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GOVERNANCE

PRODUCTION AND CONSUMPTION OF INFORMAL LAW: A MODEL FOR IDENTIFYING INFORMATION LOSS

*Sandra M. Huszagh**
Fredrick W. Huszagh

I. INTRODUCTION

Erwin Griswold published a short article in 1934 entitled *Government in Ignorance of the Law: A Plea for Better Publication of Executive Legislation*.¹ It opened with a quote from Bentham: "We hear of tyrants, and those cruel ones: but, whatever we may have felt, we have never heard of any tyrant in such sort cruel, as to punish men for disobedience to laws or orders which he had kept them from the knowledge thereof."² Our previous article dealing with the communication characteristics of formal and free laws suggested that the cruelty to which Bentham referred at times may well exist when free law is applied.³ Government reliance on complex formal laws to establish citizen obligations without regard to mechanisms for transmitting law content also may constitute such tyranny through negligence.

Griswold's article, however, was not concerned with actual or potential deficiencies in government transmission of formal or free law content. Instead, it focused on the communication of legal obligations established by the executive branch of the United States government pursuant to delegated legislative authority, no doubt because such "executive legislation" promised to be the bulk of law

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Kevin Buice has been invaluable in locating explicit examples of the various theoretic concepts set forth in the text.

¹ 48 HARV. L. REV. 198 (1934).

² J. BENTHAM, WORKS 547 (1843).

³ Huszagh & Huszagh, *A Model of the Law Communication Process: Formal and Free Law*, 13 GA. L. REV. 193 (1978).

setting forth rights and obligations of citizens. When a legal right or obligation is discernable only by reference to both congressional legislation and executive or judicial action,⁴ the law creating the right or obligation is informal law under our conceptual scheme.

Griswold and others⁵ depicted the obvious inadequacies of official United States government publications for distributing critical components of informal law and successfully urged the creation of a special publication, the *Federal Register*, for physically placing executive legislation in the public domain.⁶ Subsequently, the government has established other publications to facilitate citizen access to this legislation on a continuous basis.⁷ These efforts by the federal government have not kept pace with the increasing complexity of administrative law. While the government does or should know of the high probability of citizen ignorance of administrative action, it has not acted responsibly to mitigate such ignorance. Communication deficiencies at the state and local levels are far worse.⁸

This Article seeks to indicate where the probability of citizen ignorance is greatest, and to identify the important independent variables that determine the probable level of ignorance. On the basis of this analysis, the Article sets forth a model designed to facilitate development of law communication reforms that can restore legitimacy to the government's assumption that ignorance is not a proper defense to noncompliance.⁹ The model can be applied

⁴ Such action is frequently referred to as executive and judicial legislation because it creates contours of legal obligations not evident before such action. The authors find these labels appropriate, perhaps as a result of insensitivity to legal niceties, but recognize some readers may wish to style these actions as something less than legislation, especially when judicial action is involved. For support for our perception, see generally Griswold, *supra* note 1; Ronald, *Publication of Administrative Legislation*, 7 GEO. WASH. L. REV. 52 (1938); CARR, DELEGATED LEGISLATION (1921).

⁵ J. COMER, LEGISLATIVE FUNCTIONS OF NATIONAL ADMINISTRATIVE AUTHORITIES 1963 (1927); Fairlie, *Administrative Legislation*, 18 MICH. L. REV. 181, 199 (1920).

⁶ The Federal Register Act was enacted in 1935 and on March 14, 1936, the *Federal Register* was first published. See Ronald, *Publication of Federal Administrative Legislation*, 7 GEO. WASH. L. REV. 52 (1938).

⁷ The *Code of Federal Regulations* was created in 1949 to provide an organic compilation of executive legislation noticed on a one-shot basis in the *Federal Register*. This and other reforms designed to improve citizen awareness of government action are analyzed in Newman, *Government and Ignorance: A Progress Report on Publications of Federal Regulations*, 63 HARV. L. REV. 929 (1950), and Note, *The Federal Register and the Code of Federal Regulations: A Reappraisal*, 80 HARV. L. REV. 439 (1966).

⁸ See, e.g., Cohen, *Publication of State Administrative Regulations: Reform in Slow Motion*, 14 BUFFALO L. REV. 410 (1965).

⁹ For an early and widely cited questioning of the legitimacy of the maxim "ignorance of the law is no excuse," see J. COMER, *supra* note 5, at 196.

at any jurisdictional level.¹⁰ The nine charts at the end of the Article illustrate how various communication factors individually and cumulatively condition information flow at each level.

Because administrative agency action is the source of law information that is subject to the greatest deterioration in the communication process, both the text and footnotes emphasize such action. In essence, we share Griswold's belief that administrative government is the most prolific of law sources, a belief that modern empirical evidence amply supports. We are not unmindful, however, that judicial action related to congressional enactments and administrative decisions is the source of a significant amount of law information that citizens need for lawful and enlightened action. Our analysis of information loss is easily applied to such "judicial law" and the Article's conclusion directly addresses some unique facets of communication of judicial law.

II. INFORMAL LAW COMMUNICATION MODEL

A. Full Text Paths of Informal Law

Path One Examples (Full Text):

Various informal law full text, unannotated channels, plus *Federal Register*, *Code of Federal Regulations*, publications by federal agencies, state codifications of administrative rules, state and local administrative agencies, official federal and state court reports, and slip opinions¹¹

Path Two Examples (Full Text plus Annotation):

¹⁰ Our previous article set forth the factors that substantially affect the transmission of legal information from its source to destination. It also analyzed these factors as they specifically relate to the transmission of formal and free laws. The following analysis of informal laws is based upon the analytical format of the earlier article. See Huszagh & Huszagh, *supra* note 3, at 195-201.

¹¹ Examples of federal agency and court publications are the *United States Reports*, federal slip opinions, *Interstate Commerce Commission Reports* (I.C.C.), *National Labor Relations Board Decisions and Orders* (N.L.R.B.), *Federal Communications Commission Reports* (F.C.C.), *Federal Trade Commission Decisions* (F.T.C.), and *Treasury Decisions under Internal Revenue Laws* (TREAS. DEC. INT. REV.). Examples of state codifications of administrative materials are the *Official Compilation, Rules and Regulations of the State of Georgia, 1972* (GA. RULES & REG.), *Opinions of the Attorney General of the State of Georgia* (OP. GA. ATT'Y GEN.), *Montana Administrative Code, 1972* (MONT. AD. CODE), and *Oregon Administrative Rules* (ORE. AD. RULES). An example of a codification of administrative rules on the municipal level is the *New York City Administrative Code*. Examples of reports of municipal administrative agencies include the *New York City Department of Investigation, Annual Report, 1938*; *New York City Department of Personnel, Annual Reports*; *New York City Law Department, Annual Reports*.

commercial services and reporters¹²

1. *Technical Level.*—Informal law sources and messages are characterized by their multiplicity. This is due in part to the delegation of the lawmaking process from the legislative or executive lawmaking source to a law implementing body such as an administrative agency.¹³ Acting under the authority of this delegation, the agency serves as a supplemental information source, and thus sends separate messages.¹⁴ Further, many agency actions are subject to judicial review, and the resulting court decisions may substantially modify the significance of agency action as a guide for future citizen action.¹⁵ The business destination must receive each of these messages for satisfactory technical communication. Messages originating with agencies include: (1) rules and regulations, (2) orders, (3) licenses, (4) advisory opinions, (5) agency decisions, and (6) actual enforcement practices.¹⁶ Judicial decisions on administrative law questions are yet another message class.¹⁷

¹² See, e.g., at the state level, *Georgia Insurance Law Annotated, Rules and Regulations of the Commissioner* (GA. INS. LAW ANN. [Harrison 1960]), *State Tax Reporter—Georgia* (STATE TAX REP.—GA. (CCH)); at the federal level, *Securities Regulations & Law Report* (SEC. REG. & LAW REP. (BNA)), *Standard Federal Tax Reporter* (STAND. FED. TAX REP. (CCH)), *Trade Regulation Reporter* (TRADE REG. REP. (CCH)), *Labor Law Reporter* (LAB. L. REP. (CCH)), *Equal Employment Opportunity Commission Compliance Manual* (EEOC COMPL. MAN. (CCH)), and *Radio Regulation* (RAD. REG. (P-H)).

¹³ See, e.g., the Interstate Commerce Commission's broad power to "administer, execute, and enforce all provisions of this [act], to make all necessary orders in connection therewith, and to prescribe rules, regulations, and procedures for such administration," under the Motor Carrier Act of 1935, 49 U.S.C. §§ 301-327 (1970), now commonly referred to as part II of the Interstate Commerce Act. Locally, a 1958 constitutional amendment (1958 Ga. L. 582) authorized the Georgia General Assembly to empower the commissioners of DeKalb County to license, tax, and regulate businesses in that county's unincorporated areas. The General Assembly passed the enabling provision (1959 Ga. L. 2658-61) at its 1959 session.

¹⁴ For example, pursuant to the broad powers delegated to it, *supra* note 13, the Interstate Commerce Commission issued a set of rules that drastically changed motor carrier practices in the leasing of equipment, including a prohibition of equipment leasing for less than 30 days, to combat the difficulties of regulating short-term oral leases. Similarly, the DeKalb County Board of Commissioners passed an ordinance on July 1, 1959, that imposed a schedule of license taxes upon all businesses covered by the delegated authority. See note 13 *supra*.

¹⁵ See generally Newman, *supra* note 7, at 932-44.

¹⁶ In highly-defined, stable regulatory fields, judicial opinions primarily reinforce administrative legislation. In unstable regulatory areas such as CATV during the late 1960's and early 1970's, and in relatively undefined areas such as antitrust, however, court opinions may effectively create legislation that later guides agency enforcement practice.

¹⁷ See I. POLLACK, *FUNDAMENTALS OF LEGAL RESEARCH* 365 (1967). For more detailed explanations, see W. GELLHORN & C. BYSE, *ADMINISTRATIVE LAW* (6th ed. 1974); K. DAVIS, *ADMINISTRATIVE LAW TEXT* (3d ed. 1972). A popular handbook of the Nutshell series is E. GELLHORN, *ADMINISTRATIVE LAW AND PROCESS* (1972), which contains sections such as "the delegation doctrine" and "rules and rulemaking."

Multiple sources and messages impose technical burdens on the information process that the two full text paths handle differently. Unannotated full text paths seldom coordinate multiple sources and messages. Messages generally appear in multiple channels.¹⁸ The annotated path compiles and annotates messages composing the informal law,¹⁹ but this compiling effort is difficult when no single agency serves as the definitive source for messages and their interpretation. For example, when the determination of informal law's applicability is postponed until the enforcement or dispute resolution phases, access to sources other than the agency itself is required.²⁰ Similar problems arise when enabling legislation does not provide an agency with sufficient details to allow it to act without referring back to the legislative or executive source.²¹

Law message perishability may vary, depending partly on subject, stability, jurisdiction, and level of message redundancy.²² Per-

¹⁸ The following examples typify the multiplicity of federal sources: Executive Order 10660, providing for the establishment of a National Defense Executive Reserve, is printed in 21 Fed. Reg. 1117 (1956); agency regulations for the establishment within the Interstate Commerce Commission of a unit of the Defense Reserve are found in 32A C.F.R. 177 (1977), as established by Admin. Order I.C.C. TM-1; any agency opinions or decisions on the matter would be found in *Interstate Commerce Commission Reports* (I.C.C.). In contrast to the federal level, Oklahoma, as of 1935, had no legal requirement of reports from its Banking Department under the direction of its Bank Commissioner or administrative reports from its Building and Loan Board.

¹⁹ The *Equal Employment Opportunity Commission Compliance Manual* (EEOC COMPL. MAN. (CCH)) is typical of such publications.

²⁰ A startling discussion of the dispersal of enforcement authority related to federal equal employment among 25 separate agencies appears in the *Wall Street Journal*, Aug. 26, 1977, at 1, col. 6. The difficulties that such dispersal imposes on intended business destinations in determining how the agencies involved define violations and what means of enforcement they will utilize caused former Labor Department lawyer William J. Kilberg to comment that "[e]mployers are forced to spend money and time trying to resolve the confusion, instead of spending it on ending discrimination."

²¹ The creation of a new Energy Department in the Carter Administration appears to involve such enabling legislation. Reporting on both the Energy Department's suggestion that data supplied by oil companies for statistical purposes might be passed on to department regulators and to other federal agencies, and the companies' sharp criticism of the proposal, the *Wall Street Journal*, Feb. 10, 1978, at 3, col. 2, stated that "[t]he adoption of new rules governing the acquisition and use of information is a complicated process, involving further hearings, written comment and substantial review within the Energy Department. Legislation might be required." A company spokesman stated: "Companies responding to [the] demands for information must determine how to respond on the basis of the uses to which the information will be put. . . . If no uses are specified, then companies will be reluctant to supply the information."

²² Redundancy is an important characteristic of the informal process: no one message is intended to be free-standing; rather, each message achieves coherence within the context of a series of messages. Adequate redundancy most often exists at the federal level and at the state level in industrial states because of the quality of message systemization. Redundancy

ishability is often low if the law's substantive focus is important to the contemporary business environment (as is true of product safety regulation), if amendments are built upon a well-defined framework, or if the law is a federal one, for numerous channels typically exist to transmit informal federal laws. Message perishability also depends on the channel itself. For example, lower message perishability can be anticipated when commercially annotated services transmit messages, because interpretive comments and detailed indexing by encoders enhance law information.²³

Encoders of annotated channels can enhance messages during the annotation and indexing processes, but, the multiple messages of informal law require serial transmissions. This may lead to a technical error in the encoding step. To avoid such an error, encoders of annotated services must grasp both the technical and semantic interrelationships among the messages, which vary in complexity depending upon the law's substantive coherence, stability, complexity, length, and jurisdiction. In contrast to the annotated path, the amount of encoding involved in the unannotated path is minimal. For the latter, encoders load onto the channel the full text message as the information source has produced it,²⁴ and index it broadly as

is often inadequate in local jurisdictions. In some subject areas, needed redundancy exists because of treatment of the subject at all jurisdictional levels. The following exemplifies informal lawmaking on the same subject matter at all three jurisdictional levels: In New York City, the Personnel Department and the City Civil Services Commission together have extensive powers over the decisions of other city agencies. The two find their major assignments in the New York State Civil Service Law; Chapter 35 of the charter is simply a duplication of a section of the state legislation. One such assignment is to hear appeals concerning employment discrimination. On the state level, fair employment administration has been handled by such diverse agencies as the New York State Commission for Human Rights (rules governing practice and procedure adopted April 30, 1953, and filed in the office of the Department of State, Albany, New York, and made effective May 14, 1953) and the New York State Commission Against Discrimination (statement issued January 1, 1961, to accompany the list of lawful and unlawful preemployment inquiries). The analogous federal agency is the Equal Employment Opportunity Commission (*see* agency regulations in the *Code of Federal Regulations*, Title 29). For an interesting analysis of redundancy in the judicial context, see Shapiro, *Toward a Theory of Stare Decisis*, 1 J. OF LEGAL STUD. 125 (1977).

²³ Perishability is also somewhat lessened if the messages are carried by a regular, official channel specifically covering an administrative agency, *e.g.*, *Federal Communications Commission Reports* (F.C.C.). Such official agency channels, however, suffer from many of the same problems found in such general official channels as the *Code of Federal Regulations*.

²⁴ If messages are important, preenactment records may be accessed. As with formal law, the jurisdiction generally determines the organization or even the existence of such preenactment messages. The *Federal Communications Commission Reports*, for example, often include a Notice of Proposed Rulemaking which provides background information on the matter in question, alternative proposals for change of the existing regulations, and tentative conclusions which generally invite responses and spell out the proper procedures for such. The proposed amendment of Part 76 of the Commission's Rules and Regulations (§§ 76.59 - 76.63) with respect to "saturated" cable television systems, 66 F.C.C. 2d 710 (1977), and the Peti-

to subject, time, and current changes.²⁵

Channels associated with both Paths are adequate in number and capacity to carry multiple messages. Consequently, the major channel limitations of Path One flow from the factors of directivity, accessibility, and perishability. Both directivity and accessibility are limited because decoders must use multiple channels to retrieve the informal law's multiple messages.²⁶ Because of multiple channels, no one channel can be relied upon to gather all information, and channel power is diffused. Path One channels may be rare or unavailable at state and local levels; the agency itself may thus be the sole repository for informal law messages.²⁷ The inefficiency of

tions for Rulemaking to Amend FCC Form 395 and Instructions (dealing with job categorization and Equal Employment Opportunity guidelines), 66 F.C.C. 2d 955 (1977), are typical. Under the Administrative Procedure Act, 5 U.S.C.A. § 553, the government is required to give general notice of proposed rulemaking by publication in the *Federal Register*, and the Act requires publication of a substantive rule not less than 30 days before its effective date, with some exceptions.

²⁵ For example, regulations appearing in the *Federal Register* are subject-keyed to the 50 titles of the *Code of Federal Regulations*. The *Federal Register* also publishes monthly, quarterly, and annual indexes to its bulky daily issues. Current changes in the Code itself are also noted. Quality of indexing declines at the state and is nonexistent at most local jurisdictions.

²⁶ For example, a complete understanding of Treasury Regulations § 1.305-7, dealing with the treatment of certain stock transactions as distributions for tax purposes, would require examination of I.R.C. § 305(c), which authorizes the Secretary of the Treasury to prescribe such regulations for the enumerated types of transactions. In addition to the examples supplied within the regulation, certain Revenue Rulings, made either in response to questions of a particular taxpayer or at the initiative of the Internal Revenue Service, might deal specifically with the problem facing the particular decoder and thus require examination. Although in the past, so-called "private" rulings made in response to requests for the Service's position on particular contemplated transactions were not disclosed, subsequent court rulings have withdrawn the secrecy. Tax Analysts & Advocates, 505 F.2d 350 (1974); Fruehauf Corp., 522 F.2d 284 (1975). The Tax Reform Act of 1976 now provides for the public availability and inspection of all rulings, determination letters, and technical advice memoranda, with certain limited safeguards. See I.R.C. § 6110.

²⁷ Official channels are most developed at the federal jurisdiction, and include the *Federal Register*, which provides the broadest coverage, the *Code of Federal Regulations*, which incorporates procedural and substantive rules of all federal agencies, and official compilations of rules published separately by some federal agencies, such as *Interstate Commerce Commission Reports*. Typical periodic state and local publications include the annual reports of the Georgia Departments of Public Health and Public Welfare, and the New York City Department of Personnel. The *Code of Federal Regulations* is subdivided into titles that correspond numerically to the *United States Code* provisions under which they are promulgated, assisting in access. Neither the *Code of Federal Regulations* nor the *Federal Register*, however, contain decisional law. To access the quasi-judicial decisions of a federal agency through this path requires use of official publications by the Government Printing Office, such as *Interstate Commerce Acts Annotated*. These publications are generally collected by research law libraries. Although available, indexes and digests of agency decisions, such as the Index of the Interstate Commerce Commission Valuation Reports (1951), and Consolidated Index—Digest

using either multiple, uncoordinated channels or the administrative agency certainly contributes to message and channel perishability. Annotated channels are clearly superior to unannotated for directivity, accessibility, and imperishability. Compilations of messages by subject matter or by a responsible agency enhance directivity; indexing²⁸ and compilation of multiple messages within one channel facilitate access, and the constant updating of the original message with partially redundant messages reduces perishability.

Decoding the official path with its multiple channels and their inherent limitations requires considerable time and expertise for satisfactory technical communication. If encoders of annotated channels reliably integrate messages in a directive and easy-to-use form, demands on decoders are lessened.²⁹ Decoders who consistently use either official or annotated channels frequently are lawyers specializing in administrative law or a specific subject area.³⁰ These lawyers can find messages at the request of business personnel, although access is generally more difficult at the state and local levels.

2. *Semantic Level.*—Sources and messages of informal law

of Reports of the Interstate Commerce Commission Involving Rates and Practices (e.g., September 1958—July 1960, July 1960—July 1962, September 1969—January 1974) are not consistently up to date. See I. POLLACK, *FUNDAMENTALS OF LEGAL RESEARCH* 403-05 (1967).

²⁸ Annotated services use a variety of techniques to increase access to messages, including general indexes, topical indexes detailed by major subject area, cumulative indexes, quick-search indexes, cross-reference tables, current indexes for additional information, detailed tables of contents, case tables, finding lists (which include specific section numbers of the particular manual being used), and tables of particular agency decisions and forms. Path One channels lack similar techniques to increase accessibility. For example, a major problem with the *Code of Federal Regulations* is the lack of detail in the general index as compared with those found in annotated services.

²⁹ Loose-leaf reporters and services adequately serve this function for federal and some state jurisdictions in the United States. When services are limited to certain subjects, as is true in most states, or are nonexistent, as is the case for most cities, demands on decoders forced to rely totally on official channels may be excessive. Such informal laws as Cost of Living Council Release No. 459, November 9, 1973, creating a Nonunion Construction Advisory Committee within the Office of Wage Stabilization, for example, might be difficult to retrieve were it not for Commerce Clearing House's *Economic Controls* service. The release is found in 1 *ECON. CONT. (CCH)* ¶ 42,301 (November 9, 1973). Regulations scattered throughout the *Federal Register* are consolidated in such services and placed in logical order.

³⁰ Specialized lawyers follow federal agencies such as the Civil Aeronautics Board (CAB), Federal Communications Commission (FCC), Federal Power Commission (FPC), Federal Trade Commission (FTC), National Labor Relations Board (NLRB), and Securities and Exchange Commission (SEC). At state and local levels fewer specialized lawyers are available and fewer subject areas are treated in concentrated fashion. A significant volume of important information is needed to support such specialized lawyers. Funds to support this specialization are especially limited in nonindustrial, low density states and local areas. See generally J. GOULDEN, *THE SUPERLAWYERS* (1972); C. HORSKY, *THE WASHINGTON LAWYER* (1952).

which possess reasonable homogeneity are desirable if semantic communication is to be achieved with high probability. Such homogeneity is facilitated by agency actions which seek to insure organization survival and growth through systematic and rational output.³¹ Because informal messages, such as regulations, are drafted over a period of time, adroit rule-makers consider changes in the environment affecting the law's consistency.³² When environmental changes are not reflected in successive messages or multiple sources for a law area do not coordinate their outputs, only the annotated path can cope with the resulting confusion about message meaning. Such confusion is reduced by the annotated path's integration of related messages, such as statutory texts, regulations and rules, and administrative and court decisions. If one regulation lacks detail—increasing the number of possible semantic interpretations—the annotated services' compilation of all regulations can assist decoders in interpreting the regulation.³³

Encoders are often critical to minimization of message distortion. For example, during the annotation process associated with Path Two communication, encoders can highlight the message's focus, its probable side effects, and enforcement probabilities.³⁴ In contrast, encoders serving full text channels of Path One cannot add commentary that could sharpen message meaning. Also, because Path Two encoders specialize in subject areas, it is more likely that they can preserve message meaning when laws are complex and chang-

³¹ Francis E. Rourke illustrates this well-recognized phenomenon of organizational behavior in his work, *BUREAUCRACY, POLITICS AND PUBLIC POLICY* 93-94 (2d ed. 1976).

³² For an example of less adroitness, see *Gregoire v. Biddle*, 177 F.2d 579 (2d Cir. 1949), which concerned the allegedly dishonest arrest of Gregoire by two successive U.S. Attorneys General, two successive Directors of the Enemy Alien Control Unit of the Department of Justice, and the District Director of Immigration at Ellis Island, from 1942-46. As a "native" of a "hostile government" (Germany), Gregoire was an enemy alien. He was born in Lorraine, which was in fact German at the time of his birth, but French in 1942. A subsequent ruling following a hearing before the Enemy Alien Hearing Board finally declared Gregoire a Frenchman, a fact which more forethought at either the formal or informal lawmaking stage might have established much more economically.

³³ The Civil Aeronautics Board's 1943 certification of a third carrier, Western Airlines, to the Los Angeles-San Francisco market in competition with United and TWA, for example, involved a general policy pronouncement about a "strong, although not conclusive, presumption in favor of competition on any route which offered sufficient traffic to support competing services without unreasonable increase of total operating cost." Reference to other messages was clearly necessary to give this statement substantive meaning.

³⁴ Subject matter and jurisdiction have independent effects on semantic clarity of messages. Also, if there is a lack of detail in messages, numerous possible interpretations may cause critical loss in meaning despite annotation. This is currently an obvious problem with the Department of Justice's enforcement of the Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, § 104, 91 Stat. 1496 (codified in scattered sections of 15 U.S.C.).

ing.³⁵ This generalization is, of course, based on the notion that background in a given subject area enables encoders to resolve problems related to message interpretation.

Channels of the annotated path are also far superior to those of the official path in terms of semantic communication because of their capacity for a better match with message characteristics. For example, official channels are not generally modified to accent certain messages and their interrelationships.³⁶ In contrast, channels of the annotated path are well-matched to informal law messages due to their subject organization, frequent updating in a manageable loose-leaf form, and integration of multiple messages necessary for interpreting a given informal law.³⁷

Decoding within Path One with a minimum of semantic distortion is difficult even for specialized lawyers due to the path's bulk and inadequate indexing. Personal contact between agency personnel and specialized lawyers serving as decoders, however, is an alternative for clarifying meaning.³⁸ These contacts are found where rela-

³⁵ See, e.g., *U.S. Export Weekly's* coverage of the Department of Commerce's implementation of the Arab boycott provisions contained in the 1977 amendments to the Export Administration Act of 1969, 50 U.S.C. app. §§ 2401-2413 (1976). Special complications in message interpretation may result, however, if multiple agencies are involved in a subject area. This may be the case with new laws, such as the Freedom of Information Act, 5 U.S.C. § 552 (1967), which establishes procedures for the public inspection of identifiable records not excluded by the Act that are in the custody and control of various agencies. See, e.g., the regulations of the Cost of Living Council, 38 Fed. Reg. 21972 (1973), 1 ECON. CONT. (CCH) ¶ 45,001 (September 17, 1973).

³⁶ The informal law aspect of federal income taxation, for example, involves separate multiple official messages. Official channels do a far poorer job than annotated channels in highlighting the relationships among these messages. Legislative history is found within published committee reports and hearings (House Ways and Means Committee, Senate Finance Committee, Senate Home Conference Committee) and the *Congressional Record*; regulations are found in the *Code of Federal Regulations*; and revenue rulings can be discovered through use of indexes of the several volumes of the *Cumulative Bulletins* and index volumes that cover a number of years of cumulative bulletins. There is no attempt to match these channels so that the semantic meaning of messages through each can be prepared. Such matching is sought through the CCH and BNA annotated tax services, which in effect market integration.

³⁷ Tax researchers utilizing annotated channels are able to find case law with relative ease by utilizing the *United States Code Annotated*, the *Federal Digest*, *Supreme Court Digest*, *Tax Court Digest*, *Shepard's Citations*, and Prentice-Hall's *Federal Tax Citorator*. Special tax services include multi-volume treatises such as *Mertens, Law of Federal Income Taxation*; *Robbin and Johnson, Federal Income, Estate and Gift Taxation*; and *Research Institute of America (RIA), Federal Tax Coordinator*. The Bureau of National Affairs (BNA) publishes *Tax Management Portfolios* which offers textual discussion of specific tax law areas and includes "worksheets" setting out relevant treasury regulations, items of legislative history, leading cases, and sample documents. Comprehensive special reviews are published by Commerce Clearing House, Inc. (CCH, *Standard Federal Tax Reporter*) and Prentice-Hall (P-H, *Federal Taxes*).

³⁸ For federal laws the aptly termed "Washington lawyers" are examples of such decoders.

tionships between regulatory agencies and their constituencies are active, as is the case between the Securities and Exchange Commission and security companies, the Federal Communications Commission and broadcasters and major carriers, and the Civil Aeronautics Board and major air carriers. For less important agencies and at state and local levels, such personal contact is often limited.

The quality of decoding is better when decoders can use Path Two channels that integrate multiple messages. In most cases, however, gathering the messages' full meaning requires decoding by lawyers familiar with the subject area, especially when informal laws are complex.³⁹

3. *Effectiveness Level.*—Numerous features of Path One inhibit effective communication at the effectiveness level. Nonfocused, general channels such as the *Federal Register* are particularly ineffective when a given informal law is new and the subject matter of the law is unusual, as in the area of consumer product safety,⁴⁰ and environmental protection in the late 1960's.⁴¹ The failure of trade journals serving power utilities to report on environmental regulation at its inception in the 1960's illustrates this deficiency.

Sources such as an administrative agency are critical to insuring

See C. HORSKY, *THE WASHINGTON LAWYERS* 59-117 (1952). The author states that

[a] record consequence of this broad delegation of power to administrative agencies is the overwhelming importance, in the case of the Washington lawyer, of an ability to see and interpret trends, to evaluate directions and speed, and to advise in the light of what is probably best described as an informed hunch.

Certainly it is no longer possible to read the law and render an opinion. Statutory standards are so vague and generalized that only by the gradual evolution of boundaries through agency action do they become meaningful at all. . . . This problem of the Washington lawyer, however, does not arise solely because of the generality of the basic statutory law. It is further aggravated by the fact that many administrative agencies do not write opinions when they decide cases

Partly because the customary sources of information are limited, and partly because the essence of administrative action is its kinetic quality, the Washington lawyer must take full advantage of every other course of information

Frequently more important than the information acquired from any of these sources [i.e., statutes, legislative history, agency personnel background, agency's sense of its "mission"] is what the lawyer can learn from dealings with the agency and its staff.

Also, see generally J. GOULDEN, *THE SUPERLAWYERS* (1972).

³⁹ This would be true in such areas as income, estate and gift taxation, labor relations, equal employment opportunities, and communication law.

⁴⁰ The Consumer Product Safety Act, 15 U.S.C. §§ 2051-2081 (1976), was enacted in 1976. For an overview of the present scope of activities associated with this law, see *Product Safety Liability Reporter* (BNA).

⁴¹ The National Environmental Policy Act, 42 U.S.C. §§ 4321-4347 (1976), was enacted in 1969. It spawned a myriad of administrative and judicial actions from that date to the present. For an interesting summary of the range of these activities, see R. STEWART & J. KRIER, *ENVIRONMENTAL LAW AND POLICY* 733-810 (1978).

communication at the effectiveness level for Path One. Unfortunately the frequency of personal contacts with the agency may be limited by physical distance between the agency and the decoder. The absence of semantic focusing by Path One encoders also critically limits the decoder's and destination's perception of message rationality. In contrast, annotated services with their focusing and integration of multiple messages enhance messages' rationality and provide a framework for their interpretation.

Encoding within the first path designed to facilitate effectiveness is seldom possible because the encoding step is limited to technical preparation of documents for placement in the channel. In comparison, annotated path encoders increase the probability of message transmission in terms of effectiveness through subject organization, integration of multiple messages, and detailed indexing. Annotated channels are not only better organized, but by integrating both informal law's content and information about enforcement, such channels are especially useful to decoders.

Factors affecting the communication process at each of the three communication levels handicap decoders of Path One channels. Decoders must compile and interpret multiple messages before a response can be formulated. For this reason, decoders likely will rely on the official path only if there is no coverage by the annotated path, and when there is a considerable time lag between the origination of the message and its coverage.⁴² Even when messages are carried by annotated channels, if they are not focused sufficiently to trigger an appropriate response by the business organization, then decoders must perform an additional interpretive step.⁴³ Finally, the annotated path's coverage is not "universal" for all informal laws, given these channels' selection of subjects and jurisdictional range. Some states and the majority of municipalities are not

⁴² Although the time lag problem is generally provided for in §4(c) of the Federal Administrative Procedure Act ("The required publication or service of any substantive rule . . . shall be made not less than thirty days prior to the effective date thereof . . ."), most state agencies do not use this idea of deferred effectiveness. The Model State Administrative Procedure Act also provides that a rule becomes effective upon filing, unless a later date is required by statute or specified in the rule. K. DAVIS, *ADMINISTRATIVE LAW TEXT* § 6.07 (1972).

⁴³ For example, further interpretation by a decoder perhaps in memorandum form or by verbal comments may be required when a law is new or has been recently modified, or when the law's subject focus is unusual. Such tailor-made opinions have become quite prevalent in connection with industry compliance with the Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, § 104, 91 Stat. 1496 (codified in scattered sections of 15 U.S.C.), and the boycott provisions in the Export Administration Act of 1969, 50 U.S.C. app. §§ 2401-2413 (1976), as amended.

covered.⁴⁴ Eventual destination response often requires strong linkages between decoders and destinations, with decoding restricted to important subjects under the jurisdiction of the federal government or the highly industrialized states and cities.

4. *Some Conclusions on Full Text Communications.*—The administrative agency portion of informal laws has greatly increased in breadth and complexity. Consequently, the official law transmission mediums proposed by Griswold and others are no longer adequate to support the legitimacy of the maxim “ignorance of the law is no excuse.” The government’s full text paths do not attempt to integrate the numerous sources and messages that collectively comprise informal law content. Also, the numerous components of an informal law message are not indexed to minimize perishability and, apart from indexing deficiencies, the multiplicity of components requires considerable expertise for proper integration by the intended recipients or their agent decoders.

The deficiencies of the official path at the technical level, aside from causing deterioration of message integrity at that level, generate significant problems at the semantic and effectiveness levels. In areas of the law undergoing rapid change due to scientific innovation or shifting public values, official paths do not have the capacity to communicate law information without distortion for all those affected. A small group of specially trained lawyers may be able properly to inform some potentially affected parties of these deficiencies, but such selective communication is not enough to maintain citizen confidence in their government.

Path Two annotated law texts have evolved primarily to meet the communication challenges posed by burgeoning administrative government. Their costs and complexity, however, restrict their utility to legal specialists who serve only a portion of citizens who are subject to informal law at the federal level. In many important areas of municipal and state regulation, there exist neither Path Two texts nor legal specialists that are able to achieve a meaningful distribution of informal law, even at the technical level. Thus, semantic and effectiveness subtleties that law sources seek to incorporate within their messages to achieve more responsive government seldom have an impact upon their destinations, especially at the state and municipal levels.

⁴⁴ See note 29 *supra*.

B. *Signaling Paths of Informal Law*

Path Three Examples (Specialized Media):

Trade and professional journals, newsletters⁴⁵

Path Four Examples (Mass Media):

Newspapers ranging from metropolitan and widely circulated newspapers such as the *New York Times* and the *Wall Street Journal* to small town dailies or weeklies; general periodicals such as *Business Week*, *Time*, and *U.S. News & World Report*

1. *Technical Level.*—As with formal law, Paths Three and Four transmit only short, simple informal law messages or brief summaries or signals indicating the law's existence and its subject focus.⁴⁶ Normally, informal laws with multiple sources⁴⁷ producing multiple messages require integration and summary by media encoders into signals; thus, a greater probability of information loss exists at the technical level for informal than for formal law.

Encoders of both paths are restricted in their capacity to preserve message integrity by the nature of the channels they serve. Adequate message processing by specialized media encoders depends on message congruency with the subject concentration of the channel.⁴⁸ Mass media encoders normally are unable to summarize informal laws properly because required coverage of all newsworthy events by this media precludes specialization. When signals must summarize a series of lengthy and complex messages or an informal law that is changing or new, encoders of both paths often have an almost im-

⁴⁵ Other examples are the *Federal Trade Commission News Summary*, the *National Association of Railroad and Utilities Commissioners Bulletin*, the *National Association of Regulatory Utility Commissioners Bulletin*, the *Energy Conservation Project Report*, *Antitrust and Trade Regulation Reporter*, the *Highway Users Federation Reporter*, *Art and the Law*, *National Labor Relations Board Release*, *The Citation* ("A Medicolegal Digest for Physicians"), *Handgun Control News*, *I and N* (Immigration and Naturalization) *Reporter*, the *Forrest Reporter* (published by the Georgia Conservancy) and *EPA* (Environmental Protection Agency) *Journal*.

⁴⁶ Exceptions to this generalization may occur when specialized journals or offices serving the legal profession cover informal law. Sometimes articles in law reviews and law journals and governmental agency releases include the text of all informal law relevant to a particular subject. Examples of such coverage are the *United States Securities and Exchange Commission Accounting Series Release* and the *Land and Water Law Review*.

⁴⁷ When coordination is low among information sources, it is especially important that a "partial" source is not mistaken by media encoders as a full source. This is particularly important at state and local levels in order to avoid confusing the destination.

⁴⁸ Both the *Federal Trade Commission News Summary* and the *Antitrust and Trade Regulation Report*, for example, are necessarily limited to their respective narrow legal areas in the interests of brevity and conciseness.

possible task. With their background in a particular subject area, specialized media encoders, however, are more capable of preserving the integrity of messages when such messages are covered by the channels they serve.⁴⁹

Channel capacity of the mass media is quite limited at the state and local levels in contrast to the federal level. Specialized channels are extremely rare below the federal level, especially in sparsely populated and less industrialized states and in localities where the economic support necessary for the operation of both types of media channels is absent.

In terms of directivity, business destinations normally assume mass media channels have little focus, although certain publications such as the *Wall Street Journal* or *Barrons* may be exceptions. Consequently, if such destinations rely on mass media channels with their bulk and general coverage, the multiple signals of informal law increase the demands on themselves and their decoders. There may be exceptions, however, as when a particular subject, such as product safety laws relating to specific manufactured goods, already holds special significance for business organizations.

Apart from directivity problems, channels of both paths lack accessible indexing that would facilitate use after distribution.⁵⁰ In light of these deficiencies in directivity and accessibility, important elements of informal law signals are highly perishable in specialized and mass media paths. Nevertheless, specialized media with a specific subject orientation matching the law's focus may be able to "preserve" a number of signals over a period of time. Normally at the technical communication level, it is best that the message be decoded at the same time it is received.

Decoding of informal law requires greater technical expertise than decoding of formal law. Decoders must be alert to multiple transmissions and to the technical interrelationship of such transmissions despite incomplete information inherent in signaling. As discussed below, the quality of decoding partly depends on how well encoders summarize the relevance of law messages to intended destinations.

⁴⁹ See, e.g., *U.S. Export Weekly* (Bureau of National Affairs) and *Journal of Marketing*.

⁵⁰ Computer systems such as the LEXIS system of Mead Data Control, Inc., the WESTLAW system of West Publishing Company, JURIS (Justice Retrieval and Inquiry System) of the United States Department of Justice, the QUIC/LAW system of Queen's University, STAIRS (Storage and Information Retrieval System) of IBM, the DATUM (Documentation Automotique de Textes Juridiques de l'Universite de Montreal) system, and the LITE (Legal Information through Electronics) system may significantly increase accessibility, especially to specialized media that serve lawyers.

2. *Semantic Level.*—At the semantic level two advantages flow from the informal lawmaking process. First, encoders may directly contact information sources to clarify the meaning of messages they produce,⁵¹ but a lack of homogeneity among information sources, e.g., legislative, executive, implementing agency, may substantially limit this advantage. In such cases, the encoders must contact a number of separate sources in order to discern the meaning of ambiguous statements. Second, the consistency of the original message with its environment may be retained if later informal messages harmonize the law's meaning with relevant changes. Such ongoing interpolation is particularly important in a developing jurisdiction where the law-implementing body must respond to a rapidly changing environment. In a turbulent setting the later law message may reflect conditions vastly different from the context of the originating environment.⁵²

⁵¹ For this purpose the most useful of all sources may be the law-implementing body itself. Greater expertise is generally required to retrieve law information from state and local than from federal agencies. At all levels, publications by the administrative agency may be an inefficient and bulky channel, requiring personal contact with people inside the agency. Such could well be the case in decoding public welfare law in New York City:

Welfare officials in the city are governed not only by state administrative regulations but by the regulations of federal officials as well. The Bureau of Public Assistance of the Social Security Administration, which is in turn a component of the federal Department of Health, Education and Welfare, furnishes an outline to state welfare departments applying for welfare grants in aid from the federal government. These outlines set the format for state plans for each of the assistance programs supported by federal funds, and the plans, once approved by the federal agency, become the basic controlling documents for the administration of these programs. They are supplemented by a Handbook of Public Assistance Administration put out by the Bureau of Public Assistance, which sets forth in great detail administrative standards and the ways and means of carrying out public assistance programs. Observing federal regulations wherever they apply, and formulating comparable regulations of its own for those programs that do not receive any federal money, the State Board of Social Welfare issues rules and orders binding upon city welfare officers, the city constituting one of the state's welfare districts. The Board of Social Welfare acts through the Department of Social Welfare to see that its intent is translated into practice. Furthermore, the state Social Welfare Department regularly publishes Welfare Bulletins, a series of regulatory and informational issuances to county and city welfare agencies, and approves a Local Administrative Plan describing local welfare policy, procedure, and administrative organization in detail.

W. SAYRE & H. KAUFMAN, *GOVERNING NEW YORK CITY—POLITICS IN THE METROPOLIS* 569-70 (1965).

⁵² In 1969 the National Environmental Policy Act, 42 U.S.C. §§ 4321-4347 (1976) was enacted amid rising citizen concern about the deteriorating quality of the nation's environment. Despite vigorous opposition by the nation's largest enterprises, many substantial environmental protection standards were implemented during the ensuing six years. In recent years, however, the inflationary and anti-competitive effects of some environmental regulations have prompted significant restraints on the application of environmental regulations.

When individual messages do not reflect environmental changes, encoders of mass media signaling paths are at a great disadvantage, because they seldom specialize in one regulatory area. Specialized media encoders, however, are normally able to construct accurate signals of the law's major focus and enforcement probabilities.⁵³ Due to their background in the subject area, they can grasp interrelationships among multiple messages, and can select one among numerous possible interpretations if legislative detail is missing or if laws are changing. Encoders serving only a few mass media channels, such as writers of the *Wall Street Journal* covering labor and tax laws, may also have this type of background and training.⁵⁴ Unfortunately, such experienced encoders are seldom affiliated with mass media channels serving nonindustrial, less populated states and localities.

Encoders are most able to transmit without distortion when subjects of major importance to specialized media users are involved. Encoders, when decoders may contact them for message clarification, have an even greater incentive to construct undistorted signals. Such contact tests the technical and semantic integrity of the encoding process, and can be expected when powerful trade associations maintain a skilled Washington staff.⁵⁵ Two critical limitations, however, apply to the encoding step within the specialized media path: (1) message content must relate to the subject orientation of specialized channels before encoders will process information, and

See, e.g., *Can Carter's Advisers Meddle in Regulation?*, BUSINESS WEEK, February 5, 1979, at 26-27.

⁵³ In the spring of 1978 the Department of Commerce placed certain types of truck chassis on the Commodity Control List, thus requiring United States exporters of such items to obtain a validated license before shipment. 207 U.S. EXPORT WEEKLY A1 (1978). Subsequently a truck producer in Oshkosh, Wisconsin was denied a license for truck sales to Libya. Path Four media reported the event but usually failed to note its limited applicability due to evolving concern about export competitiveness. *U.S. Export Weekly* (BNA), however, reported the legal event in the context of rising pressure against a wide variety of export impediments, including licensing. Thus, readers of Path Three were aware that the Commerce Department action was extreme in the evolving environment and did not constitute a significant precedent.

⁵⁴ The labor and tax columns appear on Tuesday and Wednesday respectively. An example of a news item follows:

THE CHECKOFF: Utah Gov. Matheson vetoes legislation repealing the state's prevailing-wage law, which sets wages for construction workers on state-funded projects . . .

The Associated General Contractors praises the Occupational Safety and Health Administration for completing its initial step toward adopting a single safety standard for the construction industry.

Wall St. J., Feb. 27, 1979, at 1.

⁵⁵ See Huszagh & Huszagh, *supra* note 3, at 215 n.76.

(2) encoders may distort signals to coincide with existing editorial biases of channels.

The substantive match between law signal and channel is considerably better for specialized than for mass media channels. With their more narrow subject focus, specialized channels generally are designed to present signals to consistent users and are tuned to enhance the meaning of signals. Similar adjustment by most mass media channels is limited by the clutter of non-law information. Mass media channels, such as the *Wall Street Journal*, *Business Week*, and *U.S. News & World Report*, often seek to combat this problem with special columns or sections presenting law information.

Decoders of both specialized and mass media channels must interrelate multiple messages transmitted over time before technical and semantic communication can be achieved. This burden is best met when decoders consistently rely on certain specialized channels that focus on law developments in a single subject area. Decoders of mass media channels face a more difficult task because they must interrelate multiple signals sifted from a multitude of unrelated information. For successful decoding from these channels, considerable familiarity with the law's subject area is generally required.

3. *Effectiveness Level.*—At the effectiveness level the destination's perception of a given signal's rationality is related to factors at the technical and semantic levels. Most significant among them is whether encoders have adequately summarized the substantive focus and interrelationships of multiple messages composing informal law. Specialized channel encoders more frequently have the background skills required to perform these tasks than do mass media encoders.

Decoders and destinations may view specialized channels as more important "conduits" for law information, but this will depend on the information-gathering habits of individual decoders and destinations. The technical factor of channel capacity has special consequences at the effectiveness level. For example, if channels do not have adequate physical space to carry signals of both content and enforcement probabilities, an appropriate response by the destination is not likely.⁵⁶ Other technical factors, such as deficiencies in

⁵⁶ See note 54 *supra*. *U.S. News & World Report* normally devotes a separate page each week to current tax rulings and other court and government decisions. See, e.g., *Tax Rulings & News Lines—What You Can and Cannot Do If You Run a Business*, U.S. NEWS & WORLD REPORT, Feb. 12, 1979, at 85. A less detailed and rather eclectic summary is presented weekly in *Business Week*. See BUSINESS WEEK, Jan. 29, 1979, at 133.

subsequent access to mass media and specialized channels, require scanning when the publication is on hand. Mass media channels' nondirectivity and the clutter of non-law information impedes this scanning. If decoders are external to the intended destination, how they present information to destination personnel and to whom they present it is certainly important. Decoders may need to explain signals if such personnel do not have legal skills. Explanatory remarks are especially important to communicate laws having only tangential relevance to the destination, and to set in motion organizational procedures requisite to full text retrieval.

4. *Some Conclusions on Signaling Paths.*—Informal laws present both problems and advantages for signaling paths. The sequential messages of informal law enable it to remain in tune with environmental changes and thus to require less expertise on the part of encoders and decoders. Also the signals of such messages tend to recur over time, thus enhancing accessibility.

Some characteristics of informal laws, however, present almost insurmountable difficulties for accurate transmission at all three levels by the mass media channels, and may cause considerable problems for the specialized channels. In many subject areas, sequential messages may each be extraordinarily complex and span long periods of time. Unless both encoders and decoders have considerable expertise, it becomes almost impossible for an accurate signal of the message to be placed on the channel. This may be true even though the channels are highly specialized and matched to the subject areas covered by the message. At the state and local level it is likely that specialized channels will not exist because the demand is insufficient to justify their costs. Even at the federal level, such specialized channels often lack an indexing system that permits the necessary accessibility to the various interrelated messages describing the whole law and the levels of enforcement associated with it. The problem becomes even more severe when a lack of homogeneity exists among the various message sources for the laws. For example, the agencies involved in the wage-price controls in the early 1970's were highly specialized while the courts with review powers often lacked the expertise necessary to adequately evaluate the important distinctions being made by the administrative agencies. This problem was compounded by the fact that the price controls were thought to be temporary, and thus there was little incentive for the courts to make the investments necessary to gain the required expertise.

Because of the lack of specialized encoders and the breadth of

specialized laws involved, the mass media deficiently transmits informal laws. Furthermore, in the absence of both directivity and accessibility in regard to indexing, the channel cannot make the necessary linkages among sequential laws. The only partial exceptions to this generalization are mass media newspapers such as the *New York Times* and the *Wall Street Journal*, which have sufficient clientele to afford encoder specialization, channel indexing, and directivity through specialized sections within the channel.

In areas where substantial economic interest is involved, informal laws do permit extensive interaction between encoders and decoders which tends substantially to enhance the quality of the signal at all levels. Furthermore, when specialized channels serving a particular law area become closely identified with a particular agency or law source, they develop a symbiotic relationship and the channel may become almost an official signaling organ, so that the interests of the law sources are transmitted and the reactions of the law destinations are affected. In essence, it becomes a two-way flow between these two important sides. Mass media channels are inadequate signaling organs because of their lack of directivity and accessibility over time, and unevenness in capacity to reduce the law messages accurately to representative signals.

III. CONCLUSION

For more than a century the courts have developed law from imprecise legislative mandates in response to evolving environmental circumstances.⁵⁷ Early in this century, however, courts began fashioning doctrines of delegation that permitted units of the executive branch to create law directly and indirectly through rulemaking, adjudication, and enforcement processes.⁵⁸ The courts also fashioned law in response to strategic executive branch enforcement of vague legislation.⁵⁹ Such judicial recognition of delegations of au-

⁵⁷ See, e.g., note 53 *supra*.

⁵⁸ For a comprehensive review of the evolution of such delegation doctrines, see K. DAVIS, *ADMINISTRATIVE LAW* 33-55, (6th ed. 1977); W. GELLHORN & C. BYSE, *ADMINISTRATIVE LAW* 58-108 (6th ed. 1974); H. LINDE & G. BUNN, *LEGISLATIVE AND ADMINISTRATIVE PROCESSES* 519-564 (1976); SCHWARTZ, *ADMINISTRATIVE LAW—A CASEBOOK* 73-159 (1977).

⁵⁹ The Justice Department's enforcement of the Sherman Act of 1890, 15 U.S.C. §§ 1-7 (1976), and the Clayton Act of 1914, 15 U.S.C. §§ 12-27 (1976), and the Federal Trade Commission's enforcement of the Federal Trade Commission Act of 1914, 15 U.S.C. §§ 41-44 (1976), are examples of how agencies have used selective enforcement practices to substantially control judicial definition of vague legislation. For an interesting, theoretical analysis of how government agencies and other "repeat" litigators can co-opt the judiciary's rulemaking capacity, see Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 *LAW & Soc'y Rev.* 95 (1974).

thority to and strategic enforcement by government agencies stimulated a rapid expansion of law as each new agency became a separate lawmaking and law-enforcing source.

Prior to this plethora of agency law, the volume of informal law was relatively small. To the extent that court actions transformed formal to informal law, special features of the common law tradition greatly facilitated the communication of how noncongressional actions determined citizen rights and obligations.⁶⁰ A well-defined profession possessing the expertise to discern how court opinions charted the evolving contours of vague congressional acts recorded, indexed, and interpreted the judiciary's lawmaking activities with relative success.

The advent of executive law dramatically increased the volume of informal law and reflected citizen acknowledgement that substantial portions of law could be designed and enforced by organizations not directly responsible to the people. Griswold and others recognized the communications problems presented by this chartering of a new, prolific category of lawmakers. They proposed that a new communications medium, the *Federal Register*, serve a function similar to the recording of legislative branch output by the *Statutes at Large*.⁶¹ The safeguards against "perishability" of the *Statutes at Large* provided by the *United States Code* were later sought for the *Federal Register* by creation of the *Code of Federal Regulations*.⁶²

The forebears of these administrative law communication reforms at the national and to some extent the state level were adequate due to substantial mediation by the legal profession. The administrative law communication reforms, however, proved deficient almost from the start, largely because of message bulk and complexity, nonspecialized encoding, the limited distribution and bulk of the full text channels, and the scarcity of specialized decoders outside of Washington, D.C. Citizens experiencing agency enforcement practices were often the source of knowledge of such administrative law. At the state level, such communication reforms were not adopted until

⁶⁰ Karl N. Llewellyn, aside from fame as a legal realist, was a living example of the common law tradition and the composer of a tune called the "Common Law Tradition" which lives strong in the memories of his students. He authored several books dealing with facets of the common law tradition, but none capture the spirit of that tradition better than *THE BRAMBLE BUSH* (1930). See also K. LLEWELLYN, *THE COMMON LAW TRADITION* (1960).

⁶¹ See note 4 *supra*.

⁶² See note 7 *supra*.

recently and the deficiencies noted above are even greater there.⁶³ At the local level, communication of informal law involving both judicial and administrative lawmaking has been completely inadequate in many subject areas due to the poor quality of all paths in regard to directivity, recording, indexing, and decoding skills.⁶⁴

Rapid growth of annotated and specialized signaling paths serving the many regulatory areas of major concern to business has reduced many inadequacies of the administrative law communications model Griswold and others developed for application to the pre-World War Two environment. The increased enforcement potential of administrative government, including techniques for automatic enforcement,⁶⁵ and the linking of such enforcement to criminal sanctions have done much to prompt business support of such paths.⁶⁶ The administrative lawmaking and judicial lawmaking environments, however, have changed significantly over the last half decade. Evolution of full text and signaling paths has not kept pace. These lapses endanger both the vitality of informal law and the fundamental balances of power within government and between it and the people.

By 1950 administrative lawmaking units and their informal law output were abundant, but there was enough "jurisdictional" space within which each could operate without infringing on another's jurisdiction. Now the opposite is frequently true. Uncoordinated output of several agencies often subjects citizens to conflicting requirements⁶⁷ and the agencies themselves spend an increasing por-

⁶³ See note 8 *supra*.

⁶⁴ See notes 27, 29 & 44 *supra*. The paucity of decoding skills at the local level stems primarily from the almost complete absence of law school training concerning municipal *administrative* practice as a coherent course. The necessary knowledge to decode in these areas must be gained initially through apprenticeship in a small number of firms. See generally Huszagh & Molloy, *Legal Malpractice: A Calculus for Reform*, 37 MONT. L. REV. 279, 289 (1976); Huszagh, *Ptolemaism in the Law and Concomitant Needs for Scientific Study of the Legal System*, 56 N.C. L. REV. 495, 497 (1978).

⁶⁵ The proposed national value added tax (VAT) is an excellent example of automatic enforcement. See *Why Interest Grows in a New Kind of Tax System*, U.S. NEWS & WORLD REPORT, Feb. 12, 1979, at 77-79.

⁶⁶ Criminal sanctions inherent in enforcement of the antitrust laws, the Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, § 104, 91 Stat. 1496 (codified in scattered sections of 15 U.S.C.), and the Export Administration Act of 1969, 50 U.S.C. app. §§ 2401-2413 (1976), as amended, have prompted business executives to seek considerable information about enforcement practices in these areas through many commercial services. See, e.g., U.S. EXPORT WEEKLY A5-H9 (1978).

⁶⁷ See, e.g., the article entitled *Sears and the EEOC Dig in for a Long War*, BUSINESS WEEK, Feb. 12, 1979, at 41-42.

tion of their resources managing this interagency conflict.⁶⁸ Even when administrative decisions are coordinated, they often are the product of an agency consensus produced through structures not subject to traditional procedural requirements that are designed to protect citizen rights, including the right of participation.⁶⁹ Thus, much important law information is not distributed through normal law communication paths developed to ensure citizen awareness. Furthermore, court decisions concerning these interagency decisions, when they do exist, often are less clear and coherent than those associated with intra-agency decisions, and seldom reflect the actual dynamics of the underlying processes.⁷⁰ In sum, they fail to depict the true structures and content of informal law that guide most government decisions and enforcement policies.

Given the environment depicted above, even the annotated, full text, and specialized signaling paths are inadequate to inform citizens, organizations, and individuals of their evolving legal rights and obligations. Consequently, there is increased reliance on enforcement policies to communicate the law. Such reliance is inconsistent with the fundamental principles underlying the maxim

⁶⁸ The fight between the Alcohol, Tobacco & Firearms unit of the Treasury Department and the Food & Drug Administration (FDA) over labeling jurisdiction concerning liquor was a good example of interagency conflict. The FDA sought to issue labeling rules for the liquor industry on the basis of human consumption of the contents. The liquor industry and Treasury Departments sought to enjoin issuance of the rules. The Treasury Department actually filed a lawsuit against the FDA. Solicitor General Wade McCree brought the escalating conflict to an end by asking the Office of Management and Budget to mediate the dispute. *BUSINESS WEEK*, Aug. 22, 1977, at 93.

⁶⁹ See, e.g., GAO Report to Congress, *Administration of U.S. Export Licensing Should Be More Responsive to Industry* (Oct. 31, 1978).

⁷⁰ The complexities of administrative decisionmaking in terms of substance and procedure present a significant problem for judicial review. Many of the processes involved are not amenable to accurate identification through the evidentiary methods courts utilize for gaining insights into cases before them. Furthermore, except in the Court of Appeals for the District of Columbia, individual judges and often whole circuits do not have repeated experience with cases involving a single agency or unique activity with an agency that would enable them to act with full enlightenment. These factors explain, in part, the courts' reticence to engage in intensive review of administrative action, especially where it involves many political, economic, and social factors simultaneously. For an example of such environments, see G. ROBINSON & E. GELLHORN, *THE ADMINISTRATIVE PROCESS* 67-135 (1974).

When confronted with the necessity for judicial review, many federal agencies prefer judges in the Court of Appeals for the District of Columbia because of their general familiarity with the operating realities of administrative action. Judge Harold Leventhal of that court is noted for his perceptive analysis of complex agency cases both because of frequent exposure to them as a member of that court and prior experience as assistant general counsel of the Office of Price Administration during World War II. *Amalgamated Meat Cutters v. Connally*, 337 F. Supp. 737 (D.D.C. 1971), is an illustration of how this expertise affects judicial opinion writing.

“ignorance of the law is no excuse.” More important, it increases the disparity between law knowledge possessed by large businesses, labor unions, and others serviced by powerful trade associations, and that possessed by the individual citizen, small enterprise, and other groups not represented in Washington. Because such knowledge is important for representation of interests in governance structures, those who possess it have the capacity to influence the quantity and quality of informal law. Those without such knowledge have little basis for controlling the growth of laws adverse to their interests.

Congress and the courts presumably safeguard the interests of this latter group, but here too the rapid increase in interagency decisionmaking and the poor communication structures associated with it often pose insurmountable barriers to meaningful control. Although improved law communication cannot alone ensure appropriate balances in power among the branches of government, it is an important requisite. Without it neither the stimulus for action nor the knowledge for wise and just action is present.

Preface for Charts 1-9

Charts 1, 4, and 7 depict the likely deterioration in the flow of an informal law text or signal caused by various elements in the communication chain at the technical, semantic, and effectiveness levels. Within each level the impediments to flow caused by each succeeding element are cumulated so that the curve's final point illustrates the probability of a law or signal reaching its intended destination through a particular path at each level. The broken curve represents information flow between information sources and destinations proximate to one another, while the solid line represents flow between sources and destinations not proximate. Charts 2, 3, 5, 6, 8, and 9 depict the likely deterioration in flow caused by particular factors within each element in the communication chain for a particular path.

Chart 1
Probable Information Flow of Informal Law Type-Federal Jurisdiction

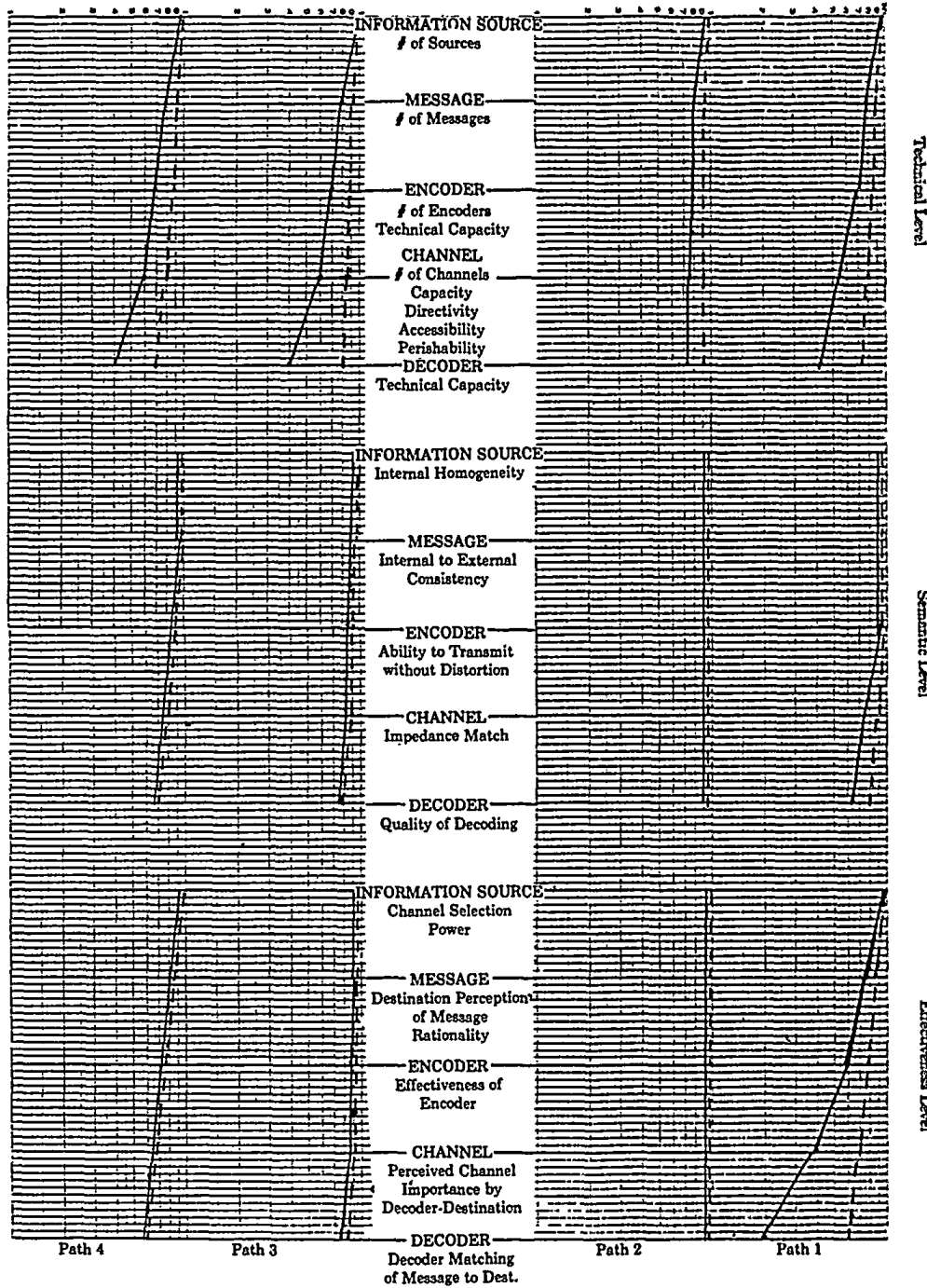


Chart 2
Informal Law: Federal Jurisdiction/No Distance

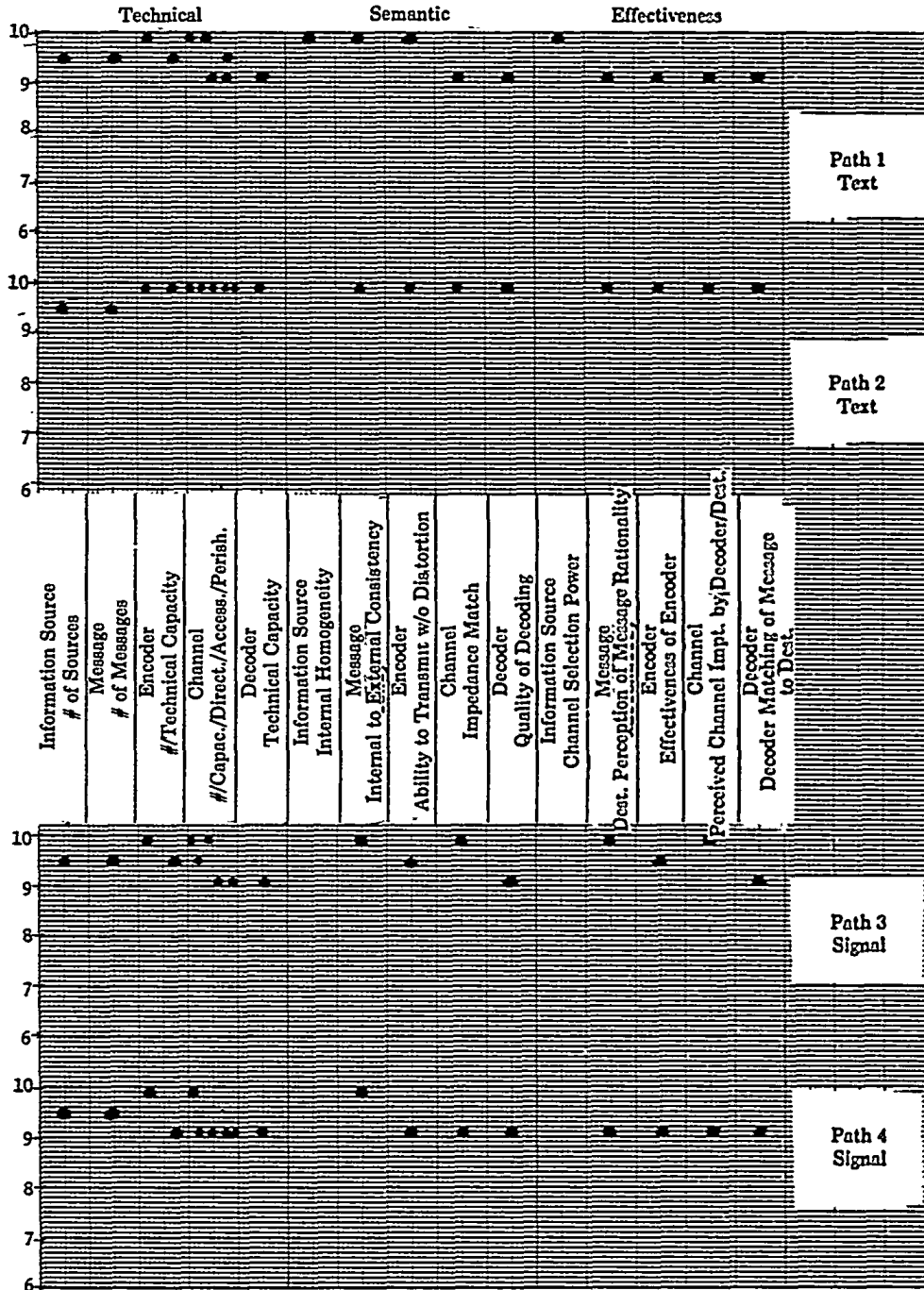


Chart 3
Informal Law: Federal Jurisdiction/Distance

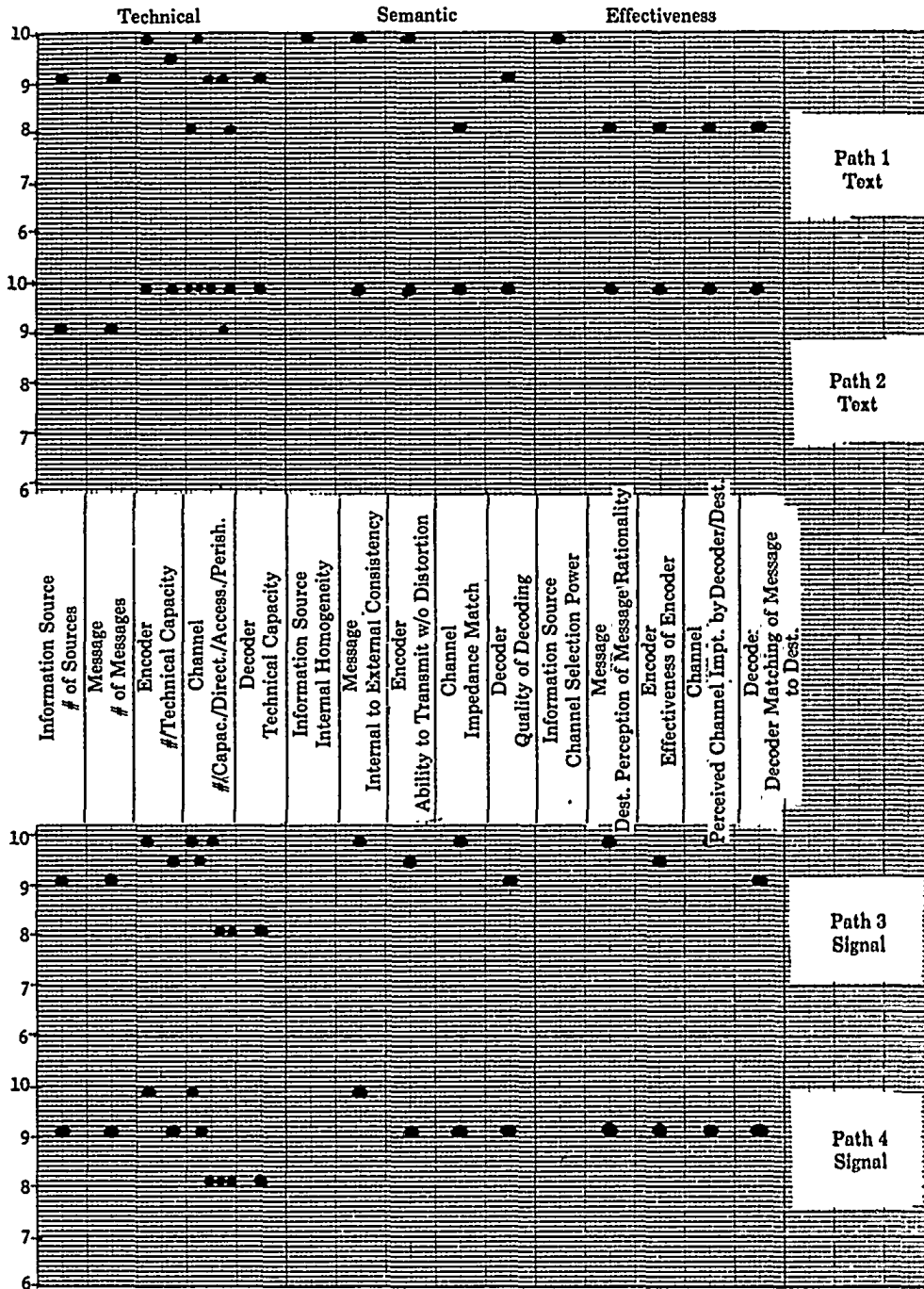


Chart 4
Probable Information Flow of Informal Law Type-State Jurisdiction

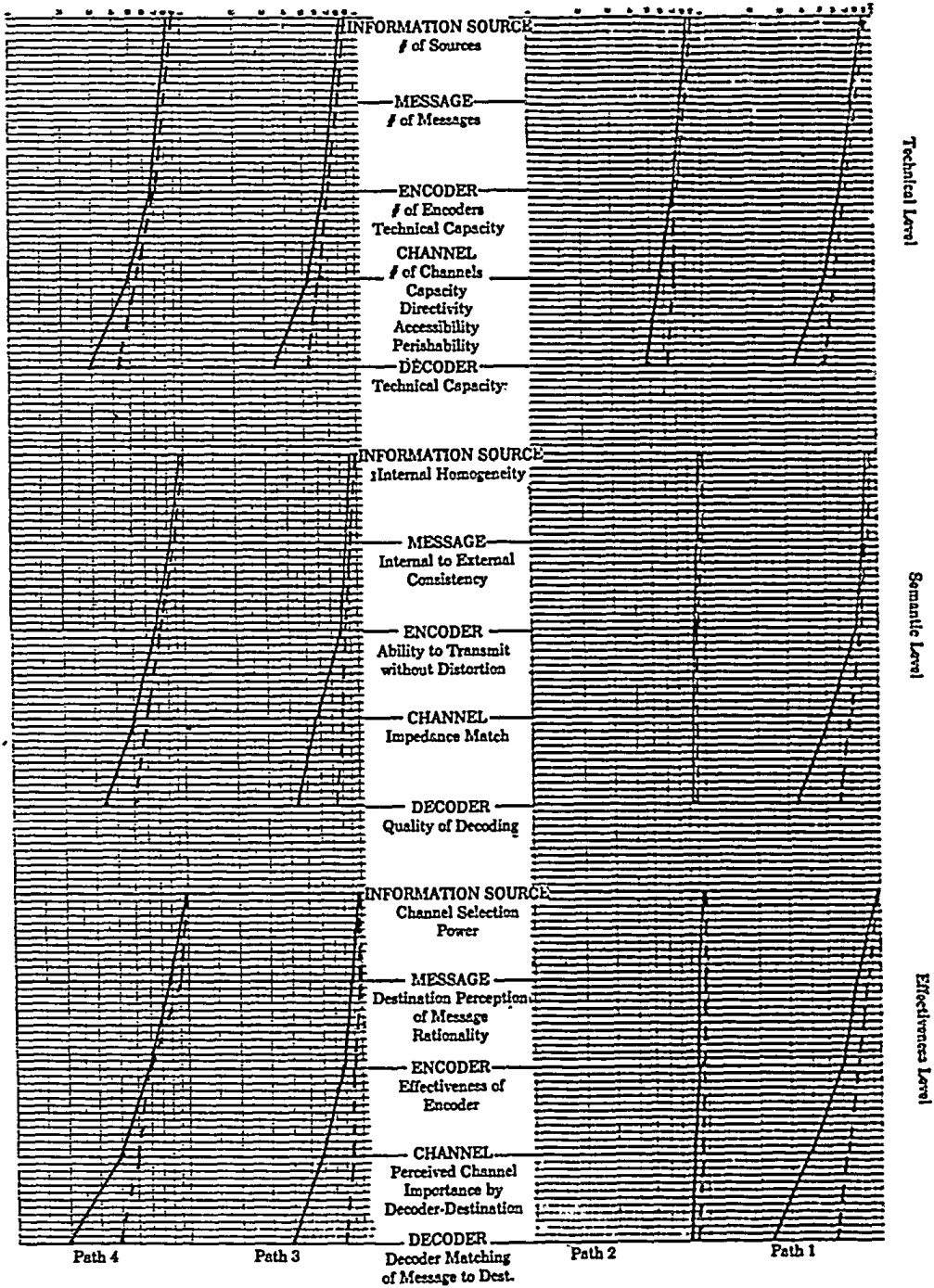


Chart 5
Informal Law: State Jurisdiction/No Distance

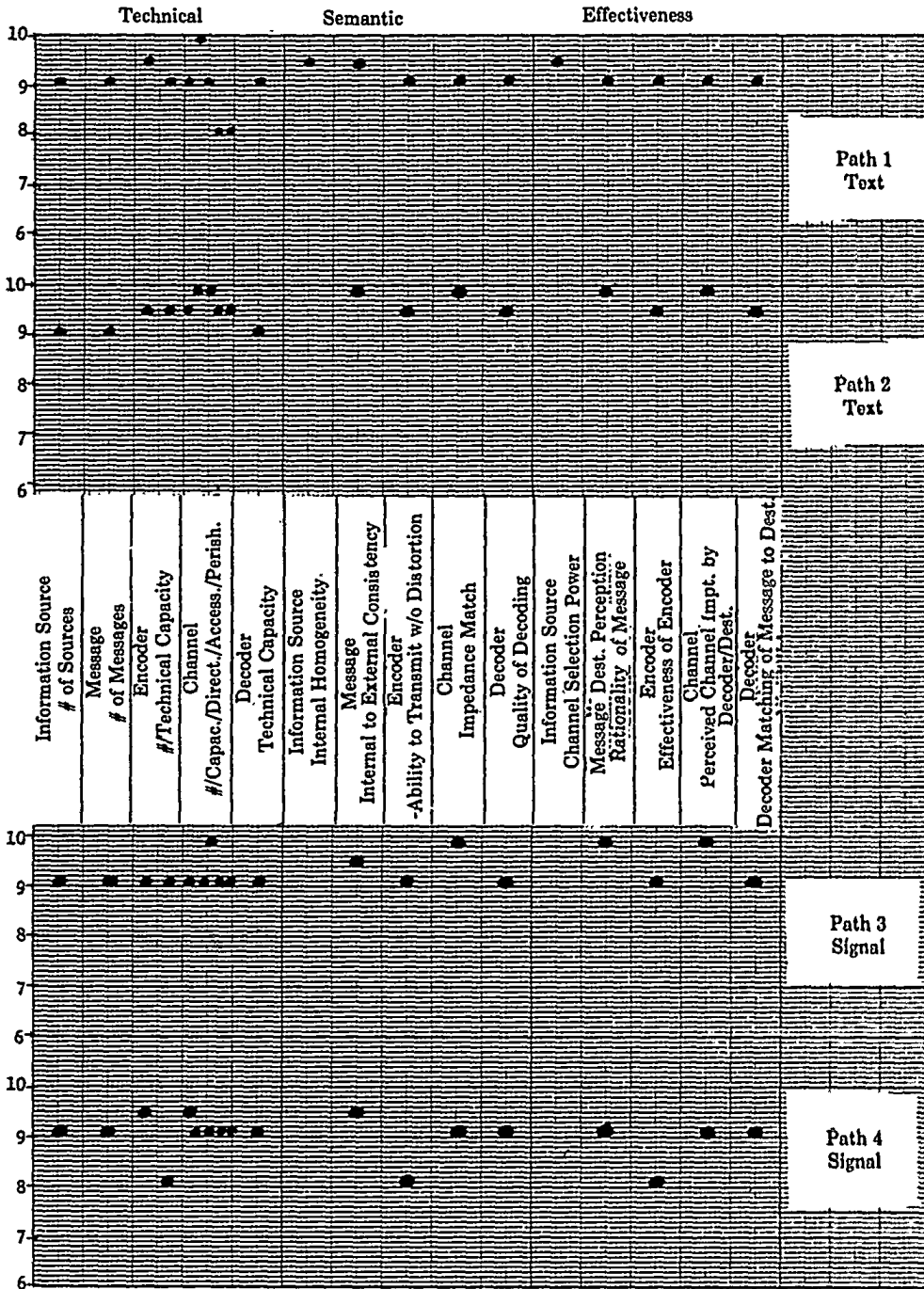


Chart 6
Informal Law: State Jurisdiction/Distance

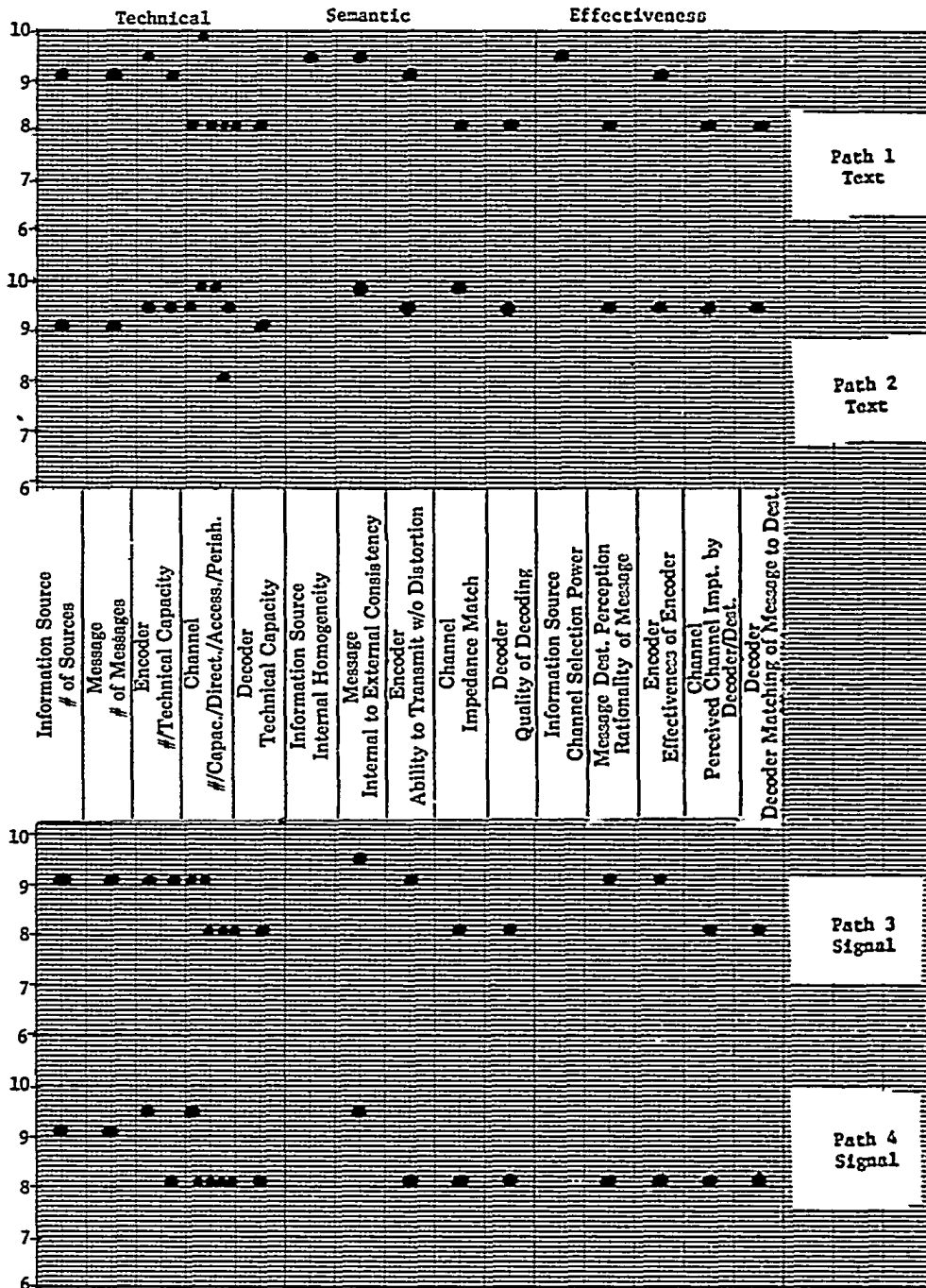


Chart 7
Probable Information Flow of Informal Law Type-Local Jurisdiction

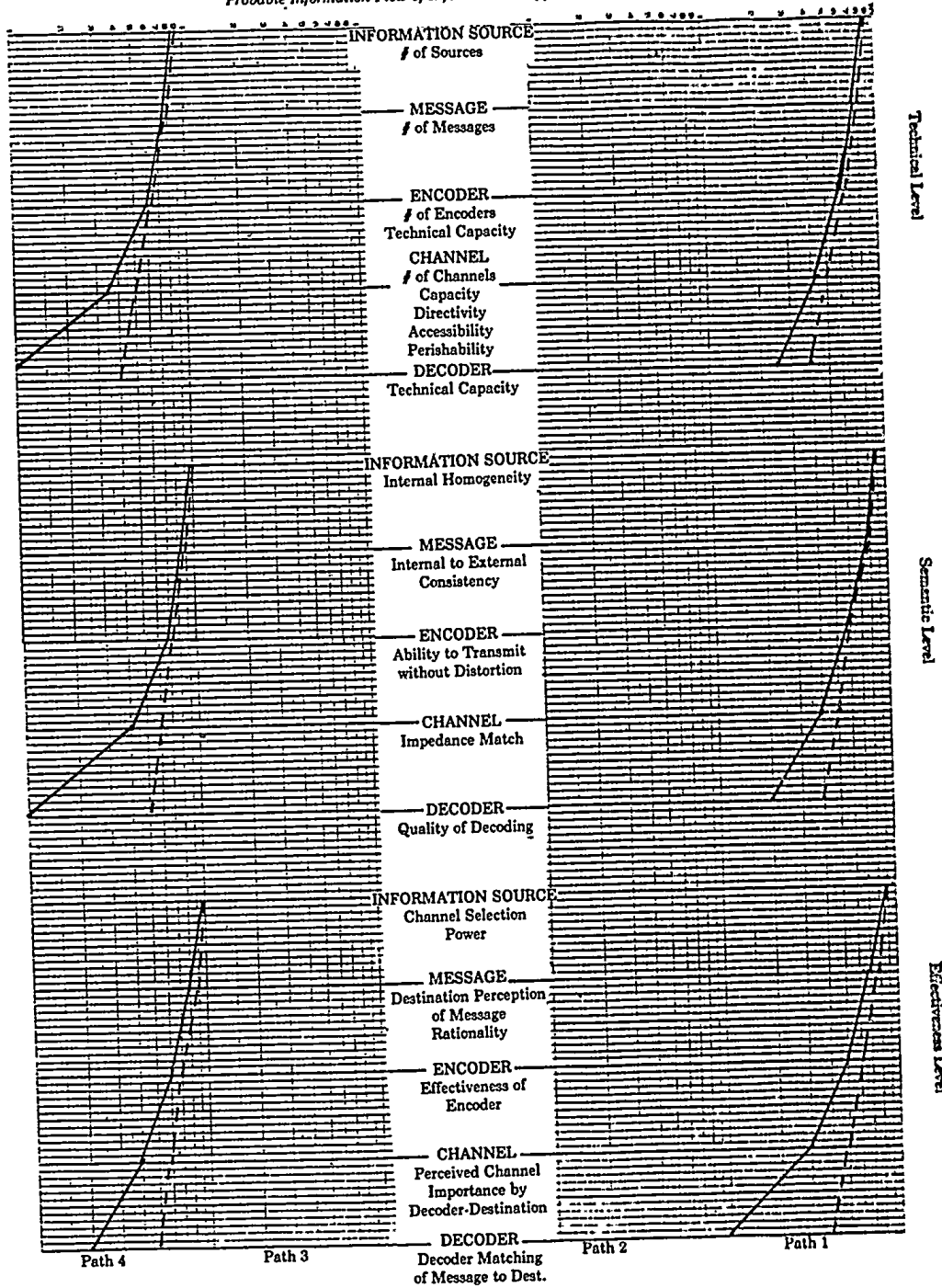


Chart 8
 Informal Law: Local Jurisdiction/No Distance

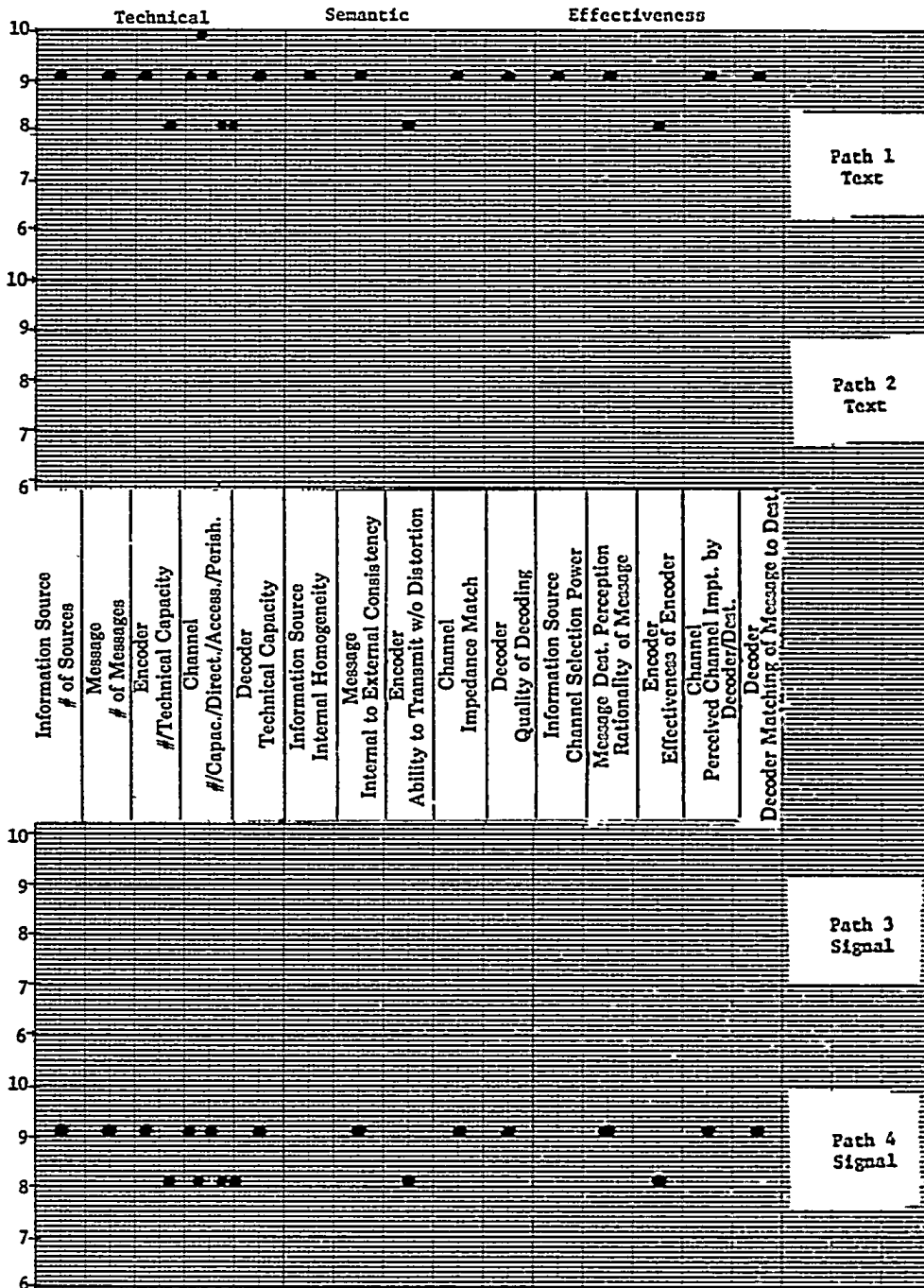


Chart 9
Informal Law: Local Jurisdiction/Distance

