Or. 1963).

[120] DeFoor v. Lematta, 437 P.2d 107, 108 (Or. 1968). For a discussion of Oregon conflicts law in terms of these cases, see Dennis J. Tuchler, *Oregon Conflicts: Toward an Analysis of Governmental Interests?*, 48 OR. L. REV 45 (1968). *See also* Herma Hill Kay, Book Note, 18 J. LEGAL EDUC. 341 (1966) (reviewing ARTHUR TAYLOR VON MEHREN & DONALD THEODORE TRAUTMAN, THE LAW OF MULTISTATE PROBLEMS: CASES AND MATERIALS ON THE CONFLICT OF LAWS (1965)).

[121] *See generally* Dominick Vetri, *Tort Markings: Chief Justice O'Connell's Contributions to Tort Law*, 56 OR. L. REV. 235 (1977).

[122] Kellye v. Greyhound Lines, Inc., 436 P.2d 727, 728 (Or. 1968).

[123] Heaton v. Ford Motor Co., 435 P.2d 806, 807, 810 (Or. 1967) (O'Connell, J., dissenting).

[124] Baxter v. Baker, 451 P.2d 456, 458 (Or. 1969); Martin v. Hahn, 451 P.2d 465 468 (O'Connell, J. dissenting in both 4–3 decisions).

[125] McConnell v. Herron, 402 P.2d 726, 729, 730 (Or. 1965) (O'Connell, J. dissenting).

(Goodwin wrote for a three-judge plurality to deny recovery and O'Connell dissented for himself and others);[126]

- on whether the minimum age for contributory negligence must be established;[127] and
- on the long-arm statute, where one case entailed a general review of tort law as to what was a "tortious act," and another, whether an out-of-state wholesaler ordering by phone was covered by the statute.[128]

In particular, as Justice O'Connell later put it, they disagreed on whether to adopt § 402(a) of the *Restatement of Torts*, on strict liability.[129] They also were said to differ in the rigor with which they precluded litigants from avoiding the statute of limitations.[130]

Yet the two justices could also be in agreement, in torts and in other areas. For example, in an obscenity case in which Justice Goodwin was on the losing side of a 4–3 vote shortly before he left the court, he joined Justice O'Connell in dissenting from an opinion by Justice Holman.[131] They were joined during the court's interesting exploration of "proximate cause" in a case in which the majority left the law "ruffled, but unchanged"[132] but the two posed major questions. In a special concurrence, citing Leon Green, and suggesting the rewriting of the standard jury instructions on proximate cause, Goodwin initially raised questions about the instructions.[133] Then, in a case involving injury to a longshoreman that he later said "was not remarkable for its facts or its law,"[134] he joined a long, scholarly O'Connell concurring opinion proposing a new formulation of proximate cause so that causation and liability issues would not be conflated.[135] On its way to deciding that case,

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[126] Price v. Gatlin, 405 P.2d 502, 504.

[127] Taylor v. Bergeron, 449 P.2d 147, 148 (Or. 1969) (O'Connell, J., concurring specially for three judges).

[128] State *ex rel.* Western Seed Prod. Corp. v. Campbell, 442 P.2d 215, 216, 221 (Or. 1968) (O'Connell, J., dissenting in part), where Justice O'Connell agreed with Justice Goodwin as to jurisdiction but then moved away on the other issue; State *ex rel.* White Lumber Sales, Inc. v. Sulmonetti, 448 P.2d 571, 572, 574 (Or. 1968) (O'Connell, J., dissenting). *See* Frank R. Lacy, *Chief Justice O'Connell's Contribution to the Law of Civil Procedure*, 56 OR. L. REV. 191, 200 n.36 (1977), and Eugene F. Scoles, *Oregon Conflicts: Three Cases*, 49 OR. L. REV. 273, 274 (1970).

[129] Interview with Kenneth J. O'Connell, Chief Justice, Oregon Supreme Court, in Salem, Or. (Oct. 18, 1994) (on file with author).

[130] *See* Lacy, *supra* note 128, at 194 (pointing to State *ex rel.* Kalich v. Bryson, 453 P.2d 659, 661, 662 (Or. 1968), in which O'Connell wrote for a 4–3 Court, with Goodwin dissenting). Lacy sides with O'Connell.

[131] State *ex rel.* Maizels v. Juba, 460 P.2d 850, 856–58 (Or. 1969). *See* Meyer & Seifer, *supra* note 13, at 542–43.

[132] Goodwin, *supra* note 48, at 189.

[133] Stoneburner v. Greyhound Corp., 375 P.2d 812, 816–17 (Or. 1962).

[134] Goodwin, *supra* note 48, at 188.

[135] Dewey v. A. F. Klaveness & Co., 379 P.2d 560, 574 (Or. 1963). Justice Sloan's prevailing opinion was less than two pages long, while the O'Connell special

the Court asked for assistance in the form of amicus briefs on the question, in a formulation specifically citing to Leon Green.[136] The *Dewey* case arrived at the court "at the time when the court was ready to reexamine proximate cause."[137] This made it unlike most cases, which "require nothing more than a decision . . . that the judgment below should be affirmed or reversed," because "[t]here is no new law involved, no discriminating application of old law to unusual facts, and, frequently, little reason for the appeal"; instead it was one of the relatively few cases in which, at a second level, the judges' function is "to do something about the law." Justice O'Connell had "assumed the role of catalyst in bringing seven good minds to bear upon a problem that needed to be reviewed afresh."[138]

VII. CONCLUSION

In this Article, through a focus largely on one justice and his interaction with his colleagues but with attention to the court as a whole, we have presented information about one state high Court, at a time when that state had no intermediate appellate court and thus the high court had to decide all cases brought to it. We have seen the process by which the court operated, and have learned something about a high court's use of departments to decide some cases, rather than having the whole court hear all cases en banc. Time to disposition has been examined, with attention to the effect of rehearing. Exploration of the court's disposition of lower courts' rulings has shown that both individual trial judges and trial judges from particular areas of the state are treated differently. The extent of disagreement within the Court—much less in cases heard in department—was far less than would be expected in discretionary jurisdiction courts and dissent is not random, with a judge more likely to dissent from the work of some colleagues than of others. Our preliminary treatment also shows that alignments among the judges fall into patterns.

While some of the findings are interesting, none are earthshaking, but none were expected to be. That the Court's activity seems to fall into patterns is of importance, as is the fact that some patterns (e.g., less

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concurrence was twelve pages long. Justice Denecke also wrote separately, and Justice Perry dissented.

[136] According to Goodwin, the court corresponded both with Green and with Prosser, who held a differing view. Goodwin, *supra* note 48, at 189. *Dewey* was first argued on February 9, 1962, to Department 2, and then was reargued to the en banc court, initially on July 2, 1962 and again on February 6, 1963. *Dewey*, 379 P.2d at 560. The request for assistance in that case came after the first reargument, which was at roughly the same time as Goodwin's concurrence in *Stoneburner,* 375 P.2d at 812. *Dewey* was eventually handed down on March 13, 1963. 379 P.2d at 560.

[137] Goodwin, *supra* note 48, at 188.

[138] *Id.* at 188–89.

dissent from the supposedly less complex and less contentious cases heard in department than in those cases the full court heard) were as hypothesized. Further exploration is still necessary—both of this Court, during the period studied and, most importantly, by comparing it during this time with its actions once the Oregon Court of Appeals was in full operation (and the Oregon Supreme Court became more of a certiorari court), and of other courts in other states.