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ARTICLES

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I. INTRODUCTION

Federal judges, by their accounts, have too much to do. Judges in overwhelming numbers report that caseload pressures have a significant negative effect on their satisfaction with their work and their ability to decide cases in accordance with what they believe constitute appropriate standards. The judges report that these pressures generate a high level of stress and frustration and decrease the judges' sense of satisfaction in their craft, as well as their confidence that they are involved in a process that produces just results.

Federal caseload has been the subject of congressional investigation, bar association study, and scholarly symposia. For the most part, discussions about caseload have proceeded from the assumption that, since they neither file cases nor control jurisdiction, judges are faced with the unhappy choice between increasing backlogs or less carefully considered decisions. Judges, however, have not viewed their options so narrowly. Instead, some judges have endorsed and implemented procedural innovations they believe will speed cases up or terminate them without trials. Most judges, in addition, have implemented rationing: they save their time for the cases they believe require the most,

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delegating as much as possible of the work they view as routine to non-Article III adjuncts.

The procedural innovations and techniques adopted by some judges to deal with caseload pressures have provoked a unique and intense debate between academics, who view many of these techniques as threats to traditional values of judicial process, and the judges themselves, who view them as survival responses. The critics' points are difficult to dispute: many of the mechanisms adopted by judges and detailed in this article undermine judicial accountability by making the decisional process less public. To the extent that judicial decision making becomes less visible, procedural guarantees against arbitrary uses of power are compromised, and effective oversight of the judiciary by the public and the elected branches becomes less likely. Other responses, such as the increasing emphasis on settlement and alternative dispute resolution in the trial courts, replace the tested procedures of adjudication with the relatively unexamined assumptions of informality or "short form" procedures.[1]

Moreover, rationing in response to caseload threatens to undermine legislative determinations about the use of the courts. Consider a paradigmatic social security case. A person claims to be disabled within the meaning of the social security laws. Her claim is disallowed by the agency, and she has a hearing before an administrative law judge who rejects her claim. After exhausting her appeals within the agency, she turns to federal court. Congress has been generous with its allocation of federal judicial resources to this sort of claim. The disappointed claimant can get a review of the agency's decision in a federal trial court, and a review of the trial judge's appraisal in the federal appeals court. However, this claimant is unlikely to command very much of the attention of any Article III judge. At the trial court level, her claim will likely be assigned to a magistrate. The trial judge will review the report and recommendation of the magistrate and will, in the great majority of cases, accept it.[2] If the report does not support the claimant, she may take an appeal. Because it is a social security case, however, she is unlikely

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1. Galanter, *Compared to What? Assessing the Quality of Dispute Processing*, 66 DEN. U.L. REV. xiii-xiv (1989) (noting that ADR in courts is really a kind of "short-form formalism" rather than a movement away from formality and professionals in the resolution of disputes).

2. C. SERON, THE ROLES OF MAGISTRATES: NINE CASE STUDIES 99-100 (Federal Judicial Center 1985).

to have her case argued to a panel of appellate judges; in most circuits, the majority of social security cases are screened by central staff for decision on the briefs alone. Finally, the decision, when it comes, will not be through a published opinion.[3] The claimant will never have seen a federal judge.

Almost all of the adaptations described in this article produce ad hoc resource allocations as judges make determinations about how the limited resources of the federal courts will be distributed among litigants contending for time and attention. These decisions are not neutral across classes of litigants and claims: they affect disproportionately individual, rather than institutional, litigants who are pursuing federal claims.

This article describes the results of surveys undertaken by the Federal Courts Study Committee that asked federal district and court of appeals judges about the effects of caseload on judges' work habits and lives.[4] It also explores the methods that judges, both trial and appellate, are using to process large numbers of cases and how adoption of these methods has changed the nature of adjudication and appeal in the federal courts.[5]

While this article criticizes many of the methods judges are employing to deal with their caseload, I cannot read the narratives judges write about their working lives without a sense of

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3. *See* Table 5 (appendix).

4. Separate surveys were sent by the Federal Courts Study Committee to trial and appellate judges. The judges were not asked to identify themselves, although they were asked the length of their tenure on the bench, whether they had previously served as judges in the state courts, and whether they had taken senior status. The trial judges were asked a series of questions about the effect of caseload on particular practices, and were asked to make comparative judgments about whether they felt caseload pressures had lightened or worsened over time. They were also asked to respond to a more general open-ended question about whether caseload affected how they did their work. The appellate judges' survey, which was sent later, asked questions not only about how or if caseload had affected particular practices, but also whether judges supported various changes in practices or jurisdiction in response to caseload. The appellate judges were also asked a general, open-ended question about whether caseload affected their work. The results of the two sets of surveys will be discussed separately.

5. The article thus does not address changes in substantive law—such as relaxed standards for summary judgment, for example—for which caseload concerns might have been responsible. Nor does it directly address congressional attempts to remedy caseload pressures by such things as adding additional judgeships. *See, e.g.*, Omnibus Judgeship Act of 1978, Pub. L. No. 95-486, 92 Stat. 1629 (1978) (codified at 5 U.S.C. § 5108; 28 U.S.C. §§ 41 note, 44 note, 45 note, 46, 133, 133 note, 1337, 1445) (1976 & Supp. III 1979). This Act added 35 court of appeals judges and 117 district court judges. For a history of recent congressional attempts to address problems of judicial administration and caseload, see Meador, *The Federal Judiciary—Inflation, Malfunction, and a Proposed Course of Action*, 1981 B.Y.U. L. REV. 617, 634-36.

appreciation for the difficult choices they must make, and the devotion judges feel towards their task. The variety and creativity of their responses to an overwhelming amount of work is itself testimony to their dedication. Indeed, judges' narratives reveal a longing for time to think, read, weigh decisions, develop as professionals—to fulfill a vision of judging as a challenging life of the mind. One challenge for the future in thinking about federal courts will be how to accommodate societal needs for careful and wise judging in all federal cases with the judges' needs. The judges' response to the pressures they face demonstrate that we can no longer assume judges will simply play the hands they are dealt.

II. The Federal Trial Courts

While increases in the caseloads of the trial courts have been substantial,[6] most discussions of the effect of caseload on the federal courts have focused on the courts of appeals. This is due, in part, to the less controversial nature of coping with increased caseload in the trial courts by simply increasing the number of judges, an option that is often viewed as not as readily available to remedy caseload stresses at the appellate level.[7] Federal trial judges face significant pressures from caseload, a fact that is apparent both in their reports about the effects of caseload on their performance, and in the adaptations to the traditional adjudicative process that caseload has generated.

A. Judges' Perceptions of Caseload Effects

As part of its examination of "problems and issues currently facing courts of the United States,"[8] the Federal Courts Study Commission sent surveys to all federal trial judges asking their opinions of the effect of caseload on their jobs.[9] Eighty percent of the judges responded; 169 of the judges, or 46%, provided written comments in response to an open-ended question about the effects of caseload on their working conditions and habits.[10]

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6. R. Posner, The Federal Courts 62-65 (1985).

7. *See infra* note 147.

8. Pub. L. No. 100-702, § 102, 102 Stat. 4644 (codified at 28 U.S.C. § 331) (creating Federal Courts Study Committee).

9. All survey responses quoted in this article are on file with the author.

10. The question stated: "Please provide any additional information concerning the effects—if any—of caseload pressure on how you do your work: have caseload pressures required you to change your work habits? If so, how?"

The written comments provide a measure of insight into the judges' working lives.

The survey results initially reflect some good news. Few judges believed they "never" or "almost never" have sufficient time to master the relevant issues in a case prior to trial (10%), to study difficult procedural issues before ruling (13%), or to stay as informed as they should of changes in the law announced by their courts of appeals and the Supreme Court (12%).

More significant numbers of judges, however, believed it is becoming more difficult to perform these important tasks effectively. When asked to compare the situation today with the situation when they came on the bench, 34% of judges replied it was "worse" or "much worse" with respect to the amount of time available to master the issues before trial; 27% described it as "worse" or "much worse" with respect to time available for study before issuing procedural rulings; and 35% said it was "worse" or "much worse" with respect to their ability to stay informed of changes in the law.[11] Moreover, 46% of the judges believed caseload pressures "often" or "usually" have an adverse effect on how they do their work. An additional 39% believed these pressures adversely affected their work "sometimes." Finally, 35% said that they "often" or "usually" must rely on their law clerks to perform tasks they believe judges should do; only 23% of the judges responded they "never" or "almost never" were forced to rely on their clerks to do things they believed they should do themselves.

Taken together, the replies indicate that while judges believe they are usually able to perform their trial role adequately, they find that caseload pressures are forcing undue reliance on clerks and are having an adverse effect on their work. The judges' written comments help illuminate the nature of the adverse effects judges perceive.

1. Sample of judges' comments: hours

> Up at 4:30 AM—work at home until 7:00 AM—arrive at office 8:30—leave for home 6:00 PM—bed by 9:00 PM—work

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11. As might be expected, answers to the questions asking for comparisons between the situation when the judges were appointed and the current situation varied with the time judges were appointed. Judges who had been on the bench longer tended to perceive more significant differences in the effects of caseload.

> virtually every Saturday and often part of Sunday. Much greater caseload pressure than in state trial court.
>
> . . . .
>
> I usually work 12 hours a day during the week and 2-10 more hours on weekends, but I feel I am operating a triage chambers with little time to understand the issues before me as fully as I should before ruling.
>
> . . . .
>
> I try to alleviate the tension between quality and quantity by working long hours—routinely from 7:30 a.m. to 6:15 p.m. and part of every weekend. I still feel, however, that I cannot provide timely service and proper decisions to all who want and need them. This is demoralizing. . . .

One third of the judges who responded with comments wrote about the hours they were required to work to keep abreast of their caseload. As illustrated above, most reported routinely working 10-14 hours each weekday, as well as part of each weekend. Many reported working at night, and expressed dismay at the deterioration of their personal lives. The exasperation and frustration associated with working constantly in response to an unmanageable caseload is palpable in some of the answers:

> The work load is up and so is my blood pressure! The work gets done by taking less vacation, going to the theatre less, reading fewer novels, and seeing fewer friends. . . . My overall sense is of increased pressure and increased effort to maintain peace and calm. I fear the consequences affect my family as well as myself. Life is still under control, but we walk closer and closer to the edge!
>
> . . . .
>
> I am tired of working 12-14 hours a day—the workload has affected my health. . . .
>
> . . . .
>
> I find myself having to 'shoot from the hip' with greater frequency than 8-10 years ago. The hours are longer but I often wonder if they are not offset by the state of mental fatigue in which I more frequently find myself.
>
> . . . .
>
> Seven nights a week; frequently working at home until 12 midnight and up again at 4 a.m.! It is intense and unreasonable. . . . Who is protecting our rights against unreasonable expectations of our resources?

2. Sample of judges' comments: quality

Many judges explicitly connected the number of hours they worked with their perception that the quality of their work was eroding. Some reported making conscious trade-offs between hours and what they considered appropriate work practices:

> I often work on orders and draft opinions while presiding over a trial. Now that I am an experienced trial judge I can "get away with" this, but the alternative—working nights and weekends—is no longer acceptable to me. Sometimes I sign and send out orders that are not as well written as I would like. . . .
>
> . . . .
>
> I find I am forced to choose between a full study of the issues presented and a prompt disposition of those issues. There is no way with the current calendar to achieve both desired results. I work many hours longer each week than I did as a trial attorney just to avoid the total breakdown of my calendar. . . .

Many judges felt the quality of their work suffers due to caseload pressures:

> I am unable to give each case the attention that I feel each case deserves. I have to proceed on a form of "judicial triage" in which I devote more time to what I deem to be more "serious" cases at the expense of paying slight attention to what on first impression appear "less serious."
>
> . . . .
>
> I'm more superficial.
>
> . . . .
>
> Rarely do I have the time to read the cases cited in the trial briefs; only in very large or very complex cases can I read more than one or two cited cases.

Forty-eight of the judges specifically commented on the adverse effects of an excessive caseload on the quality of their work. The most frequent comments concerned the lack of time available to think about legal issues:

> When I became a federal judge, I felt I was managing an operating theatre. Now I'm running an emergency room operation. No time to study or think or really talk over legal concepts with law clerks and other judges.
>
> . . . .
>
> Everything must be expedited and shortened. Not enough time to consider substantive issues before ruling.

. . . .

I have found that caseload pressure does affect every aspect of my work. I often do not give the time to significant issues that they deserve to understand their implications and to properly decide. . . .

One of the most frequently cited results of caseload pressure was what the judges considered undue reliance on law clerks:

Fortunately I have been able to reduce my caseload. I still must rely on my law clerks and magistrates for much research and writing. I check everything that goes out, but my own research time is limited. I often wonder if I am reading a judge's opinion or his law clerk's. . . .

. . . .

The biggest effect of caseload pressure is an increase in reliance on law clerks to get out rulings on motions. I have little time to spend on such pretrial matters myself. . . .

. . . .

I have virtually no time to author my own opinions. I am too dependent upon law clerk work and input for resolution of pretrial motions.

3. *Sample of judges' comments: causes*

Judges were not quick to attribute caseload pressures to particular causes, although many judges did comment about a perceived increase in criminal cases:

Increase in criminal trials has shut down my civil docket.

. . . .

I have an extremely heavy criminal docket—keeps me on a treadmill—I can manage it but it leaves the civil docket orphaned. I can only devote little snatches of time here and there to the civil docket—very frustrating. I routinely work Saturdays, holidays, and past 6 p.m. every day but generally end up behind where I started.[12]

. . . .

[T]he criminal docket drives everything I do. It also means that I am in trial or criminal hearings most of the time. I do not think that criminal cases are properly incorporated into the workload calculations.

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12. This judge, as well as several others, attributed the increase to narcotics cases.

4. Sample of judges' comments: stress

Many judges described frustration and stress due to the perception that the workload is unreasonable:

> Caseload pressure has a negative impact on bench behavior of judges. The degree of irritability increases in direct proportion to caseload pressure. This applies on the bench and off the bench. Accordingly, caseload pressure should be reduced to tolerable levels.
>
> . . . .
>
> I am very much behind, cannot catch up, and I am frustrated and stressed because I cannot catch up. I have stacks and stacks of cases on my work table waiting for me to get to them, the trials and hearings are set and heard, but the paperwork waits.
>
> . . . .
>
> There are simply too many civil cases to push through the system, too many motions, and far, far too many criminal cases for any human being to be satisfied she is dispensing justice.

B. Coping with Caseload in the Federal Trial Courts[13]

As the judges' comments illustrate, volume in the federal trial courts causes judges extreme concern over the speed with which cases are disposed. On the criminal side, Congress has mandated speed[14]; on the civil side, sheer numbers have caused judges to see speed in disposition as an attractive, if controversial, goal.[15] Because trial judges widely believe litigants and their attorneys do not allocate court resources in an efficient way,[16]

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13. This article addresses only modifications designed to cope with civil caseload.

14. *See* Speedy Trial Act, 18 U.S.C. §§ 3161-74 (1976).

15. *See infra* text accompanying notes 25-26. Speed in disposition is controversial because there is no reason to think that speedier dispositions will do anything about the volume of cases except, possibly, increase it by making quicker determinations available. Moreover, in the absence of data indicating how long cases *should* take from filing to termination, it is difficult for judges or anyone else to know the difference between "delay" and appropriate case development. *See* Luskin, *Building a Theory of Case Processing Time*, 62 JUDICATURE 114, 116 (1978). There are also economic arguments suggesting that increasing disposition time might be an ineffective response to caseload. *See* Priest, *Private Litigants and the Court Congestion Problem*, 69 B.U.L. REV. 527 (1989); Miller, *Some Thoughts on the Equilibrium Hypothesis*, 69 B.U.L. REV. 561 (1989) (suggesting that disposing of cases more quickly encourages still more filings).

16. *See, e.g.*, L. HARRIS, PROCEDURAL REFORM OF THE CIVIL JUSTICE SYSTEM 21 (1989). A survey of federal trial judges and attorneys who practice in federal court indicates that 71% of federal judges believe that "lawyers who abuse the discovery process" are a major cause of delays and transaction costs in federal court, and that 32% of fed-

and also believe that they themselves are working to absolute capacity, trial judges have adopted techniques for rationing access to court resources and limiting the amount of time they devote to cases at the trial stage. Paradoxically, judges have done this primarily by increasing their involvement in the pretrial stage in certain kinds of cases, and by screening for cases that can be handled by non-Article III personnel.[17] Judges are also experimenting with alternatives to adjudication, such as summary jury trials and court-annexed arbitration, in an attempt to divert cases from the trial court calendars and thus reduce the number of cases requiring trial.[18]

1. Pretrial procedures: managing cases for speed and settlement

In response to concerns about both caseload and costs,[19] many federal trial judges increasingly have endorsed judicial involvement in the period between case filing and trial. This pretrial activism involves a variety of techniques and devices known collectively as "case management." As one commentator has noted, "The specific techniques advocated by . . . managerial judges vary so widely that it is not clear what, if anything, they have in common."[20] However, advocates agree that the goals of

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eral judges believe that "lawyers who abuse the litigation process" are a major cause of cost and delay. The same survey found that 71% of federal judges surveyed believed that costs and delays are caused by "lawyers and litigants who use discovery as an adversarial tool or tactic to raise the stakes for their opponents." *Id.* at 25.

17. *See infra* notes 134-44 and accompanying text.

18. *See infra* notes 82-109 and accompanying text.

19. Costantino, *Judges as Case Managers*, 17 TRIAL 56-57 (March 1981) (judges' concerns on caseload); Peckham, *The Federal Judge as a Case Manager: The New Role in Guiding a Case from Filing to Disposition*, 69 CALIF. L. REV. 770, 771 (1981) [hereinafter *Case Manager*] (citing both caseload and expense as reasons for increased judicial role in pretrial process); Peckham, *A Judicial Response to the Cost of Litigation: Case Management, Two-Stage Discovery Planning and Alternative Dispute Resolution*, 37 RUTGERS L. REV. 253 (1985) [hereinafter *Litigation Cost*] ("In the federal courts, the prevailing response to the cost of litigation is judicial case management of the pretrial process.").

20. Elliott, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306, 309 (1986). As described by Judge Robert Peckham, one of its most active judicial proponents,

> case management entails two basic phases of pretrial planning. In the first phase, the pretrial activity is planned. The device the court uses in this phase is the status conference, at which the court and the parties identify issues and schedule a discovery cutoff date, pretrial motions, and the trial date, among other things. At the status conference, the trial judge can begin to introduce the possibility of settlement or any other alternative dispute resolution tech-

case management include: 1) limiting the scope of discovery and to create a timetable for pretrial activity to which the parties must adhere;[21] 2) narrowing the disputed issues for trial;[22] and most importantly 3) increasing case terminations without trial through settlement.[23] Managerial techniques have elicited support among the judiciary,[24] and have been sanctioned in part by the 1983 amendments to Federal Rule of Civil Procedure 16[25] and the *Manual for Complex Litigation.*[26]

a. Limitations on discovery. The purpose of discovery under the Federal Rules of Civil Procedure is to permit "parties to develop fully their respective positions with relevant information and data, thereby increasing the likelihood of just outcomes."[27]

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nique which might be suitable for the particular dispute. The second phase . . . involves planning the trial itself. . . . [T]he parties prepare pretrial statements and set out anticipated evidentiary objections in advance of trial.

Litigation Cost, supra note 19, at 253-54 n.3.

21. *Litigation Cost, supra* note 19, at 262; *Case Manager, supra* note 19, at 772.

22. *Case Manager, supra* note 19, at 772.

23. *Id.* at 771, 773; D.M. PROVINE, SETTLEMENT STRATEGIES FOR FEDERAL DISTRICT JUDGES (Federal Judicial Center 1986).

24. See judicial writings cited at note 9. *See also* Schwarzer, *Managing Civil Litigation: The Trial Judge's Role*, 61 JUDICATURE 400 (1978).

25. *See* FED. R. CIV. P. 16 & Advisory Committee notes; A. MILLER, THE AUGUST 1983 AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE: PROMOTING EFFECTIVE CASE MANAGEMENT AND LAWYER RESPONSIBILITY (1984) (informal survey revealed that one to two-thirds of judges were already involved in active case management before adoption of amendments to rule 16).

Active judicial involvement in the pretrial process is facilitated by the individual calendar system under which judges are assigned responsibility for cases at the time of filing. *Litigation Cost, supra* note 19, at 257. Under the alternative master calendar system, judges are not assigned responsibility for a case until the day of trial. *Id. See also* S. FLANDERS, CASE MANAGEMENT AND COURT MANAGEMENT IN THE UNITED STATES DISTRICT COURTS 13 (Federal Judicial Center 1977). Because individual calendaring allows courts to track the termination rates of each judge within a district, and to publish those results internally, it encourages judges to adopt techniques that promise to increase their termination rates—and impliedly, their efficiency.

The system, however, has its critics. For example, as Flanders notes, "If one purpose of the individual calendar system is to foster a spirit of competition with respect to disposition rates, it obviously has succeeded. It appears, however, that at least some judges are paying a price for this. One judge described the individual calendar system as 'a highly introverting experience' [and noted that there is] little sense that the court's docket is a shared burden.' " *Id.* at 13-14.

26. *See* MANUAL FOR COMPLEX LITIGATION, SECOND, § 20.1 (1985) ("[T]he propriety, if not the necessity, of judicial control to promote the efficient conduct of the litigation . . . stems from an awareness that the tensions between an attorney's responsibilities as an advocate and as an officer of the court frequently are aggravated in complex litigation and that the tactics of counsel may waste time and expense if the judge passively waits until problems have arisen.").

27. *Litigation Cost, supra* note 19, at 256.

Many judges believe, however, that discovery is used inappropriately by attorneys, and that caseload pressures dictate that judges take a firm hand in controlling discovery processes in order to expedite case terminations and control costs.[28]

Limiting the substantive scope of discovery can be accomplished by setting explicit limits on allowable discovery devices (for example, by limiting the number of interrogatories),[29] or by limiting the amount of time available for discovery.[30] Such discovery limits depend on lawyers to make determinations about the most cost-effective discovery routes to pursue, and implicitly require lawyers to reject some avenues of claim development as a response to scarcity, either of time or discovery resources.

Scheduling orders, which are now required in many cases under Federal Rule of Civil Procedure 16(b),[31] limit the amount of time for investigation and discovery, thus forcing attorneys to make early predictions about the theories they can profitably pursue. While many local court rules implementing Rule 16 do not appear to tailor scheduling orders to the needs of individual cases,[32] case management advocates' enthusiasm for scheduling

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28. *Id.* Despite strong sympathies in favor of forceful case management, Professor Miller notes that there is little evidence on the extent of discovery abuse. A. MILLER, *supra* note 25, at 30-31. Nevertheless, federal judges perceive discovery abuses as a significant cause of delay and cost. *See* L. HARRIS, *supra* note 16, at 33 (half of federal judges surveyed believed that "[f]ailure of judges to control discovery process" was a major cause of costs and delays).

29. *See* C. SERON, THE USE OF STANDARD PRETRIAL PROCEDURES: AN ASSESSMENT OF LOCAL RULE 235 OF THE NORTHERN DISTRICT OF GEORGIA (Federal Judicial Center 1986) (describing standardized local rules limiting interrogatories, deposition time); N. WEEKS, DISTRICT COURT IMPLEMENTATION OF AMENDED FEDERAL CIVIL RULE 16: A REPORT ON NEW LOCAL RULES (Federal Judicial Center 1984).

30. *See* N. WEEKS, *supra* note 29, at 3.

31. FED. R. CIV. P. 16(b) states:

> Except in categories of actions exempted by district court rule as inappropriate, the judge, or a magistrate when authorized by district court rule, shall, after consulting with attorneys for the parties and any unrepresented parties, by scheduling conference, telephone, mail, or other suitable means, enter a scheduling order that limits the time
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> (1) to join other parties and to amend the pleadings;
>
> (2) to file or hear motions; and
>
> (3) to complete discovery.
>
> The scheduling order may also include
>
> (4) the date or dates for conferences before trial, a final pretrial conference, and trial; and
>
> (5) any other matter appropriate to the circumstances of the case.

The rule mandates that scheduling orders be issued within 120 days in all cases not exempted by local rule.

32. Scheduling orders vary widely under district court local rules. *See* N. WEEKS,

orders is premised on the possibility that judges can immerse themselves in the facts and legal theories of the case in order to limit discovery and narrow issues.[33]

Other methods are available to judges seeking to limit discovery. For example, judges can use the early status conference to become familiar with the parties' theories of the case and to attempt to telescope the discovery process by assessing the minimal amount of discovery necessary for the lawyers to evaluate their case knowledgeably with an eye toward settlement.[34] More directly, judges can, under Federal Rule of Civil Procedure 26 limit discovery if they determine that requested discovery is "disproportionate" to the needs of the case.[35] As noted by the reporter to the Advisory Committee on the Federal Rules, a judges' ability to make determinations about proportionality depends on his familiarity with the facts and issues of a given case during the pretrial phase.[36]

b. Narrowing scope of trial issues. While limiting discovery can itself narrow the scope of trial issues, judges can encourage further winnowing of substantive issues by setting firm and early trial dates in an effort to force attorneys to "establish proper priorities rather than pursue all potential arguments."[37] Judges can also use status conferences to dispose "of the many immaterial or uncontested issues that arise at the outset of a typical

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supra note 29.

33. *Litigation Cost*, *supra* note 19, at 262.

34. *Id.* at 268. One commentator notes that judges are increasingly "challenging the view that ample time for discovery is a necessary prelude to court-sponsored settlement talks. Some . . . judges . . . are convinced that most lawyers already have enough information to settle their cases when they file suit." D.M. PROVINE, *supra* note 23, at 17.

35. FED. R. CIV. P. 26(b)(1) states in relevant part:

> The frequency and extent of use of the discovery methods [set out in the rule] shall be limited if the court determines that: . . . (iii) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation.

36. A. MILLER, *supra* note 25, at 36 (judicial ability to control discovery enhanced by active pretrial management because judge becomes conversant with case). Judicial power over discovery has also been enhanced by the availability of sanctions under the 1983 amendments to the rules. *Id.* at 10-11.

37. *Litigation Cost*, *supra* note 19, at 257-58.

lawsuit."[38] Finally, judges can use pretrial conferences to urge the attorneys to agree to limit the issues.[39]

Case management advocates believe forcing the parties to narrow the scope of trial issues expedites case terminations in three ways: first, it increases the likelihood that cases will settle, and so eliminates some cases entirely from the trial docket;[40] second, it encourages the disposal of cases through dispositive motions;[41] third, it reduces trial time by eliminating some issues and focusing remaining ones.[42]

c. Settlement. The belief that judges should encourage case settlements is the cornerstone of case management.[43] Advocates of judge participation in settlement insist this involvement ultimately saves court time by disposing of cases that would otherwise go to trial.[44]

As noted earlier, most aspects of case management are concerned at least indirectly with encouraging settlement. But case management advocates also envision a role for the judge in actively discussing settlement; in fact, Rule 16 now states that settlement discussions may be initiated at pretrial conferences.[45] The "issue [now] discussed . . . is no longer whether a judge should broach the issue of settlement . . . but how far [a] judge should go in negotiating settlements throughout the pretrial process."[46]

Judicial methods of encouraging settlement vary widely,[47]

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38. *Id.* at 772 ("Early in litigation the parties . . . will often urge claims or defenses that they will later concede to be without merit. A judge who takes an active role in the early pretrial proceedings can often use his status and experience to persuade the parties to eliminate these issues.").

39. *Id.* at 786.

40. *Id.* at 788.

41. *Id.* at 780.

42. *Case Manager*, *supra* note 19, at 772-73.

43. *Id.* at 773; Schwarzer, *supra* note 24. *See also* H. WILL, R. MERHIGE & A. RUBIN, THE ROLE OF THE JUDGE IN THE SETTLEMENT PROCESS (Federal Judicial Center 1977).

44. Even though saving court time is an important consideration, many judges in a conference on settlement believed that some cases, those in which there was "disparity in bargaining power, . . . and cases where lawyers seem unwilling to put the clients' interests first," called for judicial intervention even if it was not cost-effective or time-saving. D.M. PROVINE, *supra* note 23, at 15.

45. FED. R. CIV. P. 16(c)(7) mentions "the possibility of settlement or the use of extrajudicial procedures to resolve the dispute" as proper topics for discussion at the pretrial conference.

46. D.M. PROVINE, *supra* note 23, at 22.

47. One study reported approximately sixty different techniques a judge might employ to encourage settlement. Schiller & Wall, *Judicial Settlement Techniques*, 5 AM. J. TRIAL ADVOC. 39, 58-60 (1981).

but many judges agree that effective encouragement of settlement requires the judge's early and extensive knowledge of the parties' contentions, the facts in dispute, and the legal theories involved. In order to effectively obtain such knowledge of a case, judges may be required to meet with each side separately.[48] A judge can use knowledge of the case to

> supply information needed to provoke a settlement. This usually involves "throwing cold water" on the case, a reference to the fact that the information the judge imparts tends to inspire doubts about one's chances of prevailing at reasonable expense and within a reasonable time frame, or prevailing at all.[49]

d. Summary. While techniques of case management differ, two common prescriptions emerge. First, judges should be actively involved with cases during the pretrial period to expedite the period between filing and trial or eliminate the trial altogether. Second, to adequately accomplish these goals, judges need to obtain knowledge about the case early to allocate time and resources and to encourage settlement.

2. *Critiques of management*

The judicial management movement has not elicited universal approval. Active case management as a response to caseload is subject to at least three objections. First, the empirical foundation of claims that managerial techniques increase efficiency and reduce cost is questionable. Second, judges now label as "managerial" decisions that have previously been surrounded by procedural safeguards. Finally, judges engaged in case management are in effect deciding how much of the available court resources to make available to litigants. Are these allocations in-

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48. D.M. PROVINE, *supra* note 23, at 26; Schuck, *The Role of Judges in Settling Complex Cases: The Agent Orange Example*, 53 U. CHI. L. REV. 337, 351 (1986) (describing Judge Weinstein's meetings with lawyers in Agent Orange lawsuit).

49. D.M. PROVINE, *supra* note 23, at 25. The techniques Provine cites include: (1) Pointing out general problems of proof; (2) Reminding counsel that the case could go either way; (3) Discussing the probable length of the trial, the costs each party can expect to incur if the case goes to trial; (4) Emphasizing that "skilled lawyers don't let unskilled jurors decide their fate"; (5) Asking defendants to outline their defenses; (6) Sharing their own views of the case and of defendant's exposure to liability based on recent jury verdicts in similar cases; (7) Asking parties for "offers of proof" to expose weaknesses in their cases.

Id. at 25-26. For a case study of such techniques in the context of complex litigation, see Schuck, *supra* note 48.

formed by more than hunches? Which litigants are most affected, and how are these resources being distributed?

a. Empirical support. Most management supporters point to a 1977 study by the Federal Judicial Center as evidence that case management techniques are essential to achieving the speedy disposition of cases.[50] In fact, that study provides little support for more than limited judicial involvement in the pretrial period.[51] In several studies on the pace of civil litigation, for instance, courts with the fastest pace had the least settlement activity by judges.[52]

Nor is there strong evidence that judicial management is a cost-effective device for achieving speedy terminations.[53] As one critic observed, "the judge's time is the most expensive resource in the courthouse,"[54] and case-management techniques, in theory at least, can require extensive judicial involvement.[55]

As noted earlier, since there is little empirical data indicating how long a case "should" take,[56] the concern with speed as a primary value of case management is problematic. Moreover, there is little guidance that would enable judges to make informed decisions about when and how much early intervention

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50. *See* S. FLANDERS, *supra* note 25.

51. Other studies provide some support for the proposition that early judicial involvement speeds case processing time. *See* ABA ACTION COMM'N TO REDUCE COURT COSTS AND DELAY, ATTACKING LITIGATION COST AND DELAY 11 (1984) (describing Kentucky court system "economical litigation" program: median case processing time reduced from 16 months to 5 months). It is not clear which forms of judicial or nonjudicial intervention are responsible for decreasing case termination times (or even if management is actually effective) because of the difficulty of isolating causal relationships in court research. *See* Luskin, *supra* note 15, at 115.

52. Church, *Civil Case Delay in State Trial Courts*, 4 JUST. SYS. J. 166, 189 (1978)(study of 21 state trial courts); S. FLANDERS, *supra* note 25, at 37 (study of federal trial courts).

53. Marie Provine evaluated four studies designed to assess the impact of judicial involvement on settlement and determined that the evidence on whether "judicial energies devoted to settlement conferences pay off in terms of greater numbers of settlements or earlier settlements that demand less traditional pretrial processing" is inconclusive. D.M. PROVINE, *supra* note 23, at 38-40.

54. Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 423 (1982) (citing J. KAKALIK & A. ROBYN, COSTS OF THE CIVIL JUSTICE SYSTEM: COURT EXPENDITURES FOR PROCESSING TORT CASES 64 (1982)).

55. Judge Peckham believes that critics, especially Professor Resnik, overestimate the amount of time judges actually spend on case management. *Litigation Cost*, *supra* note 19, at 267. Peckham estimates that judges could "easily conduct all status conferences for a full caseload in one day per month. . . ." *Id.* Resolution of this issue is unlikely soon, but better estimates may be possible when the Federal Judicial Center completes an updated time study of trial judges that is being conducted.

56. *See* Luskin, *supra* note 15; *supra* note 11.

is necessary or effective.[57] And because most filed cases terminate without trial, judges may be wasting time on pretrial case management.[58]

Another concern is that the focus on disposition speed reveals nothing about the quality of the dispositions being achieved. Judges who write about settlement maintain that settlements achieve "better" results than trials and that litigants prefer to settle cases.[59] However, the private nature of a judge-negotiated settlement means that little is known about whether results in settled cases are better than in adjudicated cases, and there are few ways to make comparisons to find out.[60] Moreover, a recent study suggests that judges' perception that litigants (rather than their lawyers) prefer the process of judge-hosted settlement conferences to either arbitration or trial is incorrect: litigants perceive such conferences as less fair, less dignified, and less careful than the other two procedures.[61]

b. Procedural safeguards. Case management increases judges' power by giving judges, rather than the attorneys, primary control over the pace of a lawsuit.[62] Management increases a judge's knowledge of a case and her contact with the attorneys, and does so at an earlier stage than in the past.[63] Consequently,

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57. D.M. PROVINE, *supra* note 23, at 38. Marc Galanter surveyed the studies of judicial involvement in settlement and concluded they "provide no assurance that judicial promotion of settlements produce more settlements or make courts more productive." Galanter, *The Quality of Settlements*, 1988 J. DISPUTE RESOLUTION 56, 73.

58. The vast majority of cases that are filed in the federal courts are terminated without trial. In 1986, only 4.2% of civil cases in the federal district courts were terminated "during or after trial." *See* ANNUAL REPORT OF THE ADMINISTRATIVE OFFICE OF THE COURTS 211, Table C-4 (1988) (figure includes cases that settled after trial commenced). Provine notes that many cases are disposed of before even an answer is filed, with no action by a judge or magistrate. D.M. PROVINE, *supra* note 23, at 17 (31.6% of cases in twelve-month period ending June 30, 1984).

59. Judge Zampano, for instance, "suggests that trial . . . offends the basic sensibilities of most litigants," who are more familiar with negotiation. D.M. PROVINE, *supra* note 23, at 92 (quoting R. Zampano, Judicial Trends in Alternative Dispute Resolution for Commercial Disputes 4-5 (Oct. 11, 1984) (unpublished address to Center for Public Resources)).

60. Galanter, *supra* note 57, at 59-62 (discussing difficulties in making comparisons between settled and adjudicated cases).

61. E. LIND, R. MACCOUN, THE PERCEPTION OF JUSTICE: TORT LITIGANTS' VIEWS OF TRIAL, COURT-ANNEXED ARBITRATION, AND JUDICIAL SETTLEMENT CONFERENCES 79 (Rand Institute for Civil Justice 1989).

62. *See* Resnik, *supra* note 54, at 380-82 (arguing that adversarial tradition is constitutional in lineage and has traditionally depended on parties, rather than the state, to control such aspects of case development as presentation of evidence. Parties, rather than judges, have traditionally had major responsibilities for definition of the dispute).

63. *Id.* at 378.

a judge who actively manages cases makes more pretrial substantive decisions about the scope of the issues that will be investigated, the amount of justified pretrial investigation, and the worth of the claims being advanced.

Such pretrial judicial involvement may place procedural guarantees in jeopardy. For instance, Judge Peckham stated:

> Admittedly, in limiting the scope of discovery, setting schedules, and narrowing issues, the [judge] restricts somewhat the attorneys' freedom to pursue their actions in an unfettered fashion and eliminates entirely some theories or lines of inquiry. Motions to dismiss some claims or for partial summary judgment similarly may result in the drastic alteration of the contours of [litigation], yet we do not question the legitimacy of judges' deciding such motions.[64]

One commentator noted that this statement "reflects [the] fundamental insight . . . [that] managerial judging is a functional substitute for motions to dismiss or for partial summary judgment."[65] These pretrial decisions, unlike motions to dismiss or summary judgment motions, are not surrounded by procedural safeguards such as the need to provide a "reasoned justification, subject to appellate review."[66] The rules of evidence also do not apply to the pretrial management phase of litigation; no formal screening of the information available to a judge is thus available.

Nor is there case law that provides standards for making these "managerial" decisions.[67] A lack of articulated standards for what constitutes proper decision making in the pretrial management stage of a trial forces judges to rely on their own conceptions of the importance of a case and the proper speed of disposition. Such reliance promotes arbitrariness. For instance, a controlled experiment that asked judges to propose approaches for managing the same hypothetical case

> disclosed dramatic differences in the ways that individual judges would have handled the case. Based on her intuition

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64. *Litigation Cost*, *supra* note 19, at 262.

65. Elliott, *supra* note 20, at 311.

66. *Id. See also* Resnik, *supra* note 54, at 378 (noting that management work is "out of reach of appellate review").

67. Judith Resnik has noted that "no explicit norms or standards guide judges in their decisions about what to demand of litigants. . . . Given the lack of established standards, judges are forced to rely on their own experience." Resnik, *supra* note 54, at 426.

> that a case had little merit, one trial judge would have required thousands of plaintiffs to file individual, verified complaints—a move that would have made it all but impossible for the plaintiffs' lawyer to pursue the case. On the other hand, another trial judge confronting exactly the same hypothetical case would have ordered the defendants to create a multi-million dollar settlement fund.[68]

Moreover, in their case management roles, "judges frequently work beyond the public view [and] off the record. . . ."[69] Judges may meet with parties individually in order to encourage settlement.[70] Whether or not the judge meets individually with lawyers, case management presupposes pretrial contact between judge and attorneys in various contexts. These pretrial contacts may compromise the impartiality of the judge in a number of ways: contacts may generate biases; judges may become privy to untested information; or judges may develop "stakes" in the outcome of the pretrial process.[71]

Finally, the power of the judge coupled with the privacy of pretrial proceedings raises concerns about coercion. Implicit or explicit judicial pressure to adhere to the judge's conception of the proper amount of discovery, or to accept the judge's estimate of a correct settlement amount, may be difficult to resist not only because of the lack of formality and review inherent in pretrial management, but also because of a concern about maintaining a continuing relationship with a judge who has so much unreviewable power. In short, case management techniques inherently compromise most of the traditional safeguards against arbitrary, erroneous, or interested judicial decision making.

c. Management and resource allocation. At bottom, the claims for judicial management are claims about resource allocation:

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68. Elliott, *supra* note 20, at 317. Many experiments involving simulated negotiations have produced the same sorts of wide variations in results. *See* Galanter, *supra* note 57, at 76-78.

69. Resnik, *supra* note 54, at 378.

70. *Id.* at 425; Schuck, *supra* note 48, at 351-53 (noting that Judge Weinstein used separate meetings with the attorneys for each side to mold a settlement in the Agent Orange case).

71. Resnik, *supra* note 54, at 430. Some districts recognize the problems inherent in having a judge conduct settlement negotiations in a case he might try by prohibiting judges who participate in settlement negotiations from presiding at trial absent the parties' consent. *See, e.g.*, CAL. CIV. CODE § 240-1 (West 1985).

> Stripped to their essentials, the techniques of managerial judging ration a scarce good—the procedural moves available to litigants under the Federal Rules of Civil Procedure. According to the advocates of managerial judging, this good is offered to its consumers (lawyers) at well below its true social cost; therefore they consume too much of it. . . . One can in fact *define* managerial judging as the selective imposition by judges of costs on *lawyers* for the purpose of rationing the use of procedures available under the Federal Rules of Civil Procedure.[72]

The danger inherent in this sort of resource allocation is that it occurs at a time when the judge has "only a cursory understanding of the merits" of a case.[73] This in turn can lead to "premature definition of [the] issues, and outcomes based on preliminary procedural skirmishing rather than the legal merit of claims."[74]

Claim foreclosure through management arguably might have net benefits,[75] but it increases the possibility of erroneous outcomes by limiting information development without explicitly weighing the benefits and costs involved in further information development—a task we might assume lawyers would routinely undertake without judicial intervention.[76] Moreover, judges' perceptions of these costs and benefits, based as they necessarily are on intuitions, experience, and limited information, coupled with concerns about caseload and termination statistics, may lead judges to believe they know more about a case than they really do. And based on this erroneous belief, judges might limit claim development in inappropriate ways.

Finally, there is no systematic information about who bears the burdens of aggressive management decisions. We do not know, for example, what types of cases are subject to strong judicial management,[77] and whether there are patterns to judicial

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72. Elliott, *supra* note 20, at 311-12.

73. *Id.* at 328.

74. *Id.* at 321. Elliott notes that these were "primary evils that the drafters of the [1938] Federal Rules of Civil Procedure were at pains to abolish." *Id.*

75. Elliott argues, for instance, that management may increase the quality of outcomes in certain kinds of cases under certain conditions by improving settlements. *See id.* at 328-33.

76. One argument for case management is that while lawyers do make these calculations, their estimates and the estimates their clients would make might be expected to diverge. However, this argument depends on judges' abilities to make better estimates than lawyers and to perform the function of client-surrogate. That judges have these abilities is not self-evident.

77. Note, however, that we have information about which kinds are not, since local

decisions on these matters that might raise larger concerns about access to federal courts. As the experiment on management described above illustrates,[78] cases can be "managed" out of court by judicial decisions that increase the costs of continued litigation beyond the abilities of the parties to pay.

d. Conclusion. Despite the intensity of the theoretical debate over management, little has been conclusively determined about management in practice. As with most of the adaptations to caseload discussed later in this article, case management is a judicial innovation, and much of the debate over management has involved responses to the writings of a few activist judges, rather than investigations of what judges actually do. While Rule 16 encourages some forms of management, it does not require judges to take a strong role early in the life of a case. Indeed, there is some empirical work suggesting that magistrates rather than judges should, and often do, supervise discovery and perform other case management roles.[79]

Moreover, it is important to remember that case management is primarily a response to caseload pressures. Advocates of case management assume that in a world of increased demand and procedural scarcity, judges must make choices about the resources they make available to litigants; they also assume that speed in case processing is an important goal, and that "more dispositions are inherently desirable."[80] Strong versions of case management represent a flawed and risky adaptation to caseload, however, because many of the techniques advocated by adherents of active judicial management compromise values of procedural regularity in pursuit of goals—speed and dispositions—that may be in conflict with overall quality of outcomes.

3. *Use of alternatives to trials*

Judicial involvement in the pretrial phase of a case is not the only way trial courts have attempted to divert cases from the trial calendar. Trial courts are now employing a variety of alter-

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rules may explicitly exempt certain kinds of cases. *See* N. WEEKS, *supra* note 29, at 8-9 (noting that exemptions vary widely: some courts have exempted complex cases, some courts exempt frequent cases such as prisoner petitions and social security cases, and some give judges discretion to exempt cases as they see fit).

78. *See supra* note 68 and accompanying text.

79. C. SERON, *supra* note 2, at 69-82.

80. Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 529 (1986) (footnote omitted) [hereinafter *Failing Faith*].

native dispute resolution ("ADR") procedures hoping to encourage parties to settle their disputes without resort to adjudication. Various methods of ADR now in use in the courts work primarily by relying on non-judges to promote settlement. They cover a range of alternatives, including court-annexed arbitration, mediation, summary jury trials, and "minitrials." While ADR mechanisms have long attracted attention, use of ADR in the federal courthouse is relatively new and is clearly a response to increasing caseload.[81]

a. Descriptions of federal court ADR

(1) Court-annexed arbitration. Several federal district courts have long operated arbitration programs, and Congress has recently authorized up to twenty federal districts to experiment with arbitration programs.[82] Of these, half are authorized to impose compulsory arbitration as a precondition to trial, while half are limited to offering consensual arbitration.[83] This

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81. Federal court arbitration programs were first implemented experimentally in 1978, when the Justice Department urged Congress to fund such programs as responses to court congestion. *See* Nejelski & Zeld, *Court Annexed Arbitration in the Federal Courts: The Philadelphia Story*, 42 MD. L. REV. 787, 787-800 (1983). Other forms of ADR in the federal courts have even briefer histories. *See, e.g.*, Lambros, *The Summary Jury Trial and Other Alternative Methods of Dispute Resolution*, 103 F.R.D. 461 (1984) (describing Judge Lambros's development of summary jury trials in 1980).

82. *See* 28 U.S.C. §§ 651-58 (1988). Several federal trial courts have operated arbitration programs for ten years. Congress recently authorized an additional ten districts to participate in experiments with arbitration. Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, 102 Stat. 4642, 4659 (1988).

83. Thus, under the implementing legislation, court-annexed arbitration will offer an experiment, and its claims—speedier, less expensive dispositions and diversion of cases from the trial docket that would otherwise be there—can be subjected to scrutiny. *See* Posner, *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations* 53 U. CHI. L. REV. 366, 367-68 (1986) (arguing for greater testing of ADR claims). The Federal Judicial Center will evaluate court-annexed arbitration in the districts using it under the new legislation. *See* Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 903(b), Stat. 4663 (1988). Duke University has also been conducting court-annexed arbitration for the Middle District of North Carolina through the Center for Private Adjudication. An evaluation of the Center's work is close to completion. A status report on that program after it was in effect two years, however, found no "strong effect in favor of [speedier terminations] through arbitration." Moreover, the same report found that arbitration hearings took substantial time, averaging 8 hours, and that the support in the data for decreased costs through arbitration was only suggestive. The report emphasized, however, that its findings were tentative. E. LIND, DRAFT STATUS REPORT TO THE COURT: CURRENT FINDINGS OF RESEARCH IN THE PROGRAM FOR COURT-ANNEXED ARBITRATION IN THE MIDDLE DISTRICT OF NORTH CAROLINA (Oct. 1987), *reprinted in Court Reform and Access to Justice Act*, 1988: HEARINGS ON H.R. 3152 BEFORE THE SUBCOMM. ON COURTS, CIVIL LIBERTIES, AND THE ADMINISTRATION OF JUSTICE, 100th Cong., 1st and 2d Sess. 1458, 1460 (1988) [hereinafter DRAFT STATUS REPORT].

discussion focuses on the older arbitration programs, which required arbitration in certain classes of cases as a precondition to trial.[84]

Most existing federal court arbitration programs are designed to divert certain classes of cases to arbitration automatically.[85] These cases are defined by local rules, and generally limit arbitrable disputes to those that seek damages only and contain claims that do not exceed a fixed dollar ceiling.[86]

In federal court, arbitration programs typically allow a relatively short period of discovery, after which the case is heard before one to three attorneys who serve as arbitrators. Proceedings before the arbitrators are less formal than adjudication, and are generally quite abbreviated,[87] but they are adversarial. Lawyers present witnesses and documentary evidence. Thus, the arbitrator is seen as a substitute for a judge; he is required to assess liability, and to do so under prevailing legal principles. Most local rules require the arbitrator to announce his award within ten to twenty days. An award is deemed accepted and becomes a final judgment if no party to the arbitration makes a demand for a trial de novo within 30 days.[88] While all of the programs allow for trial de novo on demand, they are designed to force attorneys to calculate the chances of doing better at trial by providing that the arbitrator's fees can be taxed as costs in a trial not producing a judgment greater than the arbitrator's award.[89]

(2) Court-annexed mediation. By local rules, twenty-nine districts offer or require some form of court-sponsored media-

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84. For descriptions of these existing programs, see E. LIND & J. SHAPARD, EVALUATION OF COURT-ANNEXED ARBITRATION IN THREE FEDERAL DISTRICT COURTS (Federal Judicial Center 1983); D.M. PROVINE, *supra* note 23, at 44-51.

85. Under the new legislation, no actions based on violations of constitutional rights may be referred to arbitration, nor may cases in which jurisdiction is based on 28 U.S.C. § 1343 (1982). 28 U.S.C. § 652(b) (1982).

86. This dollar ceiling is now set by legislation: 28 U.S.C. § 652(a)(1)(B) allows courts participating in the compulsory arbitration arm of the arbitration experiment to require arbitration in any civil action where the relief sought consists only of money damages not in excess of $100,000, although those which were already using ceilings of $150,000 may continue to do so.

87. D.M. PROVINE, *supra* note 23, at 44, 47. A study by the Federal Judicial Center found that hearings in the Eastern District of Pennsylvania, a pioneer in court-annexed arbitration, averaged about three hours—about two hours longer than in the other two districts studied in the report. E. LIND & J. SHAPARD, *supra* note 84, at 53. *But see* DRAFT STATUS REPORT, *supra* note 83 (eight hour arbitrations typical).

88. 28 U.S.C. § 654 (Supp. 1989).

89. 28 U.S.C. § 655(d) (Supp. 1989).

tion.[90] Mediation differs from arbitration primarily in the type of evaluation it renders: "Whereas arbitration procedures are designed to examine the merits of a controversy as a court would, in terms of liability and damages, mediation . . . tends to be more flexible. It can be used as a mechanism for affixing a settlement value to a case, or for litigation planning, or as a forum for exploring a broad range of settlement alternatives . . . ."[91]

Mediation typically involves a settlement conference hosted by neutral attorneys.[92] Courts vary in the goals they seek to foster through mediation.[93] Some courts, such as the Eastern and Western Districts of Michigan, use the programs to offer litigants a quick, neutral third-party evaluation of the settlement worth of their claims.[94] These programs "are 'mediation' in name only [and] little effort is made to negotiate differences between parties."[95] Under local rules, the evaluation becomes a final award absent rejection by one side.[96] As with court-annexed arbitration, there is a potential penalty in going to trial; with mediation, the penalty is payment of the other side's costs incurred in trial preparation.[97]

More elaborate programs are in place in some districts. In the Northern District of California, for example, the court requires clients to attend conferences, and uses the conferences to "prob[e] strengths and weaknesses in the contentions of the parties, suggest[] possible stipulations to reduce the scope of the

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90. D.M. PROVINE, *supra* note 23, at 51.

91. *Id.* at 57.

92. *Id.* at 51.

93. Beyond differences in evaluation, mediation differs from arbitration in theory: arbitrators, like judges, decide cases by explicitly applying legal norms, whereas mediators have as their goal bringing about a settlement acceptable to all the disputants, and so are less tied to legal norms. Programs labeled "mediation" in the federal courts, however, vary, and often do not involve "true" mediation. Descriptions of various court-sponsored mediation programs include K. SHUART, THE WAYNE COUNTY MEDIATION PROGRAM IN THE EASTERN DISTRICT OF MICHIGAN (Federal Judicial Center 1984); K. TEGLAND, MEDIATION IN THE WESTERN DISTRICT OF WASHINGTON (Federal Judicial Center 1984). D.M. PROVINE, *supra* note 23, at 51-57 (brief but informative description).

94. This is apparently the purpose of the programs in the Eastern and Western Districts of Michigan, which offer a "quick look" procedure for evaluating cases. D.M. PROVINE, *supra* note 23, at 54. *See also* Levine, *Early Neutral Evaluation: A Follow-Up Report*, 70 JUDICATURE 236 (1987) (describing the Northern District of California's early neutral evaluation program, where neutral attorneys working for the court deliver frank assessments of the parties' positions and the overall value of the case).

95. D.M. PROVINE, *supra* note 23, at 54.

96. *Id.* at 55.

97. Provine notes that this penalty is rarely imposed in practice. *Id.*

dispute, and urg[e] economy in discovery and motion practice."[98] The California program is explicitly designed to contain costs, and the lawyer-hosted conference occurs early in the life of the case, "to move cases more quickly . . . into a posture conducive to settlement."[99]

(3) Summary jury trials. The summary jury trial is exclusively a settlement device.[100] As its name suggests, the summary jury trial is in fact a trial before a jury drawn from the regular pool of jurors. Litigants are required to attend. The attorneys summarize the evidence they would present in an actual trial and make their arguments, and the jurors then deliberate and render an advisory verdict.[101] While the verdict is non-binding, the procedure is compulsory in several courts.[102]

Summary jury trials encourage settlement directly by giving attorneys an actual jury's appraisal of their case. They encourage settlement indirectly because they are expensive: lawyers must devote significant time to preparation for the summary trial.[103] This may encourage some settlement before the summary trial occurs, and certainly discourages those who do go

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98. *Id.*

99. *Litigation Cost*, *supra* note 19, at 276 (quoting W. Brazil, M. Kahn, J. Newman & J. Gold, The Early Neutral Evaluation Program: Basic Elements and Rationale 3 (Jan. 1984) (unpublished tentative draft)).

100. Lambros, *The Summary Jury Trial and Other Alternative Methods of Dispute Resolution*, 103 F.R.D. 463 (1984) (Judge Lambros is the inventor of the summary jury trial). The future of summary jury trials may be in doubt: the Court of Appeals for the Seventh Circuit recently held that judges had no authority to order parties to submit to a mandatory, non-binding summary jury trial. Strandell v. Jackson County, 838 F.2d 884 (7th Cir. 1988) (overturning criminal contempt conviction for lawyer who refused to participate). *Contra* Cincinnati Gas & Elec. v. General Elec. Co., 117 F.R.D. 597 (S.D. Ohio 1987); Arabian Am. Oil Co. v. Scarfone, 119 F.R.D. 448 (M.D. Fla. 1988).

101. The jurors are usually not told that they are rendering only an advisory verdict until after they finish deliberations. The thought is that the process is effective in encouraging settlement only to the extent that it is realistic, and the jurors may not take the job as seriously if they know their verdict is only advisory. Judge Posner has raised serious questions about this practice, among them the authority of courts to compel juror service in aid of settlement, and the possible effects of tricking jurors in this way on the public's belief in the legitimacy of the trial process. Posner, *supra* note 83, at 385-87.

102. D.M. PROVINE, *supra* note 23, at 71.

103. The Judicial Conference, which has endorsed the concept of summary jury trials

> recommends a prehearing exchange of proposed jury instructions, briefs on novel issues of law, and stipulations as to the use of physical exhibits or exchange of these materials. The lawyers must also decide how to summarize the evidence and how to present their arguments so as to fit within the one or two hours judges usually allot to each side.

Id. at 72.

through the procedure from repeating the case before an actual jury.[104]

(4) "Minitrials". The minitrial is ordinarily a private, voluntary proceeding and has only recently begun to be incorporated into the federal trial courts' arsenal of devices for encouraging settlement. Central to the minitrial is "presenting the dispute to the parties themselves and allowing them a chance to discuss what they have seen and heard . . . ."[105] Its aim is "to reconvert a lawyer's dispute back into a businessman's problem by removing many of the legalistic, collateral issues in the case."[106] Thus the only necessary characteristics are "a summary presentation of the case before the key decision makers for either side, with a third party present to facilitate this process, and an opportunity for the decision makers to retire together privately after the presentation to discuss settlement."[107] Its use in federal court is presently limited, but several judges have set up or presided over minitrials,[108] and one judge concluded that the "potential for the use of mini-trials within the judicial system in appropriate cases [generally thought to be high-stakes commercial litigation] is enormous."[109]

(5) Questions about ADR as a response to caseload. Proponents of ADR make a number of claims in favor of its adoption as a solution to caseload pressures. First, they claim that it *is* such a solution; that is, that it actually has some effect in relieving the work of the trial courts.[110] Second, and in common with advocates of management, they champion settlement as a superior resolution of cases than adjudication.[111] Third, they promote ADR specifically as normatively superior to adjudication: it produces better results at lower costs to disputants.[112] Each of these claims, however, can be challenged. Moreover, the particular forms of ADR used in the federal courts today present a host of other issues. What assumptions underlie the sorting of certain

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104. *Id.* at 71.

105. *Id.* at 77.

106. *Litigation Cost*, *supra* note 19, at 272.

107. D.M. PROVINE, *supra* note 23, at 77.

108. *Id.* at 78.

109. *Litigation Cost*, *supra* note 19, at 271.

110. *Id.* at 269.

111. *See e.g.*, Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754 (1984); Galanter, *supra* note 57, at 631 (discussing claims).

112. *Litigation Cost*, *supra* note 19, at 268.

classes of litigants to certain kinds of ADR? What are the ramifications of making ADR compulsory? Of attaching it to a court at all?

b. Does ADR reduce the work of the trial courts? ADR proponents claim that ADR reduces court congestion by diverting cases from the trial calendar that would otherwise be there as well as reducing costs for litigants. But the empirical evidence to support these claims is difficult to come by.[113]

In the case of mandatory ADR, such as the compulsory arbitration and mediation programs, these claims seem counterintuitive; because a large percentage of cases will end without trial anyway, subjecting a large group of them to a compulsory procedure to increase settlement seems likely to result in over-inclusiveness. In addition, as several commentators have pointed out, it is possible that increasing the number of settlements will, over the long run, increase the rate of litigation by depriving potential litigants of authoritative decisions and thus increase the uncertainty that encourages disputes.[114]

ADR proponents' claims about disputant cost also are subject to debate. Transaction costs are important variables in determining the likelihood that a dispute will settle. The likelihood of settlement can be increased, for instance, by increasing the costs of litigation: the higher the costs of trial, all else being equal, the more likely that settlement will occur.[115] The existence of mandatory court-sponsored settlement mechanisms increases the cost of trial by adding a layer of procedures that require attorney time, other expenditures, and delay. ADR thus becomes a transaction cost to be figured into the potential cost

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113. *See, e.g.*, Gallagher, *The Transformation of Justice: Hofrichter's Neighborhood Justice and Harrington's Shadow Justice*, 13 LAW AND SOC. INQUIRY 133, 134 (1988) (collected studies: "empirical-descriptive literature has tested many of these claims and found them wanting"); Posner, *supra* note 83, at 382 (study of use of summary trials in Northern District of Ohio "does not support a conclusion that the summary jury trial increases judicial efficiency"—although Judge Posner cautions that his study is "crud[e]"). *Id.* at 377. *But see* E. LIND AND J. SHAPARD, *supra* note 84, at 93 (analysis of pilot court-annexed arbitration projects). A recent review of the literature by John Esser discovered inconsistencies in the results of studies designed to test the "effectiveness" of ADR along a number of criteria. Esser, *Evaluations of Dispute Processing: We Do Not Know What We Think and We Do Not Think What We Know*, 66 DEN. U.L. REV. 499, 532-33 (1989).

114. Posner, *supra* note 83, at 388. Judge Posner also speculates that judicial involvement in settlement, if it actually resulted in decreasing the expected cost of litigation, might result in an increase in the number of cases filed. Galanter, *supra* note 57, at 72.

115. *See, e.g.*, Posner, *supra* note 83, at 369-71.

of litigation, so ADR may well produce more settlements.[116] It also seems likely that settlement generally does cost less than adjudication.[117]

Even assuming *arguendo* that compulsory ADR reduces court congestion and litigants' costs, the question remains whether compulsory ADR reduces costs in a *manner* deserving support. For compulsory settlement mechanisms to be a desirable method of dispute resolution, the settlements they produce would have to be more equitable generally than the unmediated settlements they replace, or the settlement mechanisms would have to create settlements in cases that would otherwise go to trial *for reasons other than increasing the cost of trial itself.*[118] These special effects of ADR would have to occur frequently enough for the cost to be worth the candle. Delaying discussion of the first point, it is clear that neither ADR advocates, nor anyone else, know whether ADR tactics create settlements in cases that would otherwise go to trial. A review of the literature studies in this area demonstrates that as of yet no one has seriously asked or researched this question.[119]

(1) The promotion of settlement as a public good: some questions. Proponents of both case management and ADR promote settlements as public goods; that is, they argue that settle-

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116. *See* Galanter, *supra* note 57, at 69-72.

117. But the ADR proponents' claim is a comparative one. As Marc Galanter explains:

> Transaction costs in both adjudication and settlement mean that legal remedies will never leave the parties in as good a position as their substantive legal entitlements/obligations entitle them. Settlement can reduce the amount of transaction costs, but it cannot eliminate the paradox they introduce—that the distributive outcome always involves some departure from full legal entitlements/obligations. . . . The question is does settlement merely reproduce the "departure from equity" that pervades adjudication or does it redistribute it?

Id. at 71.

Galanter argues that "[t]here is reason to believe that some classes of litigants may capture a greater share of the benefits of settlement than others," and that "while there are savings from settlement, the ability to appropriate them is unevenly distributed." *Id.* at 72.

As Galanter has elsewhere argued, the ability to capture the benefits of adjudication is not evenly distributed, so it is possible that the net resource savings accrued by encouraging settlement justify the addition of "another layer of departure from equity." *Id.* *See* Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1975). But this is an argument that has yet to be convincingly made.

118. One must assume here that a decision by the court system to increase the cost of trial directly (by increasing filing fees, for instance) would be politically controversial.

119. *See, e.g.*, Esser, *supra* note 113, at 534-39.

ment is preferable to adjudication for society as a whole and ought to be encouraged (and subsidized) by the courts.[120] This is so not only because of the arguable cost savings involved in settlement over adjudication, but also because parties prefer settlement to adjudication,[121] and because settlement produces superior outcomes.[122] However, adjudication is heavily subsidized in our society not just because it serves as a way to resolve particular disputes between individual litigants, but also because it produces goods—precedents and other sorts of information—that can be used by those who are not parties to litigation to order their affairs. Cases that settle do not produce authoritative interpretations of law, and so do not produce at least one sort of positive externality that would justify a subsidy.[123] As one commentator observes, settled cases "avoid[] definitive resolution on causation, responsibility, degrees of blame, norms for future conduct and so forth in favor of summation of all unresolved matters in terms of a single sum of money."[124]

Settled cases can have a kind of precedential effect: they can become " 'benchmarks,' broadcasting guidelines about liability and damages," at least to those who know about the settlement.[125] In moving to increased use of ADR and to increased encouragement of settlement through case management, courts should not ignore these effects. Patterns of settlements, and the referral of classes of cases to mediation and arbitration, will inevitably affect underlying legal norms as defendants consider

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120. *See, e.g., Litigation Cost, supra* note 19; Will, Merhige & Rubin, *The Role of the Judge in the Settlement Process*, 75 F.R.D. 203 (1977); D.M. PROVINE, *supra* note 23, at 1-2.

121. It is plausible that people are in general more satisfied with settlements than with the results of adjudication since they ordinarily have more control over settlement; several studies have reported this result. Again, the results are far from uniform, and party satisfaction with settlement appears to be more a function of the perceived fairness of the process than anything else. *See* Galanter, *supra* note 57, at 64.

122. *See, e.g.*, sources cited in Galanter, *supra* note 57, at 56-59.

123. *See, e.g.*, Alschuler, *Mediation with a Mugger: The Shortage of Adjudicative Services and the Need for a Two-Tier System in Civil Cases*, 99 HARV. L. REV. 1808 (1986); Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984); Fiss, *Out of Eden*, 94 YALE L.J. 1669 (1985).

124. Galanter, *supra* note 57, at 77. This description is not true of court-annexed arbitration, which requires arbitrators to apply legal norms and find fault.

125. *Id.* at 81. These general effects are less likely where the terms of the settlements are confidential. Galanter argues that "[w]here parties and lawyers receive benefits for the suppression of information about settlements, we have what amounts to the appropriation for private benefit of the public goods produced through the dispute process." *Id.* at 82.

their potential liability exposure for conduct in light of ADR rather than litigation.[126] On this score, it might be important to give some thought to the array of interests represented by those who are currently championing settlement as preferable to adjudication—most notably defendants who are interested in settlement and ADR techniques as a shield from "negative publicity and from outcomes they have disliked."[127]

If settlements fail to produce the above described public goods that adjudication would produce, perhaps settlements should nevertheless be subsidized because they produce better results than adjudication; that is, perhaps settlements produce outcomes that are more just than those produced by litigation.[128] Whatever the validity of these arguments about settlement in general, there are special reasons to be suspicious of them in the context of settlements promoted through the use of court resources and court procedures. When judges themselves are involved in settlement, as they are encouraged to be by case management advocates, there are obvious concerns about impartiality, bias, and coercion.[129] In addition, litigants do not ordinarily choose to participate in the various ADR mechanisms currently offered by the courts; rather, their participation is required as a precondition to trial. Thus, courts give power to decision-makers through ADR but do not require the same sorts of accountability from these decision-makers that we have come to expect of judges. Informality is theoretically one of the virtues of voluntary ADR: through informality, skilled mediators and negotiators are supposed to be able to craft outcomes more responsive to the parties' needs and less destructive of long-term relationships that might exist between the parties. But court-required ADR is hardly voluntary, and when we empower deci-

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126. Galanter makes this point through a comparison of settled civil cases to "settled"—plea bargained—criminal cases. *Id.* at 81 ("Does a bargained plea . . . have a deterrent effect comparable to trial and sentence after trial?").

127. *Failing Faith*, *supra* note 80, at 538. Resnik notes that the "sudden [interest] in ADR . . . is prompted in part by . . . funds provided by corporations and insurance companies. . . ." *Id.* at 538 n.213. *Cf.* Garth, *Privatization and the New Formalism: Making the Courts Safe for Bureaucracy*, 13 LAW AND SOC. INQ. 157 (1988) (discussing "privatization" of disputes).

128. Galanter, *supra* note 57, at 63 (catalogs the arguments that settlements produce outcomes that are superior to litigation).

129. *See* D.M. PROVINE, *supra* note 23, at 92-93 ("Settlement-oriented judges . . . tend to resist the idea that judicial involvement in the settlement process might be coercive.").

sion-makers to act without the ordinary procedural constraints, we do so at society's peril.

As Judith Resnik argues, at least the adjudicatory process "offers some theory of its own limits, of what counts as permissible and impermissible adjudication. The 'alternatives' to it have yet to articulate how we might assess the legitimacy of the outcomes achieved."[130]

Because these procedures are not voluntary, we cannot even count on consent to legitimize the results of court-sponsored settlement negotiations. While parties can theoretically invoke their right to a trial, the existence of required, and costly, pretrial procedures will make some litigants unable to persevere until trial.

(2) Current uses of ADR: fairness and distribution. ADR raises other specific questions. For instance, what is the basis of the assumptions about the appropriate form of ADR for different kinds of disputes? Why is the minitrial with its focus on negotiated litigant control viewed as the superior ADR device for expensive commercial litigation, whereas compulsory arbitration—which imposes high costs on smaller claimants attempting to exercise their right to trial—considered the ADR method of choice for just those claimants?

ADR literature suggests that informed choices concerning the appropriate match of ADR technique and class of cases is possible. In fact, proponents of ADR suggest it is better than

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130. *Failing Faith*, *supra* note 80, at 546. Resnik states the problem eloquently:

> I am uneasy about approaches which slide over the problem of constraint. Adjudication is far from perfect. But what it offers is decisionmaking by government-empowered individuals who have some accountability both to the immediate recipients of the decisions and to the public at large. Our current definitions of adjudication include a packet of attributes which I continue to respect. Judges must work within the reach of the public; some of the processes occur literally in view of the public, and most decisions made in private are reported to the public. When juries decide, no reasons must be given; the community's judgment, as expressed by this ad hoc political institution, requires no explanation. But when judges, who regularly hold the government's power of decision, render judgment, articulated explanation is demanded. In many instances, unhappy litigants can voice their displeasure by invoking appellate review, and judicial decisionmaking is bounded by a series of norms about acceptable behavior. These safeguards are far from complete. . . .

Failing Faith, *supra* note 80, at 545-46 (footnotes omitted). *See also* Delgado, *ADR and the Dispossessed: Recent Books about the Deformalization Movement*, 13 LAW AND SOC. INQ. 145, 152-54 (1988)(discussing social science literature that suggests that ADR could be expected to increase risk of inappropriate considerations, such as race prejudice, in decision making).

adjudication because it allows disputants and decision makers to let "the forum fit the fuss."[131] However, the discussions of federal court ADR choices often appear to be based on nothing more than hunches regarding what certain classes of litigants can be forced to accept. For instance, several writers have indicated that court-annexed arbitration is the correct choice for smaller claimants because those with large claims would be unlikely to accept the results of arbitration as authoritative, while small claimants with limited resources would have little choice.[132] This is a description of coercion, not alternatives.[133]

c. Conclusions. ADR and settlement generally are being enthusiastically promoted as a response to caseload. We should nevertheless be cautious of this rush to dispute resolution. Nonvoluntary ADR is a relatively recent phenomenon yet to be fully examined. Therefore, we should carefully consider its full impact on important processes and values before embracing it. At minimum, we should be concerned that some ADR procedures abandon most of the formalities we associate with protections against arbitrariness, that the long-term effect of the routine use of ADR procedures on underlying legal norms is unknown, and that application of certain forms of ADR to some classes of litigants and not others raises distributional concerns.

4. Use of parajudicial personnel

One way to ease the pressure on judges is to delegate their work to others. District judges have available a variety of parajudicial personnel to whom tasks can be assigned, including law clerks, federal magistrates, and special masters. Persons in each of these positions have legitimate functions to perform, but their proliferation raises two concerns.

First, does caseload force judges to delegate judicial responsibilities to judicial adjuncts? Survey responses from trial judges

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131. Rosenberg, *Let The Tribunal Fit the Case: Developing Criteria for Channeling Matters into Dispute Resolution*, 80 F.R.D. 147, 166 (1977). *See* Sibley and Sarat, *Dispute Processing in Law and Legal Scholarship: From Institutional Critique to the Reconstruction of the Juridical System*, 66 DEN. U.L. REV. 437, 449 (1989) (challenging understanding of disputes as "sufficiently stable so that each dispute can be assigned to an appropriate process.").

132. *See Litigation Cost*, *supra* note 19; Posner, *supra* note 83, at 391.

133. Many of the current ADR mechanisms raise other fairness concerns. For example, courts use their power of conscription over jurors to provide the jury for summary trials, yet there is little positive authority for them to do so. *See* Posner, *supra* note 83, at 385-86.

detailed earlier suggest the answer is yes, and that the delegation usually takes the form of reliance on clerks to draft opinions.[134] Yet as Linda Silberman has recently noted, judges' reliance on special masters is growing, especially in complex cases. This reliance presents issues of proper judicial delegation, particularly where special masters are required to "report" on complicated dispositive motions.[135]

Second, have magistrates become the functional judges for some categories of litigants? In 1979, Congress authorized expanded jurisdiction for magistrates to "improve access to the federal courts."[136] The theory behind the creation of the magistrates' position was not to have them decide cases but to free judges from some of the pretrial tasks that interfered with deciding cases and writing opinions.[137] Yet, in 1988 magistrates disposed of 34,308 civil "proceedings and cases,"[138] and of those, 25,611 (75%) were prisoner petitions involving either civil rights, or habeas corpus, which represents 69% of all prisoner petitions terminated that year.[139] Another 7,312 (21%) were social security cases, or over half of the total number of social security cases terminated that year.[140] Other studies of magistrates' duties in

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134. *See* discussion, *supra*, under "*Sample of judges' comments: quality.*" The concerns raised by this use of clerks will be discussed in the section on appellate courts, *see infra* notes 157-60 and accompanying text.

135. Silberman, *Judicial Adjuncts Revisited: The Proliferation of Ad Hoc Procedure*, 137 U. PA. L. REV. 2131, 2157 (1989).

136. Federal Magistrate Act of 1979, Pub. L. No. 96-82, 93 Stat. 643 (amending 28 U.S.C. §§ 604, 631, 633-36, 1915(b), 18 U.S.C. § 3401).

137. *See generally*, Silberman, *Masters and Magistrates Part II: The American Analogue*, 50 N.Y.U. L. REV. 1297, 1321 (1975) (footnotes omitted).

138. ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 438 (1988) (Table M-4A: U.S. District Courts Proceedings and Cases Disposed of by United States Magistrates Pursuant to Title 28 U.S.C. Sections 636(B) and (C) During the Twelve Month Period Ended June 30, 1988). Almost half of the duties magistrates perform in the trial courts involve criminal matters. *Id.* at 36. One difficulty with comparing the workload statistics for the magistrates with other statistics about trial court caseload is that the information for Administrative Office statistics comes from reports from clerks of courts, whereas the magistrates' tables reflect the magistrates' self-reporting. For statistics compiled in Table M-4A, magistrates were asked to identify those cases in which they made reports and recommendations. Telephone conversation with Karen Hanchett, Magistrates Division, Administrative Office of United States Courts.

139. *Id.* at 203-04 (Table C-3B U.S. District Courts Civil Cases Terminated).

140. *Id.* at 203 (civil cases) and 408 (magistrate cases). However, this figure may not represent all of the social security cases disposed of by magistrates. Magistrates also disposed of 5,903 cases by consent of the parties. *Id.* at 438. Karen Hanchett at the Magistrates Division believes the majority of these to be social security cases.

the trial courts confirm that these cases are among magistrates most frequent duties.[141]

There has been continuing concern that cases assigned to magistrates may assume a second-class status.[142] The specialized use of magistrates tends to insulate judges from certain classes of litigants and certain kinds of conflicts.[143] Moreover, specialization may have hazards for magistrates: chiefly, it may make cases appear routine, and narrow the magistrates' conceptions about where these disputes fit into the rest of the legal landscape.[144]

C. *Trial Courts: Summary*

The judges' survey responses indicate that trials are not the primary cause of their stress and frustration. Rather, judges feel frustration because they have no control over either the number of cases or the number of judges available to deal with them, and they feel pressure to keep backlogs low.[145]

Most of the adaptations described above are judges' attempts to divert cases, to remove them from the queue waiting for trial. These mechanisms, however, have not solved the

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141. C. SERON, *supra* note 2, at 83-92; C. SERON, THE ROLES OF MAGISTRATES IN FEDERAL DISTRICT COURTS 16 (1983). Magistrates' roles vary from court to court, although using magistrates as specialists in social security and prisoners' cases is a prevalent model. *See also Civil Case Backlogs in Federal District Courts: Hearings Before the Subcomm. on Courts, Senate Judiciary Comm.*, 98th Cong., 1st and 2d Sess. 116 (1983 and 1984) (statement of Hon. David Bagwell, Magistrate, Mobile Ala.: magistrates in his district now trying all cases under 42 U.S.C. § 1983).

142. *See, e.g., The State of the Judiciary and Access to Justice: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 95th Cong., 1st Sess 106 (1977) (statement of Rep. Kastenmeir). *Id.* at 123 (statement of Burt Neuborne).

143. *See, e.g.*, Fiss, *The Bureaucratization of the Judiciary*, 92 YALE L.J. 1442 (1983).

144. *Compare* Kramer, *Jurisdiction Over Civil Tax Cases*, 1990 B.Y.U. L. REV. 443 (arguing that usual problems of judicial specialization do not apply in tax cases).

145. This pressure is intensified by the move to the individual calendar system, under which judges are assigned responsibility for a case at the time of filing. The individual calendar system allows courts to track the case termination records of individual judges. S. FLANDERS, CASE MANAGEMENT AND COURT MANAGEMENT IN THE UNITED STATES DISTRICT COURTS 13 (Federal Judicial Center 1977). The courts Flanders studied released monthly reports on the relative condition of each judge's docket. Flanders notes, "[i]f one purpose of the individual calendar system is to foster a spirit of competition with respect to disposition rates, it obviously has succeeded." It appears, however, that at least some judges are paying a price for this. One judge described the individual calendar system as "a highly introverting experience" and noted that there is "little sense that the courts' docket is a shared burden." *Id.* at 14.

judges' problems. Judges' written narratives reveal despair with what they feel are their choices to deal with caseload:

> [I am] [f]orced to use "case management" techniques to dispose of cases instead of giving full and fair hearing to many that deserve more.
>
> . . . .
>
> I have recruited four retired lawyers who each spend a day or two in chambers conducting settlement and discovery conferences. Without their contribution, I would be far less able to keep current.
>
> . . . .
>
> I need help!

The choices judges have made to cope with caseload, however, may lead judges to be even less satisfied with their work. To the extent that judges feel compelled to abandon judging for managing, diverting, settling, and delegating, they risk compromising both the reputation of the federal courts as a place to obtain justice, and their own sense that their job is to provide justice—that is, to judge.

III. The Federal Courts of Appeals

Of all the federal courts, the courts of appeals have been the most severely affected by increased volume,[146] and are at the same time most severely limited in the ways in which they can change procedures to accommodate caseload.[147] In contrast to the trial courts, case processing at the appellate level involves a limited number of tasks. In essence, judges decide motions, read briefs, hear arguments, confer about case dispositions, do research, and write opinions.[148]

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146. *See* R. Posner, *supra* note 6, at 65. The federal appellate court caseload has been a source of concern for at least 20 years. *See, e.g.*, Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 Harv. L. Rev. 542 (1969); Commission on Revision of the Federal Appellate Court System, Structure and Internal Procedures: Recommendations for Change 1 (1975) [hereinafter Recommendations].

147. As has been noted by many commentators, adding additional judges is a much more controversial response to caseload in the appeals courts than in the district courts, for example, because it threatens their ability to maintain a coherent body of federal law. *See, e.g.*, R. Posner, *supra* note 6, at 99-100; ABA Standing Comm. on Federal Judicial Improvements: *The United States Courts of Appeals: Reexamining Structure and Process After a Century of Growth*, 125 F.R.D. 523, 529 (1989).

148. This description ignores appellate judges' administrative duties. These duties may be time-consuming, especially for chief judges. *See* R. Wheeler & C. Nihan, Administering the Federal Judicial Circuits: A Survey of Chief Judges' Approaches and

With their limited procedural options, appellate courts have used two broad strategies to cope with caseload. First, judges have rationed the time they spend learning about cases by limiting or eliminating oral argument, and by relying on staff attorneys and law clerks rather than litigants to provide information about cases. Second, judges have rationed the time they spend disposing of cases by limiting conferencing, eliminating opinions or writing opinions not intended for publication, and delegating researching and opinion-writing tasks to clerks and staff. These strategies for reducing the burdens on judges have resulted in criticism from academics, the bar, and some of the judges themselves.[149]

To examine the strategies judges employ to deal with caseload, the Federal Courts Study Committee sent surveys to all federal appellate judges, including senior judges, asking for responses to questions regarding possible effects of caseload on their work habits, their use of staff, their courts' procedures, and their satisfaction with their jobs.[150] The judges' perceptions often diverge from the perceptions of the critics; their responses are reported below.

A. Judges' Narratives: Caseload and Job Satisfaction

Most of the responding judges (81%) reported the workload is "overwhelming" or "heavy."[151] The survey asked judges to "provide any additional information concerning the effects—if

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PROCEDURES (Federal Judicial Center 1982).

149. *See* Richman & Reynolds, *Appellate Justice Bureaucracy and Scholarship*, 21 U. MICH. J.L. REF. 623, 624-25 (1988) (collected articles).

150. The response rate was good: 113, or 74%, of the active judges responded, and 44, or 58%, of the seniors responded.

151. The complete question, and responses were:

Response	Number	%
Overwhelming	41	26.11
Heavy, but about what I was used to before I became a judge	86	54.78
Busy, but not burdensome	23	14.65
Fairly relaxed	2	1.27
No problem	1	.64
No response	4	2.55

It is difficult to interpret the response to the second option because of the clause that follows "heavy." Many judges simply lined through that clause.

any—of caseload pressures on how [they] do [their] work."[152] Seventy-eight judges (50%) took this opportunity to describe the effects of volume on their work and lives. Most of the judges reported they coped with caseload by working longer and harder. Almost every judge who wrote in response to this question mentioned increased hours:

> I find myself working virtually "around the clock."
>
> . . . .
>
> As the caseload has increased, I find that I do not have sufficient time to delve as deeply into the issues and to research the issues as deeply as I did in the past. Although my preparation for argument is the same, it remains the same at a sacrifice of time that I would spend on other activities. As a consequence, there is no time that I am free from brief reading or opinion writing. Court work has intruded on what passes for vacation time and it has become impossible to be away from a telephone or from communications with chambers for any period.
>
> . . . .
>
> Done properly, the work is overwhelming. The only way that I can do my work properly is to work nights and weekends. As long as one has the vigor, stamina and good health, it can be done. Eventually, this schedule is bound to take its toll.
>
> . . . .
>
> It is necessary to work longer hours than one should realistically expect to work in order to maintain quality. There is *no* weekend that is free of office work. Files must accompany me even on brief vacations.
>
> . . . .
>
> My work hours have increased to occupy substantially all of my available time. I would not today accept an appointment to this court if I knew the workload—but I have too much invested to get out.

Many of the judges spoke of the effect of long hours on their families, their personal lives, and their mental health:

> My typical day begins at 5:30 a.m. including weekends when I get most of my writing done. I feel I am becoming narrowly focused and less of a generally knowledgeable individual,

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152. The complete question was:

Please provide any additional information concerning the effects—if any—of caseload pressures on how you do your work. Are there areas not mentioned above that are affected by caseload? Has collegiality on your court been affected? Have your work habits or working hours changed? If so, how?

> and consequently in many ways less competent as a judge. I try to keep up friendships and have done so only because my friends are tolerant of my neglect. There is so little time for the pleasures of family and outside activities. I feel guilty when I do take any time off—like Sunday afternoon.
>
> . . . .
>
> Effects include anxiety, impatience, less time for reflection, tension, working evenings and weekends at home.
>
> . . . .
>
> I calculated I spent 299 days on judicial work last year. Since I took about two and one-half weeks of vacation, it will be seen that I worked on Saturdays more than half the time and on at least 15 or 16 Sundays. This is entirely too much for me and it is especially difficult for the younger judges who have the responsibility of families with small children. This known factor has caused one very able trial judge to indicate he no longer wished to seek the vacancy that will occur when I seek senior status.

Judges also frequently reported a lack of satisfaction in their work:

> [Caseload pressures] cause me to do more editing and less originating of draft opinions. This does not mean abandonment of judgment to law clerks, but decreases my enjoyment, because the drafting of an opinion from scratch gives me greater enjoyment. By the same token, there is less time for reflective reading—inside and outside the law. Instead, more and more time is spent on administrative matters, committee work, conferences. All of this diminishes the joy of judging.
>
> . . . .
>
> Caseload pressures greatly reduce one's sense of satisfaction with the job. I feel dirty at the end of the day, having made many decisions without time for proper reflection and analysis.

In response to a question about job satisfaction, only 12 judges replied that they found the job more satisfying than when they were first appointed. Sixty-three found the job less satisfying. Moreover, if offered their positions again, 89 judges (57%) replied they would "give the matter careful thought" and 14 replied they would "decline the offer." Only 30% of respondents (48 judges) would "jump at the opportunity."

B. Increases in Staff: The Appellate Bureaucracy

Because increasing the number of judges at the appellate

level is thought by many to produce more problems than it solves,[153] these courts have turned increasingly to law clerks and staff attorneys to reduce the burdens on judges. Appellate judges are now authorized to hire three law clerks.[154] Additionally, under guidelines adopted by the Judicial Conference, the courts are authorized to hire as many staff attorneys as there are active judges in the circuit.[155] In fact, this number has been exceeded in all but two circuits.[156] Law clerks typically work closely with a judge within chambers. Staff attorneys, on the other hand, work for the court as a whole.

1. Law clerks

The law clerk position was created to allow judges to hire recent law school graduates who would bring fresh insights and who would provide a sounding board for the judge's ideas. Their proliferation, which Judge Posner has dubbed the "Rise of the Law Clerk,"[157] has created at least two concerns.

First, clerks rather than judges are authoring opinions.[158]

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153. Concerns about large courts include the difficulty of maintaining intracircuit consistency with large numbers of judges, and the burden of remedying inconsistency when it occurs, which is generally accomplished through en banc proceedings that can be time-consuming and divisive.

Judges themselves are split on the question of handling increases in caseload by adding judges. The survey asked, "[i]f you could choose between adding judges to your court as the caseload grows and not adding judges (notwithstanding the growth in caseload), what would you do?" Eighty-two of the respondents, or 52%, would add judges. Fifty-two, or 33%, would resist adding judges, even if their own share of the caseload increased significantly. And seventeen judges, or 11%, would resist adding judges even if the backlog increased.

154. *See* J. OAKLEY & R. THOMPSON, LAW CLERKS AND THE JUDICIAL PROCESS: PERCEPTIONS OF THE QUALITIES AND FUNCTIONS OF LAW CLERKS IN AMERICAN COURTS 20 n.2.53 (1980). Chief judges are now authorized to hire four law clerks; several chief judges assign their fourth clerk position to the staff attorneys' offices. Office of Planning and Evaluation, SURVEY OF THE STAFF ATTORNEYS' OFFICES OF THE UNITED STATES COURTS OF APPEALS (DRAFT) 9 (1989) [hereinafter STAFF ATTORNEYS' OFFICES].

155. REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 69 (1982); STAFF ATTORNEYS' OFFICES, *supra* note 154, at 3-4. At the beginning of 1989, there were 162 staff attorneys within the appeals court system. *Id.* at 6. The congressional authorization for staff attorneys is found in 28 U.S.C. § 751 (1982).

156. In every circuit but the eleventh and the District of Columbia, the courts have supplemented their central staff resources either by some judges donating one or more of their law clerk positions to the staff attorneys' office or through hiring attorneys to fill positions within the clerk's office. STAFF ATTORNEYS' OFFICES, *supra* note 154, at 7-8.

157. R. POSNER, *supra* note 6, at 102.

158. *Id.* at 104-05. Almost every article critical of the delegation of opinion writing to clerks quotes Judge Rubin's comments about law clerks:

What are these able, intelligent, mostly young people doing? Surely not merely

Judge Posner has written candidly about the costs of relying on clerks to write opinions. He argues that clerk-produced opinions are longer, more opaque, and provide less information than opinions written by judges.[159] Moreover, they may lack authenticity, and opinions known to be authored by clerks rather than Article III judges might be viewed as less authoritative than those written by judges.[160]

Second, maintaining a staff of law clerks has its own costs because it requires a judge to spend more time hiring, supervising, and managing and less time reading, writing and thinking. Further, the judge who must supervise a staff of three law clerks as well as prepare for oral argument and read briefs may have little time to consult with colleagues, and thus collegiality may suffer.

2. *Central staff attorneys*

Staff attorneys' offices differ from circuit to circuit both in size and in the duties they perform. Some of the staff attorneys' offices, such as the one in the Ninth Circuit, are so large that they have specialized divisions.[161] Other offices have attorneys who perform specialized functions.[162] Staff attorneys' duties are

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running citations in *Shepard's* and shelving the judge's law books. They are in many situations "para-judges." In some instances, it is to be feared, they are indeed invisible judges, for there are appellate judges whose literary style [appears] to change annually.

Rubin, *Views from the Lower Court*, 23 UCLA L. REV. 448, 456 (1976).

159. R. POSNER, *supra* note 6, at 103-11.

160. *Cf.* Vining, *Justice, Bureaucracy, and Legal Method*, 80 MICH. L. REV. 248, 252-53 (1981) (suggesting that lawyers would not study opinions closely if they believed they were not written by judges). Notwithstanding Vining's argument, lawyers will probably continue to rely on opinions so long as they remain the only source of information available from which to make predictions about the outcomes of cases.

161. The recent survey of staff attorneys' offices disclosed the following:

> [The Ninth Circuit office has] two motions units: a criminal unit, composed of a supervisor and three or four line attorneys, which handled motions associated with direct criminal appeals, habeas corpus petitions brought by state or federal prisoners, prisoner civil rights cases and recalcitrant witness appeals; and, a civil motions unit, composed of a supervisor and seven to eight line attorneys, which processed all other motions. There were three research divisions each with a division chief and four to five line attorneys. The attorneys in the research divisions prepared memoranda on the merits of the appeal for presentation to the panel. In addition, the Ninth Circuit's staff attorneys' office had assigned three attorneys to hold pre-briefing and pre-argument conferences on all fully-counseled civil appeals.

STAFF ATTORNEYS' OFFICES, *supra* note 154, at 13-14.

162. Several circuits have attorneys who handle the substantive motions filed in

not defined by statute; they therefore are used differently in different courts. In most courts, however, the staff attorneys often screen cases to determine the need for oral argument.[163] In addition, in many circuits staff attorneys draft memorandum opinions for cases decided without argument.[164]

The use of staff attorneys to perform screening and drafting has provoked intense criticism.[165] Staff attorneys do not work consistently with any particular judge, and this lack of contact means that such attorneys may be "unable to acquire enough of the individual judge's outlook and values to function as [an] alter ego in the drafting process."[166] Lack of accountability to any one judge also may diffuse responsibility for the important decisions that staff attorneys make. Moreover, the screening function they perform may "insulate judges from the ebb and flow of the law and the full impact of the grievances presented."[167] For example, cases initially identified by a staff attorney as likely candidates for decision on the briefs may receive limited attention from judges since these cases are placed on a different decision track from those that are argued. "Thus, the most damning critique of central staff screening is that it creates the possibility that the real decision-makers will not be the publicly chosen and accountable judges, but rather a group of legal bureaucrats unknown to the bar and the public."[168] For this reason, the Commission on Revision of the Federal Court Appellate System recommended that central staff attorneys not be given responsibility for screening cases for disposition without oral argument.[169]

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connection with an appeal. *Id.* at 14.

163. Each of the circuits has slightly different procedures. In some circuits, the staff attorneys recommend both whether there should be argument in a case and the amount of argument to schedule. *See* J. CECIL & D. STIENSTRA, DECIDING CASES WITHOUT ARGUMENT: A DESCRIPTION OF PROCEDURES IN THE COURTS OF APPEALS 12-16 Table 2 (1985) [hereinafter DECIDING CASES I].

164. In eight circuits staff attorneys have some role in drafting opinions in non-argument cases. *Id.*

165. *See, e.g.*, McCree, *Bureaucratic Justice—An Early Warning*, 129 U. PA. L. REV. 777, 787 (1981) (growth of central staff "cancerous"); Fiss, *supra* note 143, at 1467 (recommending abolition of staff attorney positions).

166. Richman & Reynolds, *supra* note 149, at 629.

167. Fiss, *supra* note 143, at 1467.

168. Richman & Reynolds, *supra* note 149, at 629.

169. *See* RECOMMENDATIONS, *supra* note 146, 53-54 (staff attorneys should not identify cases for oral argument or draft opinions).

3. *Judges' perceptions on delegation: survey responses*

Appellate judges were asked a number of questions about whether caseload required them to delegate judicial work to clerks or central staff. The question of excessive delegation is initially complicated by the ambiguity surrounding what constitutes "judicial work": that is, what tasks can be delegated without fear that the judge's responsibility for the ultimate decision has been compromised? The questions in the survey required judges to consider and define for themselves the boundaries of proper delegation. Judges were initially asked how frequently they are forced to rely on law clerks to do things "that [the judges] believe [they] should do themselves." Judges who responded that such reliance occurred were then asked to describe the nature of the delegated work.

The majority of judges (63%) responded that they must rely on their clerks to do at least some work they believe they should do themselves, and 30% of respondents must do so "often" or "usually."[170] Many of the judges (113) took the opportunity to describe the delegated work. The variety of their responses indicates that judges may have different beliefs about the boundaries of "judicial work."[171] Some judges, for example, seem un-

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170. The complete question and responses were:

How frequently are you forced to rely on your law clerks to do some things that you believe you should do yourself?

Response	Number	%
Never:	18	11.46%
Almost never:	37	23.57%
Sometimes:	50	31.85%
Often:	41	25.11%
Usually:	9	5.73%
No response:	2	1.27%

171. The complete question and responses were:

If you are forced to rely on your clerks to do some things that you believe you should do yourself, what is the nature of that work?
Number of judges responding with written comments: 113
Drafting opinions: 62
Research (reading and analyzing cited cases, finding relevant authority): 57
Reviewing the record: 44
Reviewing petitions for en banc and rehearing: 5
Reading briefs: 4
Checking cites, legislative history, etc.: 6
Motions: 2
Bench memos/review of bench memos: 2
Editing: 2
Work on time-sensitive cases (extraordinary writs, death penalty): 2

comfortable with any reliance on work done by their clerks, even in checking case citations. The tasks mentioned most frequently by respondents, however, were opinion drafting, research, and reading the trial or administrative record.

Answers to other questions confirm that clerks play a large role in opinion drafting. In response to a question about opinion drafting practices, for instance, only 14 judges (9%) report that they prepare the first draft in all cases. Most respondents (115, or 73%) reported preparing the first draft in some cases, and 21 judges (13%) reported that they never prepare the first draft.[172]

Many judges wrote that caseload required they delegate much opinion writing to clerks:

> In this circuit, a judge has to turn out 150 opinions a year to stay current. It is not possible to do that without excessive reliance on the law clerks.
>
> . . . .
>
> Keeping current with the docket has to be a high priority for any judge. I am unable to keep my work current if I read the records and do the writing and take time for thinking in those cases where it is needed. I spend time moving mail with little decisions (protecting the law clerks from being interrupted) and editing the work of clerks.

Many of the judges also mentioned their reliance on the clerks' reading and interpretation of precedents required for a decision of a case:[173]

> Sometimes I rely on a law clerk's reading of cases when I am pressed.
>
> . . . .
>
> I am now forced to rely on my clerks for record examination and for research I would prefer to conduct myself. In the past I would draft all written materials. I now find that I am obliged to "plug in" memoranda or research that the clerks conducted.

Finally, judges often mentioned using clerks to read trial

Reading court's slip opinions: 2
Reading cases to prepare for argument: 2
Reading court's unpublished opinions: 1

172. Seven judges (4%) did not respond to this question.

173. Several judges specifically described the delegated work as "research essential to a conclusion." One judge noted that he must use his clerks for "reading and summarizing precedents that I must rely on without always having time to read the cases myself."

and administrative records, and many judges mentioned that they are required to rely on the clerk's reading, rather than their own.

Judges are less troubled by their use of the staff attorneys than by their reliance on their own clerks. Only 5% of the respondents believed they must "often" or "usually" rely on central staff to do work they should be doing,[174] even though almost 20% of respondents rely greatly on staff draft opinions in non-argued cases.[175] In response to a question about the nature of work delegated to staff, some of the respondents volunteered that the work done by central staff was "appropriate" or "not a problem."[176] One judge captured the view of several: "Central

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174. The complete question and responses were:

How often are you forced to rely on central staff to do things that you believe you should do yourself?

Response	Number	%
Never:	13	8.28
Almost never:	74	47.13
Sometimes:	53	33.76
Often:	7	4.46
Usually:	1	.64
No response:	9	5.73

175. The complete question and responses were:

In non-argued cases:

Response	Number	%
I rely on the staff draft opinion greatly:	31	19.75
I almost always go through the record and law thoroughly myself:	43	27.39
I sometimes go throug the record and law thoroughly myself:	48	30.57
My law clerks usually go through the record and law for me:	20	12.74
No response	15	9.55

176. The complete question and responses were:

If you are forced to rely on central staff to do things that you believe you should do yourself, what is the nature of that work?

Number of judges responding	61
Reading/checking record:	19
Drafting opinions/orders:	18
Motions:	13
Research:	11
Pro se/habeas/prisoners:	8
Administrative:	4
Jurisdictional issues:	4
Screening:	3
Bench Memos:	3

staff, in my opinion, does things that judges should not be doing, which is the reason for the staff."

4. Conclusions

The judges' responses provide some foundation for the critics' fears about delegation. Judges themselves worry that caseload forces excessive reliance on law clerks for opinion writing and for both the research required to make an opinion sound and the record-checking required to make it accurate. Moreover, the judges' responses justify some of the concerns about the use of central staff. While judges feel the staff's work is appropriate, they rely heavily on the work of staff attorneys in cases for which those attorneys are given responsibility. In some circuits, staff attorneys are responsible for a very large number of cases, many of which judges do not find intellectually challenging. As one judge stated, "The problem in handling the cases that occupy the staff attorneys' time is not our delegation of authority but rather the often trivial nature of those cases." If judges perceive it is the nature of the cases that is the problem, rather than the lack of time to devote to them, it is likely that many judges will continue to rely on central staff to alleviate this aspect of caseload pressures.

C. Effects of Caseload on Oral Argument

1. Limitations on oral argument

In 1975, the Commission on the Revision of the Federal Court Appellate System recommended appellate courts be given the authority to limit oral argument.[177] Rule 34(a) of the Federal Rules of Appellate Procedure gives appellate courts such authority in certain classes of cases.[178] As shown in Table 1 (appendix),

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"Case development work":	1
Their work appropriate/ "not a problem":	4

177. RECOMMENDATIONS, *supra* note 146, at 46-48. The Commission cautioned against the "too-ready . . . denial of the opportunity orally to present a litigant's cause." *Id.* at 48.

178. FED. R. APP. P. 34(a) states in relevant part:

> Oral argument will be allowed unless (1) the appeal is frivolous; or (2) the dispositive issue or set of issues have been recently authoritatively decided; or (3) the facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument.

courts of appeals have used Rule 34 to great effect: only half of the appeals courts hear argument in up to half of the cases they decide on the merits. Not only is argument less frequent today than previously, it is shorter when it occurs. Some courts routinely give some cases only fifteen minutes of argument per side.[179]

As Table 2 illustrates (appendix), argument rates vary considerably not only across courts, but across subject-matters involved in the appeal.[180] Some kinds of appeals, such as those involving antitrust or securities claims, are almost always argued.[181] Others, such as administrative review claims involving the immigration and naturalization service or social security, receive argument less than half the time.[182] One study of argument and screening practices in federal courts of appeals found striking differences in the subject matter of nonargument cases among circuits.[183] An example was the differences among circuits in dispositions of criminal appeals. The study found that the First, Fourth, Sixth, and Tenth Circuits decide a much lower percentage of criminal appeals without argument than they do civil appeals, while the Third, Fifth, and Eleventh Circuits dispose of a high percentage of both civil and criminal appeals without argument.[184]

Cases not argued are usually affirmed, and are affirmed at a greater rate than cases in which argument occurs.[185] Finally, as Table 3 shows (appendix), cases not argued are much less likely to be decided with a published opinion.

Rule 34(a) also states that parties shall have the opportunity to file a statement indicating why oral argument should be heard. Rule 34(f) allows parties to waive oral argument in cases that do not meet the standards of Rule 34(a).

179. P. CARRINGTON, D. MEADOR & M. ROSENBERG, JUSTICE ON APPEAL, 16-17 (1976).

180. *See also* Case Terminations by Selected Subject Matter, Table 5 (appendix).

181. In SY 1984, 90% of antitrust claims and 84% of securities claims terminated on the merits were argued. *Id.*

182. In SY 1984, 40% of INS review cases and 47% of social security cases were argued. *Id.*

183. J. CECIL & D. STIENSTRA, DECIDING CASES WITHOUT ARGUMENT: AN EXAMINATION OF FOUR COURTS OF APPEALS 20 (Federal Judicial Center 1987) [hereinafter DECIDING CASES II].

184. *Id.* at 23.

185. *Id.* at 30. The Third Circuit had the highest affirmance rate of nonargued appeals, 91%, and the greatest difference between nonargued and argued cases (61% versus 91%). The judges in the Third Circuit do not rely on staff attorneys to screen.

2. *Values of oral argument*

Oral argument serves many functions. Most obviously, it provides a way for judges to become informed about the issues raised on appeal. Judges

> also rely on oral argument to demonstrate to the parties that the members of a panel have attended to the issues raised on appeal, to permit interaction with members of the bar, to provide a forum for the presentation of issues of public concern, to acknowledge the court's responsibility for resolving such disputes, and to provide an opportunity for the judges to confer and hear each other's views.[186]

When judges do not meet for oral argument, it decreases the likelihood that a panel of judges will focus on the case at the same time.[187] Lack of oral argument reduces the judges' involvement in the case, makes them less accountable to litigants, and decreases the visibility of the appellate process.

The denial of argument does not affect all litigants equally. As Table 2 illustrates (appendix), some classes of litigants are much less likely to be heard on appeal. Indeed, some screening programs target classes of litigants, typically social security cases and civil rights cases, as presumptively suitable for decision without argument.[188]

D. Caseload and Publication

1. *Limitations on publication*

Every federal appellate court has adopted rules limiting the publication of opinions.[189] As a result, as shown in Table 4 (appendix), only a minority of the federal courts of appeals publish

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186. DECIDING CASES I, *supra* note 163, at 160.

187. Judges are sensitive to these concerns and different courts have adopted various methods of dealing with the problem of conferencing nonargued cases. *See* DECIDING CASES I, *supra* note 163, at 33-37 (describing circuits' approaches).

188. In the Fifth Circuit, for instance, staff attorneys responsible for the initial determination whether to recommend argument routinely screen prisoner cases with and without counsel, section 2255 cases with and without counsel, civil federal question cases, civil cases in which the United States is a party (e.g., federal tort claims act cases, bankruptcy cases, and [federal] agency cases other than tax cases), civil rights cases other than title VII, and Social Security cases. *Id.* at 23.

189. *See* D.C. CIR. R. 14; 1ST CIR. R. 36.1-36.2; 2D CIR. R. 0.23; 3D CIR. INTERNAL OPERATING PROCEDURES [hereinafter IOP] 5 (F); 4TH CIR. IOP 36.3-36.4; 5TH CIR. R. 47.5; 6TH CIR. R. 24; 7TH CIR. R. 53; 8TH CIR. IOP VI (B) & app.; 9TH CIR. R. 21; 10TH CIR. R. 17; 11TH CIR. IOP 36.

even half of their decisions on the merits.[190] Limited publication is a response to caseload; its rationale derives in part from the hope that significant amounts of time can be saved by not preparing opinions for publication, but simply preparing a statement suitable for the parties that explains the results of the appeal. Preparing publishable opinions is time consuming, and one study has determined that of all the possible efficiency-related devices adopted by appeals courts, limiting publication has the most effect.[191]

There are differences among the publication plans adopted by the circuits, but the assumptions underlying the plans are fairly uniform. The central assumption is that all decisions by the courts of appeals do not warrant publication.[192] This assumption is based on the view that appellate opinions serve two functions: first, to resolve particular disputes between litigants; and second, to advance the state of the law in some manner.[193] Clearly, appellate opinions may serve a host of other purposes including supervising the lower courts or providing a mechanism for interested or disinterested observers to keep track of how an agency is administering a statute. All of the publication plans, though, are based on the central assumption that opinions serving no law-making function need not be published.[194]

While the option most responsive to the concerns underlying the publication plans would be to eliminate opinions altogether, this option has proven unattractive to judges and liti-

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190. D. STIENSTRA, UNPUBLISHED DISPOSITIONS: PROBLEMS OF ACCESS AND USE IN THE COURTS OF APPEALS 40 (Federal Judicial Center 1985) (Table 2, appendix). As of 1984, only four circuits published a majority of their opinions. The Third Circuit published a mere 22.9% of its opinions that year. Even more dramatic differences within circuits are possible when one looks at publication rates within subject matter areas.

191. Marvell & Moody, *The Effectiveness of Measures to Increase Appellate Court Efficiency and Decision Output*, 21 MICH. J. L. REF. 415, 437-38 (1988) (limiting publication led to greatest increases in output; increasing staff had least impact).

192. This assumption underlies even those limited publication plans that have a presumption in favor of publication. *See, e.g.*, 1ST CIR. R. 36.2(a). *Contra* Reynolds & Richman, *An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform*, 48 U. CHI. L. REV. 573, 579 (1981) [hereinafter *Limited Publication*].

193. *Limited Publication*, *supra* note 192, at 579; Reynolds & Richman, *The Non-Precedential Precedent: Limited Publication and No-Citation Rules in the United States Courts of Appeals*, 78 COLUM. L. REV. 1167 (1978) [hereinafter *Non-Precedential Precedent*]; Leflar, *Some Observations Concerning Judicial Opinions*, 61 COLUM. L. REV. 810 (1961); Advisory Council on Appellate Justice, STANDARDS FOR PUBLICATION OF JUDICIAL OPINIONS 2-3 (1975).

194. Most of the publication plans also allow publication when the case is particularly newsworthy. *See, e.g.*, D.C. CIR. RULE 14(b)(7).

gants alike.[195] Instead, the publication plans adopted by the courts are a compromise: they eliminate only publication of opinions rather than the actual writing of the opinion. To conserve the savings associated with nonpublication, and to deter lawyers from using them, courts circumscribe the distribution[196] and citation of unpublished opinions. In part, limitations on citation are a reaction to concerns that some litigants who appear frequently before the federal courts might have better access to unpublished opinions than others, and that such differential access would be unfair.[197] As judges achieve some of the time-savings of nonpublication by writing less careful opinions, bans on citation were also thought necessary to assure that unpublished opinions would "disappear from the landscape, leaving no precedential trace behind."[198]

2. *Values of publication*

The centerpiece of American appellate review has been the articulated, reasoned decision. Criticism of nonpublication has, therefore, centered on the quality of nonpublished opinions. Limited publication also raises at least two other issues: first, differential access to the opinions has created a layer of "nonprecedential precedent"; second, as with oral argument, nonpublication disproportionately affects certain kinds of cases.

Explaining the reasons for the exercise of judicial power is the sine qua non of accountability. One study "found that in nine of the eleven circuits, at least twenty percent of the unpublished opinions failed to satisfy a very undemanding definition of minimum standards; in three circuits, sixty percent of the opinions failed to satisfy minimum standards."[199] In these cir-

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195. The Fifth Circuit attempted for a time to eliminate opinions altogether in a substantial number of cases. *See* Shuchman & Gelfand, *The Use of Local Rule 21 in the Fifth Circuit: Can Judges Select Cases of "No Precedential Value"?*, 29 EMORY L.J. 195 (1980).

196. In most circuits, the unpublished opinions are distributed only to the parties and the lower court judge whose decision was reviewed. D. STIENSTRA, *supra* note 190, at 21. In six circuits, they are also routinely circulated to all appellate judges on the court. *Id.* at 20. *See also* Robel, *The Myth of the Disposable Opinion: Unpublished Opinions and Government Litigants in the United States Courts of Appeals*, 87 MICH. L. REV. 940, 946 n.31 (1987).

197. *See* Robel, *supra* note 196, at 946 (study showed that litigants with greater access to unpublished opinions used them despite bans on citation).

198. *Id.* at 946.

199. Reynolds & Richman, *supra* note 149, at 634 (citing *Limited Publication*, *supra* note 192, at 626-30).

cuits, the unpublished opinions often did not even give parties the reasons for the outcome of the appeal.

Nonpublication also reduces judicial accountability, making evaluation of judges' work more difficult. Indeed, it can make their work invisible. Nonpublication is especially disturbing in that percentage of cases—in some circuits, an alarming percentage[200]—decided with neither a published opinion nor an oral argument. In these cases, parties have little assurance that the judges have paid attention to their case.

Besides diminishing the judges' accountability to the parties, nonpublication can diminish the judges' responsibility to the development of law and to fully explicate intra-court disagreements concerning the application of law. Some courts, for example, routinely leave unpublished many reversals of lower court decisions and many opinions that contain concurrences or dissents.[201] Unpublished decisions can thus mask significant disagreement on a court, and can make it more difficult for the traditional critics (the bar and the scholarly community) to discern trends in a number of areas, from the effect of agency decisionmaking on the implementation of a statute,[202] for example, to the way in which legal principles play out in application.[203]

Nonpublication also makes it less likely that a case will attract the attention of the United States Supreme Court for two reasons: first, the effect of an unpublished opinion is circumscribed by the rules against citation; and second, the substance of the opinions often makes review difficult. Justice Stevens has even argued that the use of unpublished opinions encourages "decisionmaking without the discipline and accountability that the preparation of [published] opinions requires."[204]

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200. Note that in 1984, the Third Circuit decided 52% of its cases without either oral argument or a published opinion. Table 3 (appendix).

201. In 1984 the Third Circuit left unpublished one quarter of its reversals and one quarter of the decisions with dissents; the Fourth Circuit left 35.7 of its reversals unpublished; and the Sixth Circuit left 41.1 % of its reversals and 21.2% of its dissents unpublished. By contrast, the Seventh Circuit left unpublished only 7 opinions with concurrences and dissents that year. Data, compiled by the Administrative Office of the United States Courts, are available through the Institute for Social Research at the University of Michigan. Information on how these data were derived is available from the author.

202. *See* Robel, *supra*, note 196, at 948-49 (discussing the Ninth Circuit's unpublished immigration opinions: Administrative Office data showed 39 concurrences in 1983 unpublished immigration opinions and 84 concurrences in 1984 unpublished immigration opinions).

203. *Id.* at 949-55 (discussing application of legal rules in unpublished opinions).

204. County of Los Angeles v. Kling, 474 U.S. 936, 940 (1985) (Stevens, J., dissent-

3. *Nonprecedential precedent*[205]

When publication plans were adopted, one of the fears expressed to the Commission on the Revision of the Federal Courts was that those litigants who frequently appear before the appeals courts would reap advantages through their familiarity with the unpublished opinions of the courts.[206] Because the federal government is always a party to certain types of appeals, and so routinely receives unpublished decisions in those areas, some concern has centered on government litigants' use of these opinions.[207]

Courts adopted limits on the distribution and citation of unpublished opinions in recognition of this possibility. One study of government litigants found they were not deterred by the no-citation rules from using their access to unpublished opinions to their advantage.[208] While prohibited from citing the opinions, the government (and presumably other frequent litigants) uses the opinions to make litigation decisions, write briefs, and make decisions about appeals.[209] Moreover, government offices review unpublished opinions in their subject areas with an eye towards moving that favorable opinions be published under court rules and practices allowing such motions.[210] When these motions are routinely granted, as they seem to be, they allow frequent litigants to stack the precedential deck in their favor.

4. *Differential impact*

Nonpublication, like limited oral argument, does not affect all litigants equally. As shown in Table 5 (appendix), some cate-

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ing). For the history of the *Kling* case, an adventure in nonpublication, see Robel, *supra* note 196, at 948 n.38.

205. Judge Robert Sprecher coined this term in his testimony before the Commission on Revision of the Federal Courts Appellate System. *See Non-Precedential Precedent*, *supra* note 193.

206. *See, e.g.*, 2 *Hearings Before the Comm'n. on Revision of the Federal Court Appellate System*, 94th Cong., 2d Sess. 1072 (1975) (testimony of Robert Stern). *See generally* Robel, *supra* note 196, at 945-46 (discussing testimony).

207. *See* Robel, *supra* note 196, at 955.

208. Robel, *supra* note 196, at 955-59 (discussing survey of government litigants).

209. *Id.* at 957.

210. *Id.* at 958. This study found that in 1982, the Seventh Circuit ordered published thirty previously-unpublished opinions. Of those, 73% involved a government litigant. The results in all cases that involved the federal government and changed status were favorable to the government.

gories of appeals, such as those involving aliens, prisoners, and social security claimants, result in decision through published opinions relatively infrequently. When publication figures in these areas are combined with argument figures, a picture of a second tier of appellate process emerges. While some cases, such as antitrust cases, usually are decided though argument and published opinion, others, such as immigration appeals, are decided without either argument or publication over half the time.[211]

E. Judges' Perceptions: Publication and Oral Argument

Although 87% of the respondent judges found oral argument "very helpful" or "often helpful," they disagreed with the critics who contend that oral argument is being denied in too many cases.[212] Indeed, most survey respondents were happy with the practices of their courts (despite the variation in practice from court to court),[213] and with the amount and frequency of argument.[214] Moreover, they feel they are almost always able to

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211. *See* Table 2 (appendix). *See also* Songer, Smith & Sheehan, *Nonpublication in the Eleventh Circuit: An Empirical Analysis* 16 FLA. ST. U. L. REV., 963, 980-84 (1989) (arguing that differences in publication rates between appeals involving "upperdogs" and "underdogs" reveal implicit biases in judges' use of nonpublication criteria).

212. The complete question and responses were:
I find oral argument

Response	Number	%
Very helpful	44	28.03
Often helpful	93	59.24
Rarely helpful	18	11.46
No response:	2	1.27

213. The complete question and responses were:
In my court, oral argument times are often:

Response	Number	%
Too short	11	7.01
About right	125	79.62
Too long	19	12.10
No response:	1	.64

214. The complete question and responses were:
How frequently do you feel that you are required to forego argument in cases that could benefit from it?

Response	Number	%
Never:	72	45.86
Almost never:	52	33.12
Sometimes:	26	16.56
Often:	6	3.82

afford argument in cases that need it. Other survey responses indicate judges believe they have sufficient time to prepare for oral argument (75%), and that only 16% "rarely or never" are able to prepare a bench memo before oral argument.

As was true with oral argument, judges are inclined to believe they are spending appropriate amounts of time on opinions,[215] and publishing those opinions that should be published.[216]

Judges' satisfaction with their own practices and the practices of their courts ought be evaluated in light of evidence that practices from circuit to circuit reveal a lack of agreement about the appropriate amount of attention due various kinds of cases. The survey responses might suggest that judges develop court-specific norms of treatments for various cases, and then view as appropriate that which is familiar.

In the general narratives about caseload, several judges noted that one of the effects of caseload is a changing collective sense of what constitutes "appropriate" attention to a case:

> Volume tends to cut down the time for thoughtful consideration of a case. Most cases receive sufficient consideration, but as volume rises, our sense of what is the appropriate time

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Usually:	0	0
No response:	1	.64

215. The complete question and responses were:
I feel I have sufficient time for the drafting of opinions:

Response	Number	%
Always:	33	21.02
Often:	69	43.95
Almost never:	43	27.39
Never:	6	3.82
No response:	6	3.82

216. The complete question and responses were:
How frequently are you required to forego writing opinions for publication in cases you believe should be decided by a published opinion, or otherwise reduce the amount of time you spend on a written opinion?

Response	Number	%
Never:	32	20.38
Almost never:	59	37.58
Sometimes:	46	29.30
Often:	16	10.19
Usually:	3	1.91
No response:	1	.64

for deliberation about a case is altered, and we accept a faster pace.

. . . .

There seems to be a complete lack of comprehension of the sheer volume of the work on the part of our newer- appointed judges. . . . The result has been the development of some short-circuiting of personal study which would not have been considered appropriate under preexisting standards established by the judges of our court when I first came on it. The sharing or division of research and prehearing memoranda by more than one judge often means that conflicting perspectives are not presented and judges unduly rely upon the work of one clerk. This is dangerous when, as often now occurs, some of the judges do not themselves read the parties' briefs but rely solely upon summaries prepared by a clerk, sometimes not their own. . . . It is very difficult to criticize [other judges] when they are already spending such an inordinate amount of time at their work.

F. Appellate Courts: Summary

The ways appellate judges receive direct information about a case are limited: they read the briefs and hear oral argument. Judges can also receive indirect information about a case in a number of ways: the case may be screened by central staff attorneys, or the judge may receive information about the case from law clerks. One consequence of judges' reactions to caseload, as implied by the discussion above, has been to decrease the amount of direct information a judge receives about a case. This decrease in direct information may imperil the reliability of appellate process.

Another consequence of adaptations to caseload is to decrease the contact judges have with litigants and their attorneys, and to decrease the frequency with which judges subject their work to outside scrutiny through publication of opinions. The increased inscrutability of the appellate process decreases the accountability of judges, and decreases the assurances that judges adhere to traditional modes of appellate decision making.

Furthermore, the disproportionate impact of screening and publication rules on different kinds of litigants, notably those pressing claims to statutory or constitutional entitlements, renders illusory the promise that high quality appellate justice is available for all. As Richman and Reynolds have argued,

> It might be quite sensible, in light of all the competing demands on limited societal resources, to restrict access to the circuit courts to litigants whose claims meet some test of monetary amount, societal interest, or legal merit; but surely if that strategy makes sense, we should adopt it publicly. It makes no sense to permit the public pronouncements of access to coexist with the actual practice of restriction.[217]

Judges' responses to the survey indicate that while they feel tremendous pressure and a decreasing sense of job satisfaction, they often believe they are able to perform all they are asked to do adequately through hard work.[218] Yet, as noted above, there are reasons to worry that the judges' perceptions might be at variance with reality.

Finally, while many judges reported they make time to do what they consider an adequate job, many also reported their worries about the long-term effects of profound caseload pressure. In their narratives, judges frequently mentioned lack of time for reflection and reading. For instance, judges reported they often have no time to read the opinions of their own courts (and sometimes of the Supreme Court), that they do not often have the time to help each other correct errors in opinions before publication, and that they lack the time to consider in any systematic manner the "precedent tracks" they are creating.

IV. Conclusion: Federal Courts and the Future

Discussions of the effects of caseload on the "quality" of judging are fraught with difficulties. My discussion of those effects rests on several assumptions. First, I have assumed that we have not agreed as a society to provide a "first" and "second" class justice in the federal courts. Second, I have assumed that the procedures that have traditionally defined federal court adjudication and appeal have reasons for being: that they are thought to assure accountability and nonarbitrariness. Accordingly, I have put the burden of proof on the adaptations to these procedures.

The procedures courts have adopted ideally should reflect the views of the polity. This nation has traditionally expressed a

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217. Richman & Reynolds, *supra* note 149, at 645.

218. Compare, for instance, judges' survey responses indicating that they devoted adequate time to oral argument and opinion writing, *supra* notes 212-15, with narrative responses, *supra* note 216.

preference for procedures that increase the probability of correct decisions rendered by impartial disinterested decision makers, under conditions that make those decision makers accountable and visible. These values are arguably well-served by a commitment to adversary proceedings conducted in public and concluded through reasoned decisions announced by judges. To the extent courts adopt practices in response to caseload that abbreviate or eliminate adversary proceedings, reasoned decisionmaking, or public accountability, they risk undermining these values.

Moreover, ours has been a commitment not only to just procedures, but to access to the federal courts for all litigants with federal claims, rich and poor, advantaged or despised. This commitment is eroded by the ad hoc rationing of judicial services in response to caseload. Judges justify rationing on a number of grounds. In their view, given the volume of cases, they are forced to make decisions about which cases really need the scarce resource of a federal judge—the reasoning ability, the experience, the judgment and the independence that appointment to the federal bench ought to represent.

But society has entrusted Article III status only to judges, and we need their judgment not only in elite cases, but in the more important routine cases through which ordinary citizens come in contact with the courts. Indeed, we need our judges most in ordinary cases, not to exercise the wisdom of Solomon (although we expect that as well) but to legitimately exercise the power of the government. And it is more than the form of legitimacy that is needed: more than the acceptance of a magistrate's report, or of a staff attorney's review of the record. It is in these "little" cases, in which there are great disparities of power and resources between the litigants, that judicial independence and involvement is most necessary.[219]

But complaints about federal court caseload and its effects are ancient and ubiquitous, and arguments about federal court caseload are almost always preludes to discussions about federal jurisdiction. Commentators often view caseload pressures on judges as arguments that classes of cases should be removed from the federal courts and sent, perhaps, to state courts or ad-

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219. *Compare* D. LUBAN, LAWYERS AND JUSTICE 63-66 (1989). Luban suggests that, in arranging procedural schemes, we ought to be concerned not only about protecting individuals from abusive uses of state power (as we are in criminal procedure), but also in assuring individuals' abilities to assert their legal rights against those who possess concentrated economic power.

ministrative courts instead. Before reaching that conclusion, however, we need to know more.

While this article argued judicial adaptations to caseload present challenges to legislative judgments about the courts and erode procedural fairness, there are limits to what we really know or can say about the effects of judicial adaptations to caseload on the availability of justice in the federal courts.

Inquiries into judicial procedure, such as this one, yield incomplete answers to questions about justice. An evaluation of justice in the federal courts would require looking at the outcomes of cases. Moreover, it is possible to interpret the changes judges have instituted in different, less critical ways. What looks like rationing can be seen, for instance, as an attempt to keep oversight by federal judges available in cases involving disparities of power (like social security disputes), but not requiring complicated legal analysis, where the alternative is removing these cases from federal court altogether. While movements away from traditional adversary procedures present threats to process values, we know little about whether the new procedures result in unjust outcomes. What we can no longer assume, however, is that judges are waiting for the outcomes of debates over jurisdiction to make decisions about who gets full service from the federal courts.

Table 1. Percentage and Number of Cases Disposed of Without Argument (SY 1986)[1]

Appellate Court	Total Number of Appeals	Number Without Argument	Percentage Without Argument
All	18,199	8,306	46
D.C.	707	309	44
1st	565	201	36
2nd	1,214	230	19
3rd	1,284	717	56
4th	1,743	874	50
5th	2,092	1,330	64
6th	1,793	723	40
7th	1,236	391	32
8th	1,314	660	50
9th	2,636	976	37
10th	1,179	644	55
11th	2,436	1,251	51

[1]**J. Cecil and D. Stienstra, Deciding Cases Without Argument: An Examination of Four Courts of Appeal** 20 (1987) (Deciding Cases II). These figures include only cases decided on the merits.

Table 2. Changes over Time in Number of Cases Terminated, by Case Type, and Changes, for each Type, in Percentage Decided Without Argument[2]

Type of Appeal	1987	1981	1984	1986	Percentage Increase in Number of Terminated Appeals
All	8,895	11,980	14,327	18,199	104
% not argued	33	29	36	46	
All Civil	5,507	7,828	9,643	12,177	143
% not argued	35	32	38	49	
Contract Actions	657	1,037	1,310	1,461	122
% not argued	29	25	28	31	
Antitrust/ Securities	273	344	344	315	15
% not argues	10	13	16	23	
Civil Rights	924	1,510	1,902	2,458	166
% not argued	31	30	36	44	
Prisoner Petitions	1,096	1,514	2,163	3,345	205
% not argued	56	54	64	77	
Social Security	274	504	741	780	184
% not argued	61	44	50	60	

[2]**Deciding Cases II**, *supra* note 183, at 26.

Table 3. 1984 Terminated Appellate Cases: Publication and Argument[2]

Circuit	Published, Oral Arg.	Unpublished, Oral Arg.	Published, No Arg.	Unpublished, No. Arg.
All	69%	25%	5%	27%
D.C.	69%	27%	.4%	3.6%
1st	61%	18%	4%	17%
2nd	43%	39%	2%	16%
3rd	23%	22%	4%	52%
4th	41%	44%	.9%	14%
5th	40%	14%	12%	35%
6th	34%	39%	1%	26%
7th	50%	18%	4%	28%
8th	65%	7%	19%	8%
9th	38%	34%	4%	24%
10th	40%	21%	7%	33%
11th	36%	15%	9%	40%

[2]Figures in this table include only cases decided on the merits.

Table 4. Publication Figures Appellate Decisions, SY 1985-1987[4]

Circuit	Decisions	Number Unpublished	Percent Unpublished
All			
1985	16,130	9,522	59.0
1986	17,643	10,526	59.7
1987	17,955	10,957	61.0
First			
1985	561	224	39.9
1986	549	217	39.5
1987	636	240	37.7
Second			
1985	1,248	715	57.3
1986	1,185	672	56.7
1987	1,182	623	52.7
Third			
1985	1,372	940	68.5
1986	1,264	888	70.3
1987	1,177	819	69.6
Fourth			
1985	1,535	1,191	77.6
1986	1,728	1,340	77.5
1987	1,675	1,343	80.2
Fifth			
1985	1,976	1,091	55.2
1986	2,000	1,086	54.3
1987	2,123	1,223	57.6
Sixth			
1985	1,756	1,242	70.7
1986	1,758	1,292	73.5
1987	2,177	1,689	77.6
Seventh			
1985	1,130	545	48.2
1986	1,216	442	36.3
1987	1,114	381	34.2
Eighth			
1985	1,263	423	34.2
1986	1,274	623	48.9

[4]Figures include only those cases decided on the merits.

1987	1,366	694	50.8
Ninth			
1985	2,087	1,315	63.0
1986	2,529	1,545	61.1
1987	2,473	1,492	60.3
Tenth			
1985	909	555	61.1
1986	1,076	637	59.2
1987	1,142	702	61.5
Eleventh			
1985	1,832	1,076	58.7
1986	2,379	1,406	59.1
1987	1,966	1,175	59.8
D.C.			
1985	488	205	42.0
1986	685	386	56.4
1987	924	576	62.3

Table 5. Case Terminations by Selected Subject Matter, All Circuits SY 1984

	Published, Argued	Unpublished, Argued	Published, Nanargued	Unpublished Nonargued
NLRB				
# cases (a)	233	128	8	38
% total (b)	57%	32%	2%	9%
LMRA				
# cases	101	82	37	55
% total	37%	30%	13%	20%
ERISA				
# cases	47	20	2	14
% total	57%	24%	2%	17%
INS				
# cases	25	64	11	122
% total	11%	29%	5%	55%
Securities				
# cases	123	61	4	32
% total	56%	28%	2%	14%
Antitrust				
# cases	171	46	7	18
% total	71%	19%	3%	7%
Civil Rights-Jobs				
# cases	343	269	45	232
% total	39%	30%	5%	26%
Social Security				
# cases	92	165	29	268
% total	17%	30%	5%	48%
Habeaus Corpus				
# cases	329	222	93	491
% total	29%	20%	8%	43%
Prisoner Civil Rights				
# cases	143	87	50	585
% total	17%	10%	6%	68%

(a) number of cases in subject-matter category
(b) percentage of total number of cases in category