Conference on Assessing the Effects of Legislation on the Workload of the Courts: Papers and Proceedings

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I. Introduction

At both the federal and state levels, recent court-sponsored efforts in long-range planning have led to a renewed interest in the relationship between legislation and court workload. In response to this interest, and as part of its mission to conduct and stimulate research relevant to judicial planning, the Federal Judicial Center (FJC) hosted a conference in April 1993 on assessing the effects of legislation on the workload of the courts. The conference was held in the Thurgood Marshall Federal Judiciary Building in Washington, D.C., and Judge William W Schwarzer, then-director of the FJC, provided the opening remarks. The purpose of this conference was to facilitate current efforts in judicial impact assessment by providing a forum where a broad spectrum of individuals with a shared interest in this area could come together to exchange information and ideas. This publication provides a record of the papers prepared for this conference and a summary of the conference proceedings.

The conference consisted of a policy session, a theory session, and an applied session. Discussions in the policy session focused on the role of judicial impact assessment in the broader context of communication between the judiciary and the legislature. The panel for this session included members of the state and federal bench, congressional staff, and the Brookings Institution. Discussions in the theory session focused on the theoretical underpinnings of judicial impact assessment, as well as the political environment in which judicial impact assessments are produced and how that environment affects their development and presentation. The panel for this session consisted of academics who have made important contributions to this area of study. Finally, discussions in the applied session focused on the nuts-and-bolts issues associated with actually producing judicial impact assessments. The panel for this session comprised individuals who have had hands-on experience with some aspect of judicial impact assessment. Panelists were drawn from the administrative offices of the state and federal courts, the National Center for State Courts (NCSC), the U.S. General Accounting Office (GAO), and the FJC.

This publication is organized as follows: To provide some context and facilitate a better understanding of the general themes discussed at the conference, Part II includes background information on how legislation affects court workload and on the historical development of judicial impact assessment as a tool by which to measure this effect; Parts III through V con-

tain the papers prepared for each session—in those instances where ideas broached in the plenary discussions extend or supplement the material provided in the written contributions, summaries of those discussions are also included; and Part VI presents concluding remarks. Some of the authors have made additions or changes to their papers to incorporate more recent information.

Opening Remarks

William W Schwarzer
Federal Judicial Center

I want to welcome you to this conference on assessing the effects of legislation on the workload of the courts. This conference was initiated by the Planning and Technology Division of the FJC as part of its mission to support the Long Range Planning Committee of the Judicial Conference of the United States by stimulating and conducting research relevant to the committee's planning efforts. An additional goal of the conference is to support the mission of the Administrative Office of the U.S. Courts in the area of judicial impact assessment by providing information that may prove useful to the ongoing efforts of the Judicial Impact Office.

At both the federal and state levels, recent court-sponsored efforts in long-range planning and legislative–judicial relations have led to a renewed interest in the relationship between legislation and court workload. Particularly relevant for long-range planning is an evaluation of the impact on the court's caseload of statutes that create or extend federal courses of action and remedies.

To what extent can the courts plan for caseload trends associated with particular causes of action? Which forecasting methods are the most accurate for this purpose? How should we construct our data-collection activities in the future to facilitate these forecasts? When does Congress need an evaluation of potential court workload impact in its deliberations on proposed legislation, and how can the information provided by these evaluations be communicated most effectively?

To consider these and other questions, we have invited participants with a wide variety of perspectives, but with a shared interest in the role that statutes play in generating litigation. In the larger context, this conference can also be viewed as the kind of cooperative effort advised by participants at last year's conference on state–federal judicial relationships in Orlando, Fla. Planning for change in complementary state and federal judicial systems requires a coordinated examination of the relationship between litigation and legislative initiatives. In studying the effects of legislation on the workload of the courts from a variety of perspectives, we hope to further our understanding of how judicial systems adapt to change and prepare for the future.

Thank you for your participation in this conference.

II. Background

The following discussion of the ways in which legislation affects court workload—and the description of the historical development of judicial impact assessment as a tool for estimating the magnitude of that effect—helped frame the issues considered at the conference.

How Legislation Affects the Courts

Legislative proposals typically affect court workload in one of three ways: operationally, substantively, or through judicial interpretation. Operational impact has the most obvious effect on the courts and is therefore the type of impact most frequently addressed in judicial impact assessments. It involves legislation that would directly affect court procedures (e.g., adding or modifying procedures for bringing a person to trial, conducting a trial, sentencing, or appeal); court administration (e.g., altering the responsibilities or number of court personnel); or court financing (e.g., increases or decreases in budget appropriations). Substantive impact involves the elimination or creation of statutory causes of action (e.g., the elimination of diversity jurisdiction in the federal courts). Finally, legislation can affect court workload if the wording of a statute requires judicial interpretation. Judicial impact in this situation occurs not because of what the legislation says, but because of what it either omits or does not say clearly. As U.S. Supreme Court Justice Ruth Bader Ginsburg wrote when she was a circuit judge, "because statutes sorely in need of more definite statement are susceptible of diverse interpretation, they inspire litigation. . . ." and can generate inconsistency and disagreement among the lower courts.[1]

Development of Judicial Impact Assessment

In his 1972 address on the state of the judiciary, Chief Justice Warren Burger called for judicial impact statements as a tool to assist the federal judiciary in "rationally plan[ning] for the future with regard to the burdens of the courts." Congress could, he said, require them, in similar fashion to environmental impact statements, to accompany all proposed legislation that would likely create new cases in the federal courts. He pointed to the Criminal Justice Act of 1964 and the Bail Reform Act of 1966 as well-motivated statutes that had unintended consequences on the federal courts' ability to administer criminal justice.

Chief Justice Burger's address generated a wave of interest in judicial impact assessment at both the federal and state levels. Federal court caseload data at the time showed that civil actions under statutes had increased from 13,427 filings and 23% of the civil caseload in statistical year 61 to 43,750 filings and 47% of the civil caseload in statistical year 71.[2] Several research projects were initiated during the late 1970s. The most comprehensive of these was conducted under the auspices of a National Academy of Sciences (NAS) grant, which charged the Panel on Legislative Impact on Courts to evaluate "the feasibility of estimating the changes in workloads that courts would experience with the adoption of new legislation."[3] The panel reached two conclusions in its 1980 report. It found that, as proposed by Chief Justice Burger, the application of judicial impact assessment to all legislation that might create new cases in the courts was not feasible because the empirical and theoretical tools necessary for such across-the-board forecasts were not yet available. Importantly, however, the panel also determined that the process did seem feasible "if a more modest view [was] taken" of the goals of judicial impact assessment, employing it only "in selected instances" for specific legislative proposals.

In the wake of this report, interest faded in judicial impact assessment at the federal level. One possible explanation for this decline in interest is that at the federal level, judicial impact assessment became tied up in a larger effort to forecast caseloads primarily for the purpose of anticipating future judgeship needs. (In fact, much of the discussion in the NAS report explicitly assumed that judicial impact assessments would be used for this purpose.) When it became apparent that across-the-board judicial impact assessments were not tenable, their usefulness within this larger effort was compromised, and interest waned.[4]

At the state level, however, judicial impact assessment remained the subject of continued, if sporadic, attention for two reasons. First, following the "more modest" approach suggested in the NAS report, states used these assessments to forecast the judicial impact of selected legislation only. Second, state judiciaries were less reluctant than their federal counterpart to use judicial impact statements to communicate with their legislatures in order to influence policy.[5] As a result, during the 1980s judicial impact assessment continued to develop and spread in the states.

Recently, because of a new focus on planning and legislative–judicial relations in the federal and state judiciaries, there has been a renewed interest in judicial impact assessment at all levels of government. At the national level, the Federal Courts Study Committee recommended in its 1990

report that "an Office of Judicial Impact Assessment should be created in the judicial branch." Subsequently, such an office was created in the Administrative Office of the U.S. Courts.[6] Also, in 1991 the American Bar Association called on Congress and each state legislature to establish mechanisms within their budgeting processes to generate judicial impact statements for each bill or resolution potentially affecting the federal or state courts.

At the state level, in 1989 and 1990 the NCSC and the National Conference of State Legislatures cosponsored a project called "The Future of the State Courts: Legislative–Judicial Partnership." One part of this project focused on the use of judicial impact statements as communication and problem-solving mechanisms between the first and third branches. According to NCSC surveys of state and federal court administrative offices, judicial impact assessment had proved valuable in reducing unanticipated burdens on the court system, improving communication, and fostering a sense of legislative–judicial cooperation.[7] In August 1992, the NCSC began a separate project for the Conference of State Court Administrators. The project, funded by the State Justice Institute, was to develop and test a process for measuring the impact of federal legislation on the state courts.[8] The final report from this project was released in August 1994.[9]

In light of these developments, the FJC concluded that the judiciary would benefit if some of the many disparate individuals working in this field could come together to exchange information and ideas. The Conference on Assessing the Effects of Legislation on the Workload of the Courts was designed to provide such a forum.

III. Policy Session

Panelists in the policy session were asked to discuss communication between the judiciary and the legislature and the appropriate role of judicial impact assessments as a vehicle for such communication. In their written contribution to this session, the Honorable Shirley S. Abrahamson, of the Wisconsin Supreme Court, and Gabrielle Lessard, then serving as Justice Abrahamson's law clerk and now Skadden Fellow at the National Economic Development and Law Center, Oakland, Cal., provide an excellent framework for the discussion by describing various state government attempts to solve the unique problems associated with communication between the judiciary and the legislature.

In the first half of their paper, they discuss the development of judicial impact assessment in the states and draw on the lessons learned from that development to describe seven characteristics that enhance the effectiveness of judicial impact assessment as a vehicle for interbranch communication. The authors then move on to a more general discussion of interbranch communication and describe the pros and cons of certain legislative, judicial, and interbranch institutions that have been created in the states to deal with the issues of interbranch communication, statutory interpretation, and legislative revision.

In the final part of this section, a summary is provided of those portions of the oral presentations and plenary discussions from this session that extend or supplement the material provided in Justice Abrahamson's and Lessard's paper.

Interbranch Communications: The Next Generation

by Shirley S. Abrahamson
Justice, Wisconsin Supreme Court
and
Gabrielle Lessard
Skadden Fellow, National Economic Development and Law Center, Oakland, Cal.

Commentators have long recognized that the first and third branches of our government—the legislature and the judiciary—stand in "proud and silent isolation" from one another.[10] As the world grows increasingly complex, many question whether maintaining that isolation is wise, let alone feasible.

The two branches are functionally intertwined. In fact, they are dependent on one another. The judicial system is financed by legislative appropriations. New legislation has an impact on the administration of justice. The courts' interpretations of statutes determine whether the legislature's objectives are effectuated. Many are convinced that measuring and minimizing the impacts of legislation on the courts will aid in preserving the courts' ability to keep pace with their growing workload, ensuring adequate funding of the courts, improving the quality of statutory enactments, and improving the administration of justice.

These goals might be realized by increasing communication between the judicial and legislative branches. Yet where should the communication begin? The judiciary and legislature do not know how to talk to one another. Neither branch understands the "constraints, limits, incentives, motivation and attributes" of the other.[11] Under the combined force of constitutionally mandated separation of powers, our respective codes of ethics, and a general sense of institutional propriety, we are uncertain if we should be talking at all. We judges have been taught that involvement in matters that might later come before our courts may taint our decision making. And we worry that legislators and others will consider our involvement in the legislative process inappropriate, or that such involvement will jeopardize the legitimacy the courts derive from their independence of the political process.[12]

Regardless of our trepidation, the time has come for a serious examination of interbranch communication. Today we explore mechanisms by which, in Judge Cardozo's words, "[t]he spaces between the planets will at last be bridged."[13] This conference may be viewed as part of a continuing effort to develop such interplanetary communications.

This conference is primarily dedicated to the federal legislative and judicial branches and to development of judicial impact statements for congressional use. Our comments on measuring the effect of legislation on the courts and on interbranch communication are offered from the perspective of persons working in the judicial branch at the state level.

Judicial Impact Statements

Interest in measuring the impact of legislation on the courts goes back about thirty years. We therefore turn first to judicial impact statements, which had their genesis in the example provided by environmental impact statements.[14] By allowing the judiciary and legislature to share information about the administration of the judicial system, judicial impact statements can serve as valuable tools for communication and education among legislators, judges, and the public.

Development of Judicial Impact Assessment

In 1970, California became the first state to produce a judicial impact statement.[15] Chief Justice Warren Burger proposed the adoption of judicial impact statements in a 1972 address to the federal judiciary,[16] and the preparation and study of judicial impact statements became a priority in the Justice Department's Office for Improvements in the Administration of Justice under President Carter.[17]

During the late 1970s and early 1980s, measuring the impact of legislation on the courts was a subject of academic and scholarly interest.[18] Interest in the subject has been renewed in recent years. In 1990, the Federal Courts Study Committee proposed an Office of Judicial Impact Assessment that would forecast the additional judicial branch resources needed to process litigation likely to be generated by the adoption of proposed statutes, executive branch actions, or judicial decisions.[19] And in 1991, the American Bar Association (ABA) adopted a resolution supporting federal and state legislation mandating judicial impact statements.[20]

The level of interest in creating judicial impact statements may exceed the degree of consensus about what they are. For example, the Judicial Conference in our home state of Wisconsin resolved in October 1992 to

"draft, introduce and work for the passage of the requirement of a Judicial Impact Statement" on all pending legislation.[21] For several years the office of the Wisconsin Director of State Courts has been preparing statements for the legislature on the fiscal impact of bills on the courts. To many, these fiscal estimates (or notes) are judicial impact statements. Others protest they are not.[22]

The Institute for Court Management explains the distinction between fiscal notes and judicial impact statements in terms of purpose: The "fundamental purpose of a fiscal note is to provide a reliable estimate of the impact of a bill or resolution on state revenue**s** and expenditures," while "[t]he primary purpose of a judicial impact statement is to provide an analysis of the effects of legislation that extend beyond those that are easily quantifiable."[23] Examples of impacts of proposed legislation that cannot necessarily be reduced to dollars and cents include changes in caseload and caseload mix, modification in court procedures, increased numbers of pro se litigants, and changes in personnel responsibilities.[24]

Despite their theoretical advantages, judicial impact statements assessing both fiscal and nonmonetary impacts are not widely used, nor is the methodology of their preparation well developed.[25] At present we not only lack the databases necessary to generate the statements, but we are unsure about what information we should collect and how to gather it. Further, information is stored different ways in the various courts, in the legislature, and in executive branch entities such as prosecution offices, law enforcement offices, and correctional institutions.

Lessons from the States

The questions presented by the development and use of judicial impact statements are complex. We can, however, look to analogous experiences for direction. Because "the most frequently reported measure of judicial impact is estimated change in fiscal expenditure,"[26] the states' experiences in developing and using fiscal estimates can provide useful insights about judicial impact statements. Researchers might also look to the experiences of the Congressional Budget Office and the Office of Management and Budget.

In 1967, Wisconsin became the first state to require fiscal estimates on bills affecting government costs[27] and to prohibit legislative action on any bill until the required fiscal estimate is received.[28] In Wisconsin, as in other states, the director of state courts is requested to prepare fiscal estimates for bills identified as affecting the courts.[29] These fiscal estimates serve as

the state's judicial impact statements. For example, in response to proposed legislation that would require an unemancipated minor to obtain parental consent before an abortion, the director of state courts filed a fiscal estimate indicating that the court system's workload would increase if the bill were enacted. The fiscal note estimated that costs would be incurred for increased criminal actions, which would mean additional judge and court reporter time in the more populous counties, and for increased use of counselors, guardians ad litem, intake workers, witnesses, and transcripts. The estimate, which was based on other states' experiences with parental consent statutes, failed to specify a monetary figure, and instead stated that costs would increase by an indeterminate amount.[30] A district attorney's fiscal estimate for the same bill stated that it was impossible to estimate the costs under the proposed legislation.[31] The State Public Defender estimated increased costs ranging from $160,000 to $410,000,[32] and the Department of Health and Social Services filed a lengthy analysis stating that its costs would increase by over $10 million.[33]

The states' experiences with fiscal estimates are fertile sources of information for the development and use of judicial impact statements. Several observations emerge from the states' experiences.

First, objectivity is critical to the preparation of useful judicial impact statements. The Wisconsin manual for the preparation of fiscal estimates repeatedly stresses that the cost-assessment function must not be politicized, instructing that "[a] fiscal estimate should accurately, factually, dispassionately and objectively set forth the total fiscal impact estimated to occur when the bill becomes law. It should neither endorse nor oppose the bill, nor concern itself with the bill's merits as a matter of public policy."[34]

Although impact statements may be prepared best by the agency or entity most familiar with the subject matter of a bill, the legislature may be distrustful of the preparer's self-interest. As the range of responses to the Wisconsin parental consent bill suggests, fiscal estimates can be important ammunition for both proponents and opponents of proposed legislation.[35] So, too, the preparation and use of judicial impact statements can have political consequences.

Whoever prepares impact statements develops expertise and a cumulative database. Information about proposed legislation and the ability to disseminate it are important sources of power. Those with access to information analyzing pending legislation, especially in the form of "challenge-resistant" data, have the capacity to shape the debate. Thus, the preparation and dissemination of judicial impact statements may change the bal-

ance of power in the legislative arena in subtle but important ways. Abuses in the preparation of judicial impact statements, whether real or perceived, have the potential to damage interbranch relations. These circumstances necessitate careful consideration when structuring the preparation of the statements.

On the one hand, perhaps it would make sense to place an office of judicial impact assessment in the legislature, where the staff of the new agency and of other legislative agencies would be more likely to form close working relationships. The legislature may be more likely to accept an analysis prepared by its own staff than by an agency located in another branch of government.

On the other hand, since impact on the judicial branch is at issue, it might make sense to place the office of judicial impact assessment in the judicial branch, thereby utilizing the significant expertise of judges and judicial administrative staff. The role of judges in the preparation of judicial impact statements requires more attention. In the absence of databanks, preparers of impact statements may do well to rely on judges' anecdotal accounts of their experiences.

Or perhaps an interbranch entity would help to guard against interbranch rivalry or suspicion, as well as to ensure the integrity of, and build confidence in, the process.[36] Court staff could act in a support capacity to such an entity, providing information from court records and performing technical evaluations.

Second, accurate cost estimates are essential to the preparation of useful judicial impact statements. Sophisticated, technically skilled staff trained in economics, social sciences, or statistics may be necessary for a correct analysis of the relevant factors.[37] The Wisconsin court system does not have such trained persons to help prepare fiscal estimates.[38]

While it is probably not feasible to maintain this kind of technical staff in every governmental unit responsible for drafting legislation or regulations that might affect the courts, a central resource group might be created to assist the legislature, executive agencies, and the judiciary in preparing impact statements. Since such a central entity would be independent of either branch, it could be perceived as more objective.

Third, the development of judicial impact statements is a time-consuming, expensive, and inexact process. The methods employed in developing fiscal estimates vary widely.

In Wisconsin, the preparer of the fiscal estimate is urged to set forth the methods used to arrive at the estimated costs or savings and to specify all

assumptions used in developing the estimate, particularly when the provisions in the bill are permissive or vague. As a practical matter, fiscal estimates do not always provide these details. As the fiscal estimates for the Wisconsin parental consent bill demonstrate, an agency may give a wide dollar range of estimated impacts or may decline to specify any dollar amount, stating that the estimated fiscal impacts of proposed legislation are speculative. In many cases, it simply is not possible to be specific; empirical data may not be available. Even though Wisconsin agencies that develop fiscal estimates are encouraged to use other states' actual experiences under similar laws, extrastate information does not always exist.

And despite Wisconsin's emphasis on detail and specificity, estimates must be produced quickly. A legislative rule requires that fiscal estimates be furnished within five working days of receipt of a bill, except under limited circumstances. The short time frame suggests a legislative preference for quick results, regardless of whether further study would produce more accurate information. The large volume of bills for which fiscal estimates are required, combined with these time limitations, perforce restricts the quality of the fiscal estimates provided.

These experiences with fiscal estimates suggest that it would be most practical to use judicial impact statements in a limited way.[39] Perhaps impact statements could be prepared only for selected bills—bills viewed as having a good chance of passage or bills most directly affecting the courts.

Fourth, to be effective, judicial impact statements must be kept current as bills move through the legislative process. In Wisconsin, fiscal estimates are not generally revised as bills are amended; thus, their usefulness for planning purposes is significantly diminished. Ideally, impact statements should be available to legislators and the courts not only during the initial debate but also throughout the process of legislative revision.

Fifth, to the extent that data can be collected, retained, and analyzed, judicial impact statements have the capacity to become more sophisticated over time. Neither Wisconsin's legislative fiscal office nor the director of state courts now collects or examines data about the impact of legislation after a statute is enacted. This omission is significant. A database containing a history of actual impacts of enacted legislation could be used to improve the accuracy of projections and to streamline the process of developing impact statements.

Sixth, judicial impact statements will not be effective if they are not used. Statements must therefore be developed in ways that ensure their usefulness to—and use by—legislators, legislative staff, judges, and judicial

administrative personnel. Since part of making them useful is making them available, impact statements should be widely distributed and readily accessible to potential users.

Finally, measuring the impact of proposed legislation is only part of the picture. We must also strive to minimize the unintended impacts that may result from deficiencies in draft legislation.[40]

We all know that some drafting error is unavoidable and that purposefully created ambiguities are not candidates for elimination.[41] Nonetheless, many deficiencies in drafting are probably the result of oversight by the legislator or the drafter. Even if these cannot be completely eliminated, their number can be reduced.

The Federal Courts Study Committee has developed a checklist of frequently occurring statutory ambiguities that have required judicial interpretation.[42] This checklist is designed for use in drafting and reviewing proposed legislation.

One possible technique is for the legislative branch to use this checklist. Under the Federal Courts Study Committee's proposal, an office in the legislature would be responsible for reviewing proposed legislation to see whether the various items had been addressed.[43] Congress recently declined to codify the Federal Courts Study Committee's proposal.[44]

Although checklists of technical matters are common tools in legal drafting, checklists of substantive issues are found in few, if any, drafting agencies. At a recent conference of state drafting agencies, we discovered that not one agency in attendance used a checklist of substantive issues.[45]

We need to ask ourselves why checklists of substantive issues have not been more eagerly embraced by legislative drafting agencies. Lack of usefulness does not seem to be the reason. When asked whether his office would use a substantive checklist, Wisconsin Legislative Reference Bureau Deputy Chief Peter Dykman responded with an emphatic yes—and with a request for a copy of the federal checklist. Asked about the potential that a judicially inspired checklist would generate resentment, Dykman responded that the bill drafter's goal is to carry out the intent of the legislature, and any resources that would help in finding and expressing that intent would be welcome. Dykman further noted that the judiciary's concerns about legislation are important to drafters; the power to interpret statutes gives the judiciary a major role in determining whether the legislature's intent will be carried out.[46]

It would also be possible to locate responsibility for substantive and technical review of legislation in the judicial branch. In Wisconsin, each

entity preparing a fiscal estimate, including the director of state courts, is encouraged to improve the quality of a bill by furnishing the bill's author with a "technical memo" (separate from the fiscal note), highlighting oversights or errors in the bill.[47] These technical drafting suggestions have proved very helpful to the Wisconsin legislature. In like manner, an office preparing a judicial impact statement is likely to discover shortcomings in proposed legislation.[48]

It makes sense to give the judicial branch responsibility for making drafting suggestions, as long as separation of this task from policy-making activities can be ensured. After presiding over disputes generated by ambiguities in the statutes, judges are familiar with the types of errors and omissions that create them.

The checklist approach, regardless of where it is implemented, is limited by the fact that it is a particularly one-sided mode of communication. Having laid out their concerns in checklist form, the courts await the legislature's response. True communication is a two-way process, possible only when the two branches speak the same language. To write laws that will reduce the need for judicial interpretation, drafters must be familiar with the judiciary's canons of statutory interpretation, so that they can anticipate what the judiciary will perceive the text of a law to mean.[49] These canons, however, conflict with and contradict one another.[50] If the courts ask the legislature to be uniform in drafting, the courts should be willing to adopt and apply a uniform set of canons of statutory interpretation. Georgetown Law Professor William Eskridge has suggested that some agency—the courts, an academic group, or the legislature—might publish a unified and systematic list of the canons of statutory interpretation that the courts would then apply. Drafters and the courts would then have the same interpretive tools. If legislators and judges spoke the same language, lawyers and the public would be assured that laws were interpreted as the legislature intended, and the amount of litigation would be reduced.[51]

In sum, consideration should be given to minimizing proposed legislation's impact on the courts by improving the drafting process and supplementing the judicial impact statement with a technical review of proposed legislation to reduce deficiencies in proposed statutes.

Much remains to be learned about the development and implementation of judicial impact statements, but the field is not completely uncharted. We encourage researchers to look to the states, as well as to Congress, for analogous means of assessing the impact of legislation. We should build on the knowledge derived from these experiences.

Other Forms of Interbranch Communication

Many believe that the courts' workload could be reduced if bill drafting were improved, using, for example, the checklist we have described. Caseload reductions may also be achieved through communication about existing statutes. In applying the statutes to disputes, judges discover the "glitches" in statutes, such as language that fails to convey what the legislature intended and provisions that fail to cover situations the legislature did not anticipate.[52] Experienced judges could be called on to perform what Judge Frank Coffin called "statutory housekeeping" by calling attention to deficiencies and ambiguities in the statutes.[53] We turn now to other forms of interbranch communication and their potential for minimizing the effect of legislation on the workload of the courts.

Judicial Opinions

Published opinions are, naturally, the traditional vehicle for judicial communication about existing statutes. Courts communicate with legislators through their opinions in various—and sometimes conflicting—ways. One traditional method has been for a court to invite legislative override by making it clear that a distasteful result is dictated by the statute and its legislative history.[54] A variant of this approach is scrupulous adherence to a statute's language, creating a result so inconsistent with probable legislative intent that the legislature feels compelled to respond. This approach is apparently somewhat successful. Professor Eskridge found that Congress "overturned" U.S. Supreme Court decisions most often when the decisions relied on the "plain meaning" of the statutory language.[55]

Nonetheless, judicial opinions often give the legislature little guidance in crafting a resolution. Some judges are concerned that specific recommendations about the substance of legislation exceed the proper scope of judicial power. They believe that judges should alert legislators to problems in the statutes without advising them of the courts' policy preferences.[56]

Other judges do issue opinions explicitly recommending a particular legislative action. One advocate of direct judicial recommendations suggests that opinions include a legislative appendix advising the legislature about statutory revision.

Even if all courts were to agree that judicial recommendations for legislative revision are proper, is it reasonable to believe that legislators will delve through our opinions to find them? The research suggests otherwise.[57] Legislators and their staffs are rarely aware of court decisions un-

less the decisions are brought to their attention by the media or organized interest groups,[58] and most statutes requiring repair will never attract political attention. Much statutory housekeeping is nothing more than routine maintenance of noncontroversial statutes, many of which have fallen into disrepair through years of inattention.[59] Focused as they are on generating new statutes to respond to the issues of the day, legislators have little incentive to "line up as an 'enem[y] of the dangling participle' or foe of the misplaced modifier."[60]

More aggressive approaches by the judiciary are probably required to capture the legislature's attention. A minority statement in the Federal Courts Study Committee report suggests creation of a congressional entity to alert Congress to relevant court decisions.[61] Since the legislative staff could not possibly read all cases, perhaps someone from the judiciary could forward appropriate cases to the congressional entity.[62] The states' experiences suggest that even this process might not be enough. Many states already have institutional mechanisms through which judges can inform legislators about judicial opinions, but it appears that judges rarely know about or use these mechanisms.

Oversight Mechanisms

Most states have oversight mechanisms—some created by statute, others operating informally—for legislative or executive branch monitoring of judicial opinions that interpret statutes. These mechanisms vary greatly among the states, reflecting the diversity of the states' governing institutions and political cultures and serving a variety of constituencies.[63]

In many states, these mechanisms are housed in the executive branch. A few states' statutes direct the Attorney General to monitor judicial opinions and call the legislature's attention to those that affect the statutes. In Oklahoma, for example, the Attorney General is required to advise the legislature about court decisions declaring statutes unconstitutional.[64] In most states, the Attorney General communicates informally with the legislative and executive branches about court decisions without a statutory mandate. Many state Attorneys General monitor court opinions as part of their criminal prosecution function or their work representing and advising state agencies in litigation. Many state agencies monitor judicial opinions affecting their own work and communicate with the legislature directly or through the attorney general.

In many other states, the function of monitoring judicial opinions is located in the legislative branch. It often takes the form of an informal clear-

inghouse; legislative committees merely distribute judicial opinions to legislators and staff interested in specific subjects.

Several state legislatures have established formal mechanisms—revisers of statutes, legislative staff counsel, and legislative drafting and research agencies—to inform legislators of needed statutory revisions. Revisors of statutes are typically mandated to analyze the statutes and to report recommendations for changes to each regular session of the legislature, calling particular attention to errors, duplications, and conflicts.

Some states require that their oversight entities report to the legislature about statutes that have been declared unconstitutional or are otherwise affected by judicial decisions. These reports take a variety of forms. The Illinois Legislative Reference Bureau reviews all reported Illinois and federal court decisions that affect the state's statutes and reports annually to the state general assembly, recommending technical corrections and pointing out substantive issues.[65] The Minnesota revisor of statutes is required by law to "report to the legislature any statutory changes recommended or discussed or statutory deficiencies noted in any opinion of the supreme court or the court of appeals of Minnesota" every other year.[66]

The existence of such mechanisms, however, does not guarantee legislative action. In November 1988, the Minnesota revisor reported on fewer than ten cases. He recently stopped making recommendations to the legislature, concluding that "the legislature has shown a reluctance to accept the suggestions for change accompanying the [revisor's] report. . . ."[67]

Perhaps because of possible legislative sensitivity to outside direction, some states have established legislative oversight systems that directly involve legislators in the statutory review process. Alaska's legislative council, a permanent interim committee and service agency of the legislature, annually examines published opinions of state and federal courts and submits a comprehensive report of its conclusions, with recommendations, to each member of the legislature at the start of the regular session.[68]

Wisconsin has created a statutory law revision committee in the legislative council to consider judicial opinions referred by the revisor of statutes. The revisor refers to the committee all decisions of any federal district court or any state or federal appellate court in which Wisconsin statutes or session laws "are stated to be in conflict, ambiguous, anachronistic, unconstitutional or otherwise in need of revision."[69] If the committee believes that the decision carries out the legislature's intent, it probably will take no action.[70] If the committee believes that a matter is

controversial or that a judicial decision is inconsistent with legislative intent, it may refer the matter to a standing legislative committee.

There are risks and benefits in locating the statutory review function outside the judicial branch. Drafting a recommendation in bill form and introducing it can be essential first steps toward its successful adoption.[71] Nonetheless, a legislative oversight committee's success with legislative reforms may depend on the political power of its members. Further, legislative committees are generally charged to look for specific language in judicial opinions and can miss relevant opinions if the courts do not use the specific language for which the revisors are looking.[72] Unfortunately, judges are not generally familiar with the legislative oversight bodies and are rarely aware of the need to use specific language to draw their attention to the relevant judicial opinions.[73]

Legislative Liaison

Many state judiciaries communicate with the legislature through mechanisms other than opinions. About half of the states have a staff person in the judicial branch who serves as a liaison to the legislature.[74] Not much is known about what these people do or how they function. The Federal Courts Study Committee proposed that an Office of Judicial Impact Assessment be created within the federal judiciary and in 1991 such an office was created by the Administrative Office of the U.S. Courts.[75] In general, an Office of Judicial Impact Assessment could easily serve as a clearinghouse for judicial communications with the legislature. However, placing such a mechanism in the judicial branch raises questions about how the legislature would view commentary from the judicial branch. Perhaps legislators would view judicial commentary as inappropriate or as interfering with legislative activity.

In a few states, statutes or state constitutions require the judiciary to inform the legislature directly—outside the text of the opinions—of flaws or anachronisms in the statutes.[76] Pursuant to the Illinois state constitutional requirement of an annual judicial conference, the Chief Justice of the Illinois supreme court submits an annual report to each member of the state's general assembly, reviewing the work of the courts, suggesting improvements in the administration of justice, and reporting on the results.[77]

Locating this function in the judicial branch enables the judiciary to decide what message it wants sent to the legislature and ensures that this message is conveyed. The judiciary's ability to deliver its message successfully is, however, dependent on its knowledge of legislative institutions and

the relationship between the branches. Study is needed to determine whether the courts take full advantage of the existing opportunities for communication and how these processes can be improved.

Interbranch Institutions

Several states have established interbranch institutions, often called law revision commissions or law institutes, to study and propose revisions to the statutes. Locating this function in an interbranch committee can avoid the disadvantages associated with the placement of the function in any single branch. As noted by Robert Katzmann, the use of a neutral body has the "virtue of feasibility" because it is respectful of each branch's prerogatives.[78] Because both the legislature and judiciary are represented, concerns about one branch encroaching on the other's turf are minimized.[79]

As modern versions of Cardozo's 1921 proposal for a ministry of justice,[80] law revision commissions are generally charged by statute to examine the law for anachronisms and defects, propose needed reforms, and otherwise consider the potential for statutory improvement.[81] They usually include representatives from the legislative, judicial, and executive branches of state government, as well as law schools, the bar, and the public. The judicial members of the committee can aid in the identification of the judiciary's messages to the legislature. The legislative members can contribute their institutional knowledge and relationships with members of that body. Members of the community can contribute specialized knowledge to the development of recommendations and can be influential in promoting their adoption.

Law revision commissions customarily work on major revisions and codifications rather than repairing isolated statutes. They have had mixed success in the states, but their use holds promise.[82]

Direct Communication

Some commentators advocate the establishment of direct dialogue between legislators and judges to be conducted outside the context of judicial opinions or the institutional mechanisms we have described. Tenth Circuit Judge Deanell Tacha, past chair of the Committee on the Judicial Branch of the Judicial Conference of the United States, asserts that the complexities of our country's law-making and law-interpreting tasks "cry out for systematic dialogue between those who make and those who interpret legislation."[83] The late Erwin Griswold, past dean of Harvard Law School, also expressed the view that direct communication is necessary to spur

congressional action on judicially identified problems.[84] Wisconsin Supreme Court Justice William Bablitch advocates ongoing informal communication between individual judges and legislators.[85] Others suggest increasing the use of formal communication mechanisms, such as judges testifying before legislative committees, conferences on legislative–judicial relations, and educational programs for legislators and judges.[86]

The prospect of dialogue between the legislative and judicial branches raises, in the minds of many judges and legislators, the specter of impropriety and constitutional violation. Progress toward establishing interbranch communication has been hindered by the absence of agreement about its permitted scope.[87] As Chief Justice Robert F. Stephens of Kentucky has noted, some judges believe it improper to discuss even budgetary matters with the legislature.[88] Legislators likewise disagree about the permissible scope of communication between the branches.[89]

Much of this hesitancy is probably related more to uncertainty than to specific prohibitions and may reflect an excess of caution more than a real legal problem.[90] As pointed out by former Oregon Supreme Court Justice Hans Linde, the separation of powers doctrine applies equally to the executive branch, and no one would suggest that executive officials are committing constitutional violations by speaking on pending legislation.[91] Some commentators contend that dialogue between the legislative and judicial branches was anticipated by the framers of the U.S. Constitution and that the framers found interbranch cooperation to be consistent with the maintenance of each branch's individual functions.[92] And while little empirical information is available about "judicial lobbying" at the state or federal level, it appears that judicial participation in the state policymaking process may be more common, and less controversial, than at the federal level.[93] More information about "judicial lobbying" at both the federal and state levels is needed.

The participants in the first national conference on legislative–judicial relations concluded that communication between the judiciary and legislature would neither threaten the branches' independence nor interfere with the core functions of either branch.[94] Some form of communication is clearly in order. The question of how to conduct it remains.

The separation of powers doctrine, of course, is not the only guidepost to proper judicial behavior. ABA Model Code of Judicial Ethics Canon 4, which attempts to outline the boundaries of proper judicial participation in extrajudicial activities, seems not only to permit but also to encourage interbranch communication. It expressly permits judges to "speak, write,

lecture, teach and participate in other extrajudicial activities concerning the law, the legal system, the administration of justice and non-legal subjects, subject to the requirements of this code." A judge shall not, however, "appear at a public hearing before, or otherwise consult with, . . . [a] legislative body or official . . . on matters concerning the law, the legal system or the administration of justice." The guidelines for conducting any extrajudicial activity are that the activity not "(1) cast reasonable doubt on the judge's capacity to act impartially as a judge; (2) demean the judicial office; or (3) interfere with the proper performance of judicial duties."[95] Commentary to the canon encourages judges, because of their unique expertise, to contribute to the improvement of the law.

On the basis of the separation of powers doctrine and the code, one might conclude that there are few limitations on ongoing, informal, interbranch dialogue between judges and legislators. Nonetheless, we believe that judges and legislators should proceed with caution. Judicial participation in the passage of legislation might "cast reasonable doubt on a judge's capacity to act impartially as a judge" in cases arising under that legislation.

Furthermore, both the legislature and the judiciary consist of many potentially conflicting voices and points of contact.[96] Judges differ as to expertise, background, friendships with political people, credibility on public policy questions, and ambitions for the future.[97] Dialogue between individuals must be contrasted with "institutional dialogue," where a single spokesperson, such as the Chief Justice or the Judicial Conference, speaks for the judiciary. While individual judges may embrace positions different from those of the Chief Justice or Judicial Conference and should have opportunities to speak out, a more focused institutional approach may be both more effective and less likely to raise ethical concerns.

* * * * *

We conclude that interbranch communication is a worthwhile undertaking and one that is beneficial to members of both the legislative and judicial branches. Nonetheless, we remain convinced that guidelines for communication between judges and legislators are needed to avoid friction and potential legal and ethical problems. Cardozo urged us to bridge the gap "between the legislative and judicial planets." The time has come to begin the next generation of interplanetary adventures.

Proceedings from the Policy Session

The following is a summary of those points that were addressed in the oral presentations or plenary discussions of the policy session and that extend or supplement the material provided in Justice Abrahamson's and Lessard's written contribution.

Is There a Communication Problem Between the Judiciary and the Legislature?

Judge Randall Rader of the U.S. Court of Appeals for the Federal Circuit and formerly chief minority counsel for the Senate Judiciary Committee's Subcommittee on Patents, Trademarks, and Copyrights said the answer to this question is no. He questioned the view that the continued expansion of federal court jurisdiction by Congress, and the burgeoning caseloads it has caused, is a result of "too little communication between the branches. [They say] if Congress really knew what it was doing, . . . it certainly wouldn't do it." On the basis of ten years of experience on Capitol Hill, Judge Rader said, "There is not a grievous communication gap between the branches." Instead, he noted, "the growth in federal jurisdiction is nothing more than another manifestation of the growth of federal government."

Emphasizing that he did not disagree fundamentally with Judge Rader, Robert A. Katzmann, Walsh Professor of Government at Georgetown University, Brookings Fellow, and president of the Governance Institute, pointed to certain "problems of communication" between the branches. "I think those congressional committees that are concerned with the courts have developed institutional relationships for communication. But . . . those committees that are not directly concerned with the courts never think of the issues [they deal with as affecting] the courts." In his opinion, "We will all be better off [if we do] whatever we can through judicial impact statements or [other means to] improve understanding between the branches."

Michael Remington, then director of the Commission on Judicial Discipline and formerly chief majority counsel of the House Judiciary Committee's Subcommittee on Courts, Civil Liberties, and the Administration of Justice, said that improving communications between the two branches should be "our first objective." He faulted the Federal

Courts Study Committee for missing "a golden opportunity to recommend institutional reforms for both branches."

How Can the Role of Judicial Impact Assessments as a Tool for Interbranch Communication Be Enhanced?

Session participants offered several suggestions for improving the effectiveness of judicial impact assessments as a vehicle for communication between the branches. They recommended that judicial impact statements be disseminated more widely in order to facilitate communication between the courts and those congressional committees that do not deal routinely with the courts. Nancy Potok, deputy assistant director of the Administrative Office's Office of Finance and Budget and formerly chief of the AO's Judicial Impact Office, noted the "tremendous amount of legislation affecting the courts that comes out of those committees." She observed that much of this legislation is "not only poorly drafted, but hundreds of [those bills] provide for a private right of action in federal court." Maria Schmidt, a senior policy analyst at NCSC's Washington liaison office, echoed Potok's comments, emphasizing that "the most significant legislation we have monitored has not come out of the judiciary committees."

Participants also suggested that researchers evaluate the accuracy of previous judicial impact assessments and use those data to refine subsequent forecasts. According to Michael Remington, "the Administrative Office should examine impact assessment accuracy for public laws passed within a five-year period. . . . It would be really nice, now that they are gaining some experience in this area, to do follow-up." Samuel Krislov, a professor in the Department of Political Science of the University of Minnesota and co-editor of the 1980 National Academy of Sciences report on the impact of legislation on courts, reiterated this point and cautioned those making judicial impact assessments "to show the same respect for [their] methodological tools that [one] expect[s] of normal experts." "The purpose is to do better with retrospective analysis," Justice Abrahamson said. "Try to determine where you may have gone wrong and then add that into what you do in the future. At the state level, we don't have the staff resources to do a really great job at that."

Reinforcing comments made earlier by William Jenkins, Jr., assistant director of the administration of justice issues at the GAO, Judge Rader said that judicial impact assessments should take into account the effect of

legislation on the judicial system in its entirety. Judge Rader recalled that when he was a congressional staffer, "there was no information on state court impact. We need statistical analysis that stretches across the entire system. Otherwise, we tend to shift burdens from one part of our system to another without influencing anything ultimately."

Are There Additional Vehicles for Interbranch Communication?

In this regard, Katzmann described a current Governance Institute project where judicial opinions identifying problems in legislation are routinely transmitted to relevant congressional committees for legislative consideration. This project was initiated in the D.C. Circuit at the invitation of the judges of that circuit, but has subsequently been expanded to include the First, Third, and Tenth Circuits. In his 1992 year-end report, Chief Justice Rehnquist cited this project as "a modest experiment [in making] it easier for judges to alert legislators to statutory drafting problems identified in the course of adjudication."

IV. Theory Session

Panelists in the theory session of the conference were asked to discuss, from a social science perspective, judicial impact in the broadest sense—the ripple effects that legislation has on the litigative landscape.[98] As reflected in the papers that follow, the panelists approached their charge from a variety of different perspectives.

The first contribution to this session is from Professor Samuel Krislov of the University of Minnesota. In his paper, Krislov describes the "theoretical morass" that confronts those who attempt to understand the effects of legislation on litigation and, therefore, the effects of legislation on the demand for judicial services. Krislov also offers some practical suggestions regarding how we might extricate ourselves from that morass.

The second contribution to this session is from Frank Munger, professor of law, State University of New York (SUNY) Law School at Buffalo, and past editor of *Law and Society Review*; and Joseph Belluck, SUNY Law School at Buffalo. By offering their assessment of who is advocating the use of judicial impact statements and why, Munger and Belluck delve into what they refer to as the "deep discourse" surrounding judicial impact assessment.

The third contribution to this session is from Jonathan Macey, J. DuPratt White professor of law, Cornell University. In his paper, Macey looks at the incentive structure faced by judges regarding the promulgation of procedural rules, how that incentive structure is affected by the nature of the litigation brought before them, and the nature of the statutes that gave rise to the litigation. By analyzing the types of litigation that are likely to be handled procedurally and why, Macey sheds some light on whether poor legislative drafting or the subject content of legislation is likely to have a greater impact on judicial workload.

Finally, the fourth contribution to this session is from Charles Geyh, associate professor of law, Widener University. Geyh's paper focuses on what he calls the "competence/credibility paradox" in having the judiciary produce judicial impact assessments. He suggests institutional reforms that might provide a solution to this paradox.

A summary of those portions of this session's oral presentations and plenary discussions that extend or supplement the written contributions is presented at the end of this section.

Caseloading in the Balance

by Samuel Krislov
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Introduction

A little reflection or a conference such as this—they are not mutually exclusive—makes it clear that caseload studies have widely divergent purposes. The practical caseload projector is interested either as practitioner, planner, or kibitzer in the consequences for the court system. The theorist is interested in the opposite side of the equation—using litigation as a hard bit of datum to measure the volatility of social actions. The two roles—as this conference indicates—may be combined in one researcher. But both approaches contain considerable and difficult problems. Personally, my interests are theoretical and sociological. I have done some practical projects, but with a sense that theory will be advanced by being tried in the crucible of real experience.[99]

The observer–technician of affairs for court purposes superficially seems to have an easier row to hoe. Existing caseloads must be projected to anticipate future needs. As with any enterprise, the growth of demand requires new capital expenditures and personnel. So extrapolation of "consumer" needs is required. Autoregressive models of a relatively simple sort, modified to include basic changes such as population growth, will usually approximate reality in the short run. So indeed will be the simplest form of the approach—straight-line projection of past caseloads, in most instances.

These particular practical shortcuts work most of the time, but they partake of the rigor of projecting college admissions from high school attendance or even predicting today's weather from yesterday's. Projecting trends from the past seems to work *ceteris paribus*. But if one is uncertain about the nature of the parameters, one is equally uncertain about when these unknown factors have altered. It is easy enough to offer explanations after the fact when the predictions fail, but it is the future, not the past, that such efforts are aimed at.

New developments have effects that transcend predictions about caseload. But numbers alone, even when correctly projected, are only the beginning of the inquiry. Since cases are not born free and equal, projec-

tors try to estimate case types and the court time required for each type. This complicates matters by making the projective task a multiple one, with intricate calculations as to each type of case, plus an appropriate "average time" for each type. At least one expert at case-type-time, Steven Flanders,[100] has grown ever more skeptical of the venture of finding "average time." But changes in frequency of case types over time are even more elusive. As pioneered by Friedman and Percival,[101] and demonstrated by a generation of studies (including especially that of Wayne McIntosh),[102] the evolution of issue-areas follows patterns of social development. Fur-trapping cases are replaced by environmental impairment cases. The caseload-time projections are therefore forced to move toward the approach of the theorists.

The latter, though, have experienced even more difficulties. Attempting to understand caseload as a function of social conditions involves studies over time or cross-sectional studies over jurisdictions, or sometimes both. This assumes at a minimum that the definition of a case is a more or less precisely comparable unit. Intuition and experience suggest this is far from the reality.[103] As to the independent factors involved in the equations, such as stages of development or frequency of interactions, surrogates for most of them raise severe problems, especially for cross-cultural studies.[104] The deplorable inadequacy of historical data in many systems, especially ours, creates problems for over-time analysis. More recent work suggests that these problems can be patiently overcome or their effects at least limited, but complexities abound, and the closer the analysis by limiting jurisdiction or time span, the less striking the result.[105]

Finally, we are challenged to assess the impact of new factors, especially legislation, on court loads. The normal method is simply to find the closest known parallel and to substitute that known pattern with the new. Little follow-up of such projections has been undertaken, which almost certainly has been a prerequisite for the popularity of the method. Combining the almost hit-or-miss approaches compounds problems.

We have come a long way in understanding these methods and their limitations. How do we bust out of this circle? That is the focus of this paper. The message here remains that we are unlikely to make a major breakthrough. But advances to date seem promising—and short-run predictions sufficiently accurate—that work should continue and even increase in the practical world, as well as in the theoretical realm.

Theoretical Morass

Sociologists of law have long argued that litigation—"the trouble cases of society"—logically can be charted as a function of frequency of interactions and propensity to litigate.[106] As societies become more complex and less integrated, disagreements are more likely to arise and are less likely to be resolved by informal means—the consequence of increasingly impersonal relations.

Efforts to correlate the rise of caseloads with sociological factors have been tried with only modest success.[107] This is not surprising because technical obstacles abound. There are good data available here and there, but definitions of cases and their classifications are, nonetheless, subjective and change with the times.

But the largest problem in caseload projection has already been alluded to: The sum total of potential litigation in a society is as amorphous as its population's needs for medical help. The calculations traditionally used by legal sociologists at best track the "demand side" litigation potential, but actual cases are also severely limited by the costs of litigation. Societies control the costs—access to the courts, time involved in the proceedings, and need for lawyering and consequent charges—while judges control the pace of litigation and encourage or discourage proceedings through both doctrinal and procedural decisions.

The calculation of the costs and benefits of going to court is not an easy one; if it were easy, settlement would be the most efficient outcome in almost every case. However, sometimes there are reasons to litigate beyond the immediate case. Lawyers are the gatekeepers: They must advise litigants, and they must also calculate the potential value of the case and their own expenditures of time and effort.

The data—as imperfect as they are—suggest that disputes are a standard and unpredictable by-product of normal transactions, but that litigation results from a vector of dispute and opportunity, and that it is not merely the law that tries to avoid concern over trifles. There are many ways to resolve conflict. Mediation by clergy, ombudsman, throwing dice, and splitting the difference are just a few "alternative dispute mechanisms" that societies were employing long before legalists put a fancy name on so basic and ubiquitous a social function.

Furthermore, issues change as society changes, so that straight-line projections are hazardous, if not foolhardy. McIntosh, following Friedman's basic "A Tale of Two Counties" research, has documented the

decline of fur-trade disputes in the Missouri courts, and one hardly hears of a case involving horse-drawn carriages in modern times.[108] Change does not, however, have to be a result of technical or ecological transformation. Although still on the books in many states, breach-of-promise suits are so obsolescent that when one was actually filed a few years ago, it attracted national news coverage.[109]

The evolution of new causes of action is particularly problematic. Civil rights issues for women and minorities have regularly produced more cases in the federal courts than originally predicted, but Congress has retroactively approved this trend by adding provisions encouraging even more widespread use. The "black lung" legislation, which was originally designed to entitle a very small group to sue for damages, went far beyond that in scope. Conversely, the so-called "lemon law" for auto purchases fell into disuse because neither the consumers who would have had to utilize the cumbersome process nor the potential lawyers found it economically profitable.[110] Similarly, small claims court, intended for the use of litigants having small sums at stake, has become in many jurisdictions the place where credit departments file all their claims at one time, reducing their own costs and largely converting the court into a collection agency.

Why are predictions so fallible? First of all, basic assumptions may be incorrect. Experts at the turn of the century projected thousands of deaths per year by airplane, assuming the right to operate a plane would be as widespread as the right to have and operate an automobile. Marx assumed only labor created value and, therefore, capitalists would drive down wages, killing the demand for goods. In fact, capital investment increases the productivity of labor, driving up wages and increasing consumer demand.

The second major source of error is the flow of unexpected events, which may include measures undertaken in response to the predictions. Cardozo's famous decision on *McPherson v. Buick* influenced product liability development but not for the auto industry where insurance proved a better social solution.[111] Marx's writings helped develop a stronger trade union movement to protect workers' income. And societies adjust court caseloads when they see that courts are swamped. Indeed, courts themselves are not helpless. The most dramatic examples of this tailoring of load and jurisdiction are found in Japan, which has altered requirements for litigation drastically whenever caseloads increase, maintaining an almost steady state of court pressures for decades.

A Review of Previous Attempts at Caseload Projection

Increasing demand for court services coupled with declining public resources have greatly elevated the significance of predicting and explaining court caseload trends. Projections of future court caseloads are vital in planning and constructing new court facilities, budgeting for operational costs, assessing staff requirements, and generally meeting the demand for court services. Despite this increased need for accurate caseload trend research, little agreement exists as to what specifically causes variation in caseloads over time or how these changes should be properly modeled. Most attempts to explain caseload variance have been based on the theory that caseload development is dependent exclusively on factors external to the court structure, such as population, income, and economic development.[112] Within this framework, caseload research has been oriented toward identifying relevant explanatory variables, obtaining accurate measures or proxy measures of these variables, and then correlating these with caseload. This external approach to studying caseloads ignores internal determinants of caseload variance: court organization and management. It has become apparent that any complete discussion of caseload variance not only must include local environmental measures, but must also consider the reaction of a given court system to changes in its external environment. Courts are no longer considered passive actors in the management of their caseloads. As economic and/or population pressures create demand for more court services, a court system will and must react to these pressures and alter its behavior to best accommodate demand. Caseloads, then, are best explained as the result of a complex and interactive relationship between environmental or external pressures and a given court system's internal response to those pressures, which feeds back upon the demand for court services.

The underlying activity theory argues simply that caseloads change along with changes in the level of underlying activities that produce the cases. Litigation is a function of the level of disputes: Criminal cases are a function of the overall crime rate, divorce rates are a function of marital strife. It is a simple thesis, assuming a largely mechanistic transfer effect between social events and caseload levels, modified by intervening factors that have not been systematically assessed. Among these intervening factors are the expansion of constitutional rights, changes in court procedures, the availability and cost of legal services, and the level of legal certainty within a particular issue area. As such, the overall pattern of

caseload growth should not be linear, but rather curvilinear in shape, with rate-of-growth fluctuations that are possibly cyclical, rather than monotonic.

The normative effects theory of caseload development states that law increases inexorably over time due to increasing social complexity.[113] As society becomes more complex, there is less community consensus and a decline in informal mediation of disputes by society. Social development, then, implies an ever-increasing need for legal intervention. This theory predicts that law in an overall sense will increase over time.

However, court caseloads do not proceed along those linear paths. Court caseload growth is again theorized to be curvilinear, with the main explanatory cause being the court system's inability to handle ever-increasing demand for services. As litigation in a particular field increases, courts can be too slow to respond to the demand. This, in turn, produces an overriding incentive for disputants to avoid the courts and seek private solutions to what would have been lawsuits.[114] The court system then begins to perform less of an adjudicative function and more of an administrative one, as it serves merely as a ratifier of privately ordered solutions. Increases in caseload are a product of increased demand; however, given the court's inability to handle such demand in an efficient manner, the overall effect is not directly correlated.

Both of these approaches advance a variant of social modernization theory: As society becomes more complex, demand for court-like services increases.[115] Underlying activity theory directly relates changes in the volume of cases to the volume of activities in society that produces the cases. Normative effects theory views caseloads as a dysfunction of increasing complexity and differentiation in society. Each predicts a slightly different pattern of caseload development, but both project a nonlinear or even curvilinear pattern of growth, with the strong possibility of cyclical change. This suggests that any attempts to model caseload variation will be complex. A common factor in these approaches is the concept that courts are generally passive and that factors external to the system determine caseloads.

Research conducted on court caseloads has weakly supported the predicted relationships.[116] Despite increases in legal actions and an increasingly legalistic society, court caseloads do not consistently increase or behave in a predictable manner. In addition to environmental factors that affect caseload development, there are many internal developments that shape caseloads. Social and legal actors take preventive action to avoid

potential legal proceedings by incorporating court decisions into ongoing social and organizational policy.[117] For some types of disputes and legal matters, alternative forms of dispute resolution are employed. Organizational factors intervene between the environment and court caseloads by affecting the definition and transformation of disputes into court cases. Courts themselves have a role in the strategic calculus because they are social institutions that may shape their own functions.[118]

Scratching One's Eyes Out Systematically

One breathes a sigh of relief on finding that after a decade and a half the dominant conclusion remains that of our National Academy of Sciences (NAS) committee: We are neither empirically nor theoretically in command of an approach.[119] While such conclusions are a virtual cliché in all aspects of social science, one fears prematurely stifling growth. But even the most optimistic and diligent scholars have not been able to contradict or—alas—transcend us.

It is more gratifying to find that the two most theoretical pieces in Frank Munger's special issue of the *Law and Society Review* follow my theoretical arguments in Boyum and Mather (1983).[120] Sanders, explicitly, and Reiss, independently, reason along my lines, that caseloads are theoretically too rich to be captured by monotonic equations.[121]

The empirical counting problems have been summarized earlier. We shall have to try to formalize the reasons why cleaner data still will not resolve our major dilemmas.

The Durkheimian notions seem to produce a relatively simple equation:[122]

$$\text{Caseload}_{(t+1)} = \text{Caseload}_{(t)} \times (\text{Transactions}_{(t+1)}/\text{Transactions}_{(t)})$$

Closer reading and thought make the equation more difficult. An increase in societal complexity results in greater mechanical over organic solidarity (or, in other parlance, greater impersonality). Thus, as transactions increase, the rate as well as the absolute number grow.

Since social transactions are, to understate dramatically, innumerable by any known method, population increase is used as a crude surrogate. To attempt any cross-cultural study with national population data uncontrolled for industrialization or other commercial growth seems unjustifiable. So some other surrogate—say per capita income—is generally

introduced. Within-society correctives may throw in business-cycle data as well.

The surrogate for growing impersonality also tends to be population density. But this tends to be a poor measure of social attitudes conducive to litigation. Those who favor a social-cultural, nonlinear notion might incorporate growing reliance on legal mechanisms under such a rubric, but measuring litigiousness independently of past caseloads is a literally confounding task.

Thus, the equation already elaborated has grown considerably:

$$\text{Caseload}_{(t+1)} = \text{Caseload}_{(t)} \times (\text{Population}_{(t+1)}/\text{Population}_{(t)}) \times (\text{Economic Indicators}_{(t+1)}/\text{Economic Indicators}_{(t)}) \times (\text{Litigation Trend}_{(t+1)}/\text{Litigation Trend}_{(t)})$$

The Other Eye: Cases Are Not Generated Autonomously

Toharia found, as noted, that the modern-era cases did not multiply as rapidly as the population. But quasilegal actions absorbed an increasing number of cases. He reasoned that increasing social specialization affords competitive shopping and cheaper substitutes for court action. Thus, there is a denominator that cuts into those matters as well. For want of a better term, we shall designate it "access costs."

It is usual to speak of Toharia's having established a curvilinear pattern for caseloads. More precisely, his Spanish data establish a shift in the growth rate of cases, which he persuasively argues was due to the explosion of notorial actions.

The suggestion that either type of structure will grow in some smooth-curved way is extremely doubtful at best. Furthermore, what is measured is a difference in cost between two resolution processes. That difference would often be quite decisive (resulting in lumpy rather than accretionary shifts).

Now the equation would read:

$$\text{Caseload}_{(t+1)} = [\text{Caseload}_{(t)} \times (\text{Population}_{(t+1)}/\text{Population}_{(t)}) \times (\text{Economic Indicators}_{(t+1)}/\text{Economic Indicators}_{(t)}) \times (\text{Litigation Trend}_{(t+1)}/\text{Litigation Trend}_{(t)})] - \text{Priced Out Cases}$$

But Toharia's adjustment opens up a Pandora's box. Causes of litigation are socially as well as economically defined. As Haley has persuasively

argued, Japanese caseloads have been determined by sharp changes in court access when litigation has increased, as well as by tight control of the number of barristers.[123]

Thus, an exogenously defined equation in which law products called cases are generated by an external world requires not a simple, but a complex corrective. Cases are subtracted or added not merely because developmentally cheaper institutions arise, but for many other complex motives. Courts influence loads by restricting access, as do legislatures. Lawyers' fees go up (or even down) in related but not determined ways. The diversion equation seems as complex as the original basic one.

Furthermore, the new wrinkle, the new perturbation, need not move to decrease load; the literature happened to unravel in that way. But, again, as this conference indicates, the more consequential questions tend to come with moves that increase caseload. These are by and large mirror images of decremental steps. New causes of action may be generated by legislation, court decisions, or the flow of events. Lawyers' fees may drop in absolute terms, or alternative decision structures may become less popular.

This part of the equation, then, would resemble the decremental equation, except that it adds rather than subtracts numbers.

More Research Attacks and Central Notions

Robert Kagan's work challenged these notions in quite different ways.[124] He demonstrated that declining industries easily generated increased litigation as new legal problems arose. Furthermore, it is logical that in such industries there is a decline in solidarity; *sauvez qui peut* is especially resonant on a sinking ship. Conversely, a sharp increase in caseload may focus attention on a problem and promote a nonlegal solution, as his study of debt collection demonstrated. Increased litigation may contribute to its virtual disappearance.

In the somewhat woolly context of Friedman's concepts of the evolutionary nature of court issues,[125] Kagan's precise findings pack even greater poignancy. The studies of Friedman and Percival show that case distributions conceal both case evolution from divergent social issues and cases processed differently by courts.[126] The change in both of these case types will produce distinctive case numbers that have only tangential relationships with the numbers produced by decaying issue areas. Marc Galanter has focused our attention on this matter with his felicitous term, "case congregations."[127] But this problem with the Durkheimian venture

was already on the table with Friedman and Percival's work.[128] Galanter illuminates other issues as well in his article, which is not even centrally addressed to the projection issue.

The combined effect of this literature is to strike at the core of the equation. In some sense, increased social interaction likely breeds more disputes. But those disputes are processed through a complexity of "naming, blaming, claiming"[129] in which one dispute may be processed as thousands of claims and thousands, perhaps even millions, of disputes handled in a single case. The case-producing mechanism has too many contortions of its own to suggest that the problem is merely one of cleaning up the data.

In short, the main thrust of much of the work of the law-in-society approach has operated to make caseload as science a long shot rather than a perfectible and perfecting mode of research. This parallels the fate of the social-indicators movement[130] and may prove yet another epicycle in the constant churning of paradigms in the social sciences. But for reasons advanced above, I do not think a turn of the wheel will restart the grand enterprise, and, therefore, I encourage smaller steps.

Where Do We Turn? Some Modest Proposals

In both the NAS report and the *Empirical Theories*[131] piece, I strongly urge a continuation of practical caseloads and theoretical efforts. As to the first, there is little chance they would not continue and less reason to discourage continued practical attempts. Even on the theoretical level, the cross-national or time-series efforts emerge as worthwhile, with multiple purposes.

Do What We Can

On the practical level, caseloads have utility as planning instruments, without a need for sharp precision. The tolerable range of error is quite considerable, and alternative methods of analysis—e.g., extrapolating judge-need from previous expansion of judge-need or self-evaluation of time burdens by judges—are subject to much grosser and evident deficiencies.

Boyum and I have also argued—again without real disagreement from a decade of writers—that caseload extrapolations do not do badly in the short run.[132] Most of the time that is quite good enough for planning purposes, of course.

In summing up this practical situation, I would like to push our point further. In the first place, pursuit of practical objectives with weak or nonexistent theory is not unknown even in the physical sciences. The late Nobel laureate Richard Feynman notes in the preface to his lecture series on physics that we have known the pressure needed to force a specified amount of water specified distances for thousands of years—at least since Roman times—but still do not have an adequate theory to explain our known results. Similarly, only recently have scientists found previously unknown aspects of bumble bee anatomy to explain how they could fly in what had seemed defiance of aerodynamic theory.

So caseloaders need offer no apologies if they proceed on ad hoc efforts to project as closely as possible and to fine-tune their "adhockery" with new and innovative adjustments and refinements. If it works, we probably will be able to understand why and learn from it. If it doesn't work, the richest theory will not resolve it.

It seems to me that there also is a refined answer to the question of why practical caseloaders can come close to the mark even when using the crudest measure of all, simple population growth. If we look at the formulae developed earlier in this paper, it seems apparent that in the short run the various manipulations will result in multiplying by something close to unity, a little more per annum most of the time, a little less in bad years. Whether these formulae capture a real essence or not, they will come close to saying population drives the equation for any short interval. But closer inspection will, in fact, probably improve projections for as long as such efforts might work.

It is tempting—without experience and truly off-the-cuff—to suggest that planners might well start with the simplest of models and work their way to more complex ones. Ultimately, as with economic models, a simple test is available in its efficacy or failure. Tinkering for accuracy may help us to understand the problem of mapping what is going on.

Improving What We Have

The praiseworthy efforts of Frank Munger's special issue of the *Law and Society Review* are a model for continued efforts in the area. Those studies supplemented theoretical discussions with efforts to show how data can be cleaned up to permit over-time analysis. This mainly involved identifying case types and eliminating or validating sharp data changes as indicating real events. Similar clarification of cross-country data would be extremely useful. Galanter has tried to advance some of this in his treatment of litiga-

tion, assembling data about comparative personnel and litigiousness and using informed common sense to verify who the outliers are in various categories. This impressionist sifting of data suggests careful empirical work might be advanced by similar, more precise, and clearly time-consuming efforts.

The most important need is for us to understand when and why case types change. Short of this breakthrough, charted time series will be interesting but nonadditive.

The continued improvement in cross-state compilation of data may prove to be the most useful development of all. Still, so far the improved dataset has largely permitted little more than general appraisals of narrow problems and trends.

Cross-national comparison provides greater variability, which often permits better teasing out of relationships. But it also introduces vexations through political and administrative variations of greater variability and often of greater subtlety. It is important to support and appreciate the difficulties of cross-cultural studies to supplement and rival an emphasis on more specified and constrained time-series analysis.

I have noted the complications introduced by recognizing the driving power of government and courts in increasing or decreasing caseloads. These are devastating perturbations from the standpoint of a social science of the system; obviously, the driving force of increased social activity may be offset by a decrease in caseload that is set by administrative unloading of cases, as well as the opposite possibility—declining socially generated cases obscured by inloading. These multiple possibilities are discouraging, indeed.

But the practical study of caseloads might well be enhanced by these efforts, especially since the perturbations of most interest are well defined and of definably different types. In exploring perturbations, if we can isolate standard effects while specifying causes, we may learn what we need to use at a practical level, even though we still will not understand the total relationship.

Deliberately decrementalist decisions may be the most promising areas of study. Presumably, we have a known category of court clientele, and efforts to discourage their legal activity are reasonably defined. This is by no means always true, but the potential for careful study is there.

Incrementalist efforts are also possible. When an action augments and builds on the past, it can be projected by some extrapolatory method. More intriguing are new developments where, as noted, the usual model

has been to find the nearest approximation and go ahead with similar calculations. Indeed, it is difficult to find fault with this approach.

Perhaps the most significant finding of the Justice Department's major grant for developing a model assessment is that the researchers consistently redefined their model in narrower and narrower terms and still could not develop a consistent predictive model. The task is a great one, and the modest efforts of trial and error involving simple one-step projections on limited issues seem more in keeping with what we know. A databank of what has been tried and how well it has fared might supplement these modest goals.

The realization that the quest is more complicated than it had seemed does not nullify further effort. We have learned a lot by understanding what we don't know, and though those paths uncovered seem more tortuous and ever-less simple than before, they still offer the promise of leading us to greater understanding. We will stumble forward rather than soar.

P.S., Some Vague Thoughts on New Federal Legislation

Applying these principles to new legislation yields meager results. Of course, that is why I argued against any blanket impact statement, and it remains a convincing argument in my eyes.

The cleanest case is the perennial proposal to end diversity jurisdiction. This is our purest type of perturbation with known current values. It is assumed that roughly all such federal cases will become state cases, but some filings will be discouraged. It is difficult to conjure up reasons why the possibility of removal has operated to discourage filing in the past, but no doubt in real life everything happens. Those esoteric circumstances should be outweighed by the more commonsense type problem: Plaintiffs file in federal court because they believe they will do better there. Some will not want to pursue state proceedings. Thus, on net we can make small adjustments depending on which party prefers the federal forum but can assume that current filings are a ceiling (adjusting, of course, for other growth factors).

Should diversity be ended after a century of such recommendations, we could test this notion to get some sense of the costs over a few years, estimate how much savings there had been in federal courts, and see what the increased burden was to the states in terms of numbers. Processing time, on the other hand, would not be readily measurable. States may have economies of scale in handling such proceedings. Conflict of law issues, on

the other hand, may be more perplexing and complicated at that level. The federally managed case style may better fit key corporate-based diversity problems and lead to quicker disposition, or the reverse may be true.

Adjusting the jurisdiction complicates predictability. While plausible claims for increased jurisdictional dollar limits are not hard to develop, increased limits have historically priced out some cases. Legal contortions to arrive at jurisdictional amounts take time and money, and too implausible an argument erodes credibility *ab ovo*. We would look to previous experience to guide us, but, in fact, dollar amounts are not constant; lawyers may have altered their calculations and so may have clients. Educated "guesstimates" will be as helpful as past history since we are predicting elasticities of demand.

New sources of litigation are less predictable but are sometimes amenable to analysis. Making the use of a firearm in a crime a federal offense can be reasonably estimated as to maximum effect. It will not tell us when prosecutors will implement the potential. The raw numbers are staggering for the tiny federal system. No doubt U.S. attorneys would try to exercise restraint, but even so, the further criminalization of federal courts would be overwhelming.

The proposed family violence tort law is intriguingly unpredictable. Action would be permitted in one venue or the other, with no possibility of removal once filed. It is difficult to predict potential numbers, since "violence" might be held to include what is euphemistically called "rough sex" or repeated threats, or a whole range of behaviors. The propensity to sue is also conjectural. Most of these cases will arise from victims in close relationships with perpetrators, and the worst victims will have the least desire to revive such events. The most persistent causal predisposition—revenge motives—is also the most problematic, and lawyers will be leery of taking on cases. Whether federal courts (where lawyer fees are higher) or state courts are more friendly will also be problematic.

The best heuristic will probably be sexual harassment cases. But that is probably not as good a model as it appears.

Judicial Impact Statements: Unpacking the Discourse

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Proposals to require judicial impact statements as a means of regulating the effects of legislation on the federal courts have been debated at least since Chief Justice Warren Burger's 1972 state of the judiciary address. We have to begin by asking why these proposals are still being discussed. Unfortunately, one reason is that academics like us make our living being skeptical about practical proposals and are almost always willing to write another article—the more like the last, the better.

In this paper, we will describe more substantive reasons for the continuing debates about judicial impact statements and relate them to ideas about how the courts are affected by change. Then we will discuss a number of perspectives that are closer to what we think is really being talked about in what we call "judicial impact statement discourse."

To return to the question as to why we are still talking about judicial impact statement proposals, there are at least two sharply contrasting reasons for finding the continuing discussion surprising.

First, we could start from the premise that judicial impact statements are obvious losers. To many, it has been apparent for some time that we lack an effective understanding of the impact of new or existing legislation on the courts (notwithstanding brilliant discussion of the evolution of court caseloads by Marc Galanter and others).[133] The National Academy of Sciences report said it all in 1982.[134] For a decade we have not been able to agree even on the existence of a litigation explosion, so why should we expect to be able to determine the marginal effect of one among literally dozens or perhaps thousands of factors affecting the number of court cases? Even if we understood cause and effect, we do not have the massive database needed to predict effects, or reason to expect sympathy from Congress for paying to collect these data. To continue to discuss judicial impact statements as if we were at the forefront of some breakthrough in this theoretical and empirical thicket is sheer self-deception. Therefore, we should have stopped wasting money discussing these proposals long ago.

Another reason for finding this continuing discussion both interesting and surprising starts from the premise that judicial impact statements are obvious winners. We all think that knowing the effects of legislation on the courts is important. If so, the crude forecasting possible in 1993 is like the early days of economic forecasting. The uncertainties of economic forecasting did not undermine our efforts to predict economic change but rather led to enormous long-term efforts to improve our methods. Therefore, we should have stopped wasting time and money discussing the purposes of judicial impact statements long ago and begun long-range projects for the development of indicators.

We believe that both of these arguments against continuing the discussion of judicial impact statements are wrong, and, therefore, the discourse about judicial impact statements is located on a middle ground. The discussion is not strictly about measurement. On the other hand, the discussions obviously do not start from a shared assumption about the desirability of judicial impact statements. Both conclusions suggest that more is at stake in this debate than simply wanting to predict the impact of legislation on the courts and about the technology of measurement.

What we propose to do next is to describe and then examine in greater detail some of the stated and unstated reasons underlying judicial impact statement proposals.

Theories of Courts and Change

The discourse about judicial impact statements is a discussion among insiders—namely, judges, court administrators, and legislators. The problems of the courts might be described and remedied in very different ways by litigants or the legal profession. Some time ago, Austin Sarat argued that it is perspective alone that determines whether rapidly rising caseloads are understood as evidence of the success or the failure of the legal system, as evidence of its success in creating and giving effect to new rights or as evidence of its failure to find more appropriate answers to problems of social order and social conflict.[135]

What the insider perspectives seem to have in common is their depiction of courts and society as out of sync, suggesting that in recent times things have changed significantly, ending what was previously a more natural and effective relationship.

It is helpful to remember that officials of our own time are not the first to see a problematic relationship between a society undergoing rapid

change and the administration of a government charged with maintaining order (particularly through its criminal and civil justice systems). Indeed, the efforts of the classic social theorists of the nineteenth century to explain precisely this kind of relationship and its limits have shaped our own vision of change. Contemporary versions of those theories may explain some of the insiders' discourse on court reform.

Theories of change provide four perspectives on the effects of social change on the courts.

1. *Increasing Complexity*. In the views of many, the engine of change is the increasing complexity of society, the presumed universal and inevitable evolution of society driven by differentiation in the relations of production. Increasing complexity accompanies, indeed marks, the modernization of any society. In turn, increasing intervention by government is required to order and rationalize the emerging and changing relationships among members of the society.

Other than feeding apocalyptic views of the impact of change on the courts, does such a simple theory of change tell us anything useful about proposals for court reform? If complexity is increasing, and has been for a hundred years, what's new? How should the courts in 1993 respond to such an ancient problem? We might begin by observing that unless the nature of what courts do is being altered in some important way, the simple and appropriate response to the increasing scale of society seems to be the one suggested by Cornelius Kerwin, namely, to increase the number of courts and judges.[136]

Increasing complexity has more specific implications than this, however, because increases in the scale of what courts do also change qualities of courts that are valued by our legal and political culture. In particular, the role that judges are expected to play has undergone a qualitative change. Judges are required to move well beyond traditional judicial roles when they manage a large staff, coordinate their activities with a large number of colleagues, or administer justice in what is meaningfully characterized as a judicial system rather than a simple court. Thus, the proposals for judicial impact statements and other types of court reform may respond in part to such tensions created in the role that judges play in a changing system rather than to the increase in the quantity of adjudication alone.

2. *Rationality Crisis*. Other versions of the increasing complexity theory claim that the late twentieth century has experienced unique political and legal crises affecting the courts. Europeans seem to have a knack for such

grand theorizing, and some of this theory has been helpful. Specifically, two of the greatest recent European theorists, Niklas Luhmann and Jurgen Habermas, both argue that what is really happening is that the legal system's capacity to rationalize and impose order is being outstripped by the complexity of society.

In historical terms, the authority of the courts derived from their separation from the specific concerns of particular social interests.[137] Courts applied generalized (autonomous) standards for the imposition of authority to different aspects of social life. Thus, the general law administered by the courts rationalized and legitimated the exercise of authority throughout the society.

However, as society and its institutions have become more and more diverse, different parts of society operate in very different ways. The general rules developed by the courts are less and less adequate for resolving conflicts deeply embedded in the unique norms appropriate for particular activities of society. In brief, law loses its bite, creating a "rationality crisis."

3. *Legitimation Crisis.* A second version of the crisis of modern law has received greater play in the United States, namely the so-called "legitimation crisis."[138] If the rationality crisis proclaims the failure of the courts to supply appropriate law, the legitimation crisis problematizes the changing quality of the demand for law.

According to this view of the impact of complexity, the growth of the welfare state has been driven by the demand that the state respond to an ever-expanding range of demands for equity from different social groups. Yet, the more particularized the benefits granted by the state to a group, the less neutral and legitimate the state itself seems to be. Thus, every legal victory by an interest group, in courts or legislatures, is viewed as a partisan decision with a corresponding incremental reduction in the legitimacy of the decision maker. The apparent politicization of formerly neutral, autonomous functions of government has, therefore, created a legitimation crisis.

The cultural shift Lawrence Friedman has described in twentieth century America as giving rise to an expectation of "total justice" may be one aspect of this larger picture of crisis.[139] Courts are being asked to create and enforce rights that meet a broader and broader range of needs of American citizens. Granting rights to some that exceed the expectations of others only feeds the perceptions of illegitimacy that inform reporting on much contemporary rights litigation.

In the Progressive Era, lower court reform domesticated the threat from the rising tide of immigration and urban growth. During the New Deal, the creation of administrative courts and a more instrumental theory of government addressed the collapse of the economy. Since the 1960s, in response to increasing demands for inclusion and equity for which political support has been mobilized, court reform proposals have in part attempted to clear the federal courts of large numbers of less important cases thought to impede more important traditional functions of orderly conflict resolution and integration of diverse values and opposing social interests. Each of these proposals for major court reforms illustrates a response to concerns about the legitimacy of the political system itself, the last (post-1960s) being the crisis of demand described by Habermas and others.[140]

4. *Professional Projects*. A fourth theory concerns the evolution of professional projects. Insiders, such as lawyers and other legal professionals, have had a strong interest in court reform. Lawrence Friedman, in yet another perceptive essay, observes that legal professionals, like lawyers and judges, promote reforms in part to maintain a public image.[141] This is so because using expertise to ensure the quality of legal and judicial services is part of what justifies the autonomy granted by law to self-regulating professionals.

Judges are a distinct subgroup of lawyers with distinct professional interests. But courts are the domain of other professionals as well, namely court administrators. Like lawyers, judges and court administrators are professionals whose power is derived in part from public respect for their unique expertise. In turn, like lawyers, they must visibly display their concern for improvement of the courts. Such expressions of concern are perfectly appropriate. Thus, without being at all disparaging, one of the motives for discussing judicial impact statements may be the generalized interest of judges and court administrators in publicly demonstrating their commitment to improvement of the courts, irrespective of crisis or change. We would argue also that the increasing involvement by judges and court administrators in court reform is not the result of the growing numbers of court professionals alone, but the result of the development of internal court system structures, such as the Federal Judicial Center and the various administrative councils constituted by members of the federal and state judiciary, that have given new voice to the impulse to reform.

In sum, significantly, none of these theories attributes the cause of reform directly to the rising number of cases. Because of the increasing scale of adjudications, judges are being asked to play new, nontraditional roles

in their courts, not simply to do more. Because of a perceived rationality crisis, courts are being asked to do what they do not feel competent to do, and because of the apparent legitimation crisis, they are involved in increasingly politicized adjudication. Finally, court professionals benefit from being publicly critical of the system that delivers their services.

Judicial Impact Statements—The Discourse

> *Buffalo News* story 3/27/93: A man who had waited 11 years for trial of his age discrimination suit collapsed and died in the lobby of federal court. "The death is only the most dramatic illustration of a severe case of backlog in the federal courts" declared the *News.*[142]

The concept of "impact" is like the concept of "efficiency." "Efficient" is an administrator's way of saying something is good, but the term often means very different things in different contexts. The movements for court reform described at the end of the preceding section, each defined efficiency differently: In 1920, it meant incorporating more cases in the court system; in 1935, it meant reducing the difference between adjudication and administration; and in 1969, it meant casting unimportant cases out of the federal court system. Similarly, impact means different things in different contexts.

Many interests underlie proposals for the use of judicial impact statements. In 1982, Boyum and Krislov found that "[t]he idea of judicial impact statements has attracted judges, court administrators, researchers and academics, and occasionally legislators"[143] To date, there has been little analysis of what lies behind proposals for judicial impact statements. The idea clearly parallels Chief Justice Warren Burger's court reform proposals. In addition, the Council on Competitiveness included a judicial impact checklist in its fifty-point judicial reform plan, and Aetna Life & Casualty—a strong supporter of recent civil justice reform efforts—has cosponsored research on the topic at Yale Law School.[144] Currently, however, the primary supporters of judicial impact statements are federal and state judges, court administrators, and professional organizations. Both the Federal Courts Study Committee and the Judicial Conference of the United States have publicly supported judicial impact statements, as has the American Bar Association's Committee on the Judiciary and a number of individual judges.[145]

There appear to be many reasons why these groups are advocating the use of judicial impact statements.

Court Funding

Renewed interest in judicial impact statements has coincided with a growing disparity between rising caseloads and judicial budgets in both state and federal courts.[146] According to a 1992 American Bar Association (ABA) report on court funding, twenty-five states experienced budget cuts to some element of the justice system during the period from January 1, 1990, to February 1, 1992.[147] As a result of these budgetary pressures, some states have experienced increased delays in hearing cases, laid off court personnel, imposed unpaid furloughs on court employees, and even ceased civil trial sessions in order to permit disposition of criminal cases.[148]

Federal courts are experiencing similar problems. For instance, in 1993 it was necessary for the Judicial Conference to ask Congress for an additional $78 million because the federal courts had run out of funds to pay court-appointed attorneys and jurors' fees.[149] The judiciary linked this shortfall to Congress's decision to authorize $370 million less than the judiciary had requested for fiscal year 93.[150] In addition, the federal judiciary recently announced that it will begin charging federal agencies for the use of its computer-based Public Access to Court Electronic Records (PACER) program.[151]

In advocating the use of judicial impact statements, certain groups may be trying to guarantee ample judicial resources by shifting the focus of the budget process away from judicial budget requests and toward proposed legislation that would affect court workload. In the April 1993 issue of *Trial* magazine, the president of the ABA makes this point expressly when he claims that the preparation of justice impact statements will "ensur[e] adequate [judicial] funding."[152]

The Role of Judges

Court funding problems, coupled with increasing case dockets, have also affected the role of judges. Many agree with Heydebrand and Seron that there has been a "shift in the disposition of cases from adjudication to administration"[153] and a shift from "the dispute-resolution dimension of judicial activity to the administrative . . . functions of courts."[154] As a result, "the resources and labor-power of courts are disproportionately devoted to administrative rather than adjudicatory services,"[155] and judges

are increasingly required to function as case managers rather than adjudicators.

Judges may expect that judicial impact statements will aid in forestalling further increases in case dockets and, thereby, help preserve their roles as adjudicators. Judges may also expect that judicial impact statements will result in limits on the number and types of cases that require administration rather than adjudication. Evidence in support of this thesis is provided by a recent statement by the chief judge of the Michigan Court of Appeals urging continuation of Michigan's judicial impact statements program as a means of reducing the workload of Michigan's judges.[156]

Judicial Jurisdiction

Judges may also be concerned about protecting their jurisdiction. State judges have serious concerns about the increasing preemption of state law and regulation of state judges by federal legislation. In addition, state judges have an interest in curbing federal jurisdiction over particular claims and limiting federal judicial review of state court decisions. These judges may believe that judicial impact statements will force members of Congress to admit that states' rights are being contracted. Or, state judges could believe that greater awareness of the financial impact of legislation will forestall federal preemption and encroachment. Some proposals for judicial impact statements, such as the checklist proposed by the Federal Courts Study Committee, have specifically recommended that Congress consider these issues before passing legislation. Similarly, the ABA has claimed that judicial impact statements are needed because "Congress is currently contemplating new criminal statutes which would extend federal jurisdiction into what was heretofore the states' domain."[157]

Concerns About Statutory Interpretation

Another controversy that is currently engaging the judiciary concerns the appropriate method of statutory interpretation. Judicial impact statements may be convenient tools for both liberal and conservative judges embroiled in the debate. The New York State Bar Association argues that judicial impact statements will end the "after-the-fact search for what Congress meant when it passed a law."[158]

Behind this simple call for more precise legislation may be more complicated motives. In his book *Who Will Tell the People? The Betrayal of American Democracy*, William Greider discusses the role of the federal judiciary in interpreting statutes.[159] He notes that conservative judges "are

generally hostile to federal regulation" and "are advancing behind the general principle that political decisions should be made by accountable political officers of government."[160] Judicial impact statements may be seen as a mechanism for forcing Congress to accept responsibility for some of the tough political decisions that conservative judges feel are being inappropriately thrust on the courts.

Poor Communication Between Courts and Legislators

Another reason for the advocacy of judicial impact statements may be an increasing frustration on the part of judges with the quality and quantity of communication between the judiciary and the legislature. Former Circuit Judge Abner Mikva has written that "the problem with drafting statutes and with statutory construction 'as often as not is the unawareness that the legislative branch and the judicial branch have of each other's game rules.'"[161] Similarly, Justice Shirley Abrahamson of the Wisconsin Supreme Court has concluded that "the judiciary and the legislature rarely move together with a sense of common purpose."[162]

Some judges clearly believe that these communication problems are influencing their work. As Justice Ruth Bader Ginsburg wrote when she was a circuit judge, "statutes sorely in need of more definite statement are susceptible of diverse interpretation [and] . . . inspire litigation"[163] and can generate inconsistency and disagreement among the lower courts. Some judges may also be dissatisfied with the infrequency with which their decisions are read by legislators and the failure of legislators to correct statutes based on judicial decisions. Thus, these judges may perceive judicial impact statements as a way to require greater legislative attention to both the financial and policy concerns of the judiciary.

A Second Look at the Goals of Impact Statements

We have suggested that underlying the proposals for judicial impact statements may be a number of concerns that are not always fully expressed: pressures on judges to adopt new roles, declining effectiveness of the courts, loss of legitimacy and public respect for the courts, and the inevitable pressure to do something to improve routine court management by addressing perennial concerns about costs and workload.

We will conclude with some observations about the appropriateness of judicial impact statements as a means of achieving each of these underlying goals and observations about the impact of judicial impact statements on interests not represented by court insiders.

1. *Reducing Caseloads #1: Preserving Traditional Judicial Roles*. We have suggested that rising caseloads by themselves are not the real problem motivating reformers, but have suggested instead that reforms have been motivated by changes that rising caseloads have caused in the role of judges and the internal organization of the courts. Judicial impact statements may, in fact, reduce court caseloads, not only by causing Congress to reconsider particular pieces of legislation, but also by increasing the cost of passing every piece of legislation, and thus reducing the number of laws passed regardless of their merit.

But reducing court caseloads may not be directly responsive to the problems experienced by judges and administrators, and it raises other questions—addressed in the last part of this paper—about which cases will be excluded from the courts.

Our point is, if the underlying impulse for reform is the pressure on traditional judicial roles created by rising caseloads, that problem can be addressed more effectively by other more appropriate means—for example, through training or by altering procedures in ways that increase efficiency while preserving valued attributes of adjudication.

2. *Reducing Caseloads #2: Limiting Federal Adjudication to Really Important Rights.* Judicial impact statements have an effect bill by bill, not court by court. Thus, judicial impact statements do not really shift the focus of Congress to the general needs of the courts, but rather have a direct impact on deliberation of the merits of each proposal to create new rights. Whatever the value of consultation between the legislature and the judiciary about generalized standards for legislation, many judges have expressed discomfort at the thought of having the interests of the judiciary intrude into the consideration of the merits of particular pieces of legislation.

3. *Eliminating Cases in Which the Courts Are Ineffectual*. To the extent that judicial impact statement proposals are in part a response to the rationality crisis, they are intended to keep courts from being drawn into conflicts that the judiciary deems inappropriate for adjudication. Presumably, the great cost of complex litigation is one of the concerns leading to judicial impact statement proposals. Yet, if the problem is simply the cost of adjudication, the appropriate remedy is increased appropriations for the courts, not a bill-by-bill review of the cost or benefit of legislation. Indeed, to the extent that Congress applies its own criteria in weighing the value of a full-court adjudication as a means of determining

the scope of legal rights, the judiciary may be inviting politicization of the very process it seeks to insulate.

To achieve the goal of effectiveness, the judiciary must be more specific about the kinds of conflict resolution for which the federal courts are not suited, rather than attempting to subsume this problem under the general heading of costs and impact.

4. Deflecting Political Pressure. Finally, the overtones of the legitimation crisis detectable in judicial impact statement discourse suggest that these proposals may be intended in part to deflect political pressure from the courts by making Congress think twice about dumping difficult social issues on the judiciary. Again, if this is part of the reason for proposing judicial impact statements, there is a large gap between what is being proposed and what is likely to be achieved unless the problem is described more directly. Because Congress will not be directed to consider the symbolic costs of adjudicating politically sensitive issues by any of these proposals, such costs are not likely to be part of the express consideration of the merits of legislation. Indeed, putting the problem this way raises concerns about the "problem" itself, since, as Frankfurter and Landis noted in their classic study of the impact of the Judiciary Act of 1925, the purpose of judicial reform is to make space for precisely those questions of great political importance that the courts should resolve in order to fulfill their role in defining the appropriate limits of government.[164]

Impact Revisited: Who Wins, Who Loses?

The recent increase in judicial impact statement advocacy by federal and state judges, court administrators, and well-organized professional associations coincides with increasing public awareness about the rise of special interest control over our country's democratic processes and a feeling of individual isolation from both the legislative and administrative processes of federal and state governments.[165] As lobbyists and other insiders stall actions by legislatures and regulatory agencies, and frame the content of laws and regulations, citizens are becoming anesthetized to abuses of public trust by government officials.[166] In a democracy, lack of citizen awareness and participation negatively affect not only the amount of attention given by government to citizens' concerns, but also the quality of government output.

It is our belief that judicial impact statements are being promoted by insiders and special interests. There is no grassroots demand for such

statements—federal and state judges, court administrators, and professional organizations are the main supporters. These groups, just like corporate and industry lobbyists, have tremendous influence over and access to the legislative process.

Noticeably absent from any of the discussion about implementing judicial impact statements are the viewpoints of ordinary citizens or public interest organizations. This is significant because judicial impact statements are likely to burden the creation and expansion of substantive rights. Promoters of judicial impact statements might argue that most citizens are not concerned with mundane procedural issues, such as judicial impact statements. But, as Frankfurter and Landis recognized in their study of the Judiciary Act of 1925,

> the mechanism of law—what courts are to deal with which causes and subject to what conditions—cannot be dissociated from the ends that law subserves. So-called jurisdiction questions treated in isolation from the purposes of the legal system to which they relate become barren pedantry. After all, procedure is instrumental; it is the means of effectuating policy.[167]

Since judicial impact statements are designed to influence the substance of legislation, those citizens who are currently isolated from the legislative process will become further removed. The result may be that statutory protections and rights for the politically disempowered will be less likely to be enacted.

A more important concern, however, is that these viewpoints will also be left out of the preparation and analysis of judicial impact statements. Of course, because judicial impact statements focus mainly on the cost of legislation, they are inherently biased against the creation or expansion of rights. As a result, citizen participation will have to be focused on analyzing judicial impact statements or preparing alternative ones.

If judicial impact statements are required, how will ordinary citizens participate in their preparation and analysis? One possibility is that citizens can be represented by the interest groups that currently participate in the legislative process, such as civil rights organizations and consumer groups. However, judicial impact statements will significantly increase the cost of participation by these groups and will add another entry barrier to their intervention in the legislative process. This is troublesome because existing entry barriers have already allowed organized economic interests to predominate over public interest groups in legislative processes.

According to a study by a committee of the U.S. Senate, public interest groups are so inadequately funded that they are forced to be absent from a significant percentage of formal federal government proceedings and are typically outnumbered ten to one by industry representatives.[168] On some important matters, the study concluded, industries invest 50 to 100 times more resources than public interest advocates can afford.[169] The burden of preparing counter judicial impact statements or detailed analyses of existing ones will further limit the ability of public interest groups to represent their members effectively.

Apart from the participation of representatives of the public interest, how will ordinary citizens be able to participate in analysis of judicial impact? Government has already become unresponsive to the concerns of many citizens because participating directly in government decision making is too expensive for most Americans.

The barriers to citizen participation in decision making on most issues are great but may be particularly acute in legislative decisions regarding the judicial system because of the important yet diffuse nature of the social benefit from civil justice. Take, for example, the issue of civil justice reform. The civil jury is currently under attack from a variety of interests, including some manufacturers, insurance companies, doctors, judges, and lawyers. As these interests try to regulate downward the civil jury, who is able to fight for the survival of the seventh amendment? Although some legal organizations and public interest groups are strong defenders of the civil justice system, ordinary citizens are not able to participate in the debate. Consumer advocate Ralph Nader has pointed out that identifying the "consumers" of the civil justice system is difficult and has called for a national association of citizens who have sat on civil juries to defend the civil justice system. He describes the justice system as a "unique and decentralized muscle of our society."[170] If citizens are unable to organize around more concrete issues, such as the seventh amendment, how will ordinary citizens ever be able to organize themselves to prepare and analyze judicial impact statements?

Finally, some of these problems could be mitigated if Congress provided funding to citizen groups that wanted to prepare impact statements or to help interested citizens band together. These alternatives, however, have been rejected in other contexts and are unlikely to be adopted for judicial impact statements.[171]

Some of these problems may also be mitigated if judicial impact statements are prepared with sensitivity to a variety of concerns. Constituencies

outside of the legal profession and judiciary should be involved in the preparation of judicial impact statements. Second, a variety of perspectives other than those of the courts should be utilized in the preparation of judicial impact statements. Third, judicial impact statements should not revolve solely around the financial costs of legislation. Instead, an approach that analyzes the potential benefits of the substantive rights that would be created or expanded by legislation, as well as the goals of proposed legislation, is necessary. The statements should also focus on the costs of doing nothing. Each judicial impact statement should be required to include specific information about the purpose the statement is trying to achieve and explicit information about the functions of the courts that would be enhanced and diminished by proposed legislation.

Judicial Preferences, Public Choice, and the Rules of Procedure

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Introduction

An efficient procedural system will minimize the costs of erroneous judicial decisions and the costs of operating that system.[173] However, for the most part, the rules of procedure are formulated by judges. If the self-interest of those judges conflicts with the efficiency criterion, it would seem plausible that the judges will formulate procedural rules that further their own interests, rather than the interests of efficiency.[174]

The prediction that judicial behavior is likely to conform to judges' rational self-interest, rather than to the interest of economic efficiency, appears to be particularly valid in the context of a discussion about procedural rules. Such rules are not only construed by judges, but they also are promulgated under the direction of judges. The committee that initiates revision of the Federal Rules of Civil Procedure is composed primarily of judges.

The present membership of the Advisory Committee on Civil Rules includes three circuit judges, two district judges, one magistrate judge, one state court Chief Justice, a representative of the U.S. Department of Justice, four private lawyers, one law school dean, and one law professor.[175] After a period of public comment, approval by the Standing Committee, and approval by the Judicial Conference of the United States, the rules of procedure promulgated by this Advisory Committee on Civil Rules must be approved by the Supreme Court. However, to date, the Supreme Court has served as a mere conduit for the work of the advisory committee, approving every change the committee has recommended.

Judicial rule making is not completely independent of legislative control. While amendments are technically subject to congressional oversight, Congress typically acquiesces in the promulgation of civil rules amendments. Because procedural rules are designed to facilitate judicial adminis-

tration, judges are given considerable leeway to craft such rules to conform to their preferences.

Regardless of the motivations of the judges involved in crafting the rules of procedure, it seems beyond dispute that the lawyers involved in this process will have little to gain from minimizing the costs of the procedural system. As Judge Winter has observed, "important segments of the organized bar have little incentive to lessen the cost of litigation by reducing the need for unnecessary legal services. Those who seek to reform the [procedural rules of] discovery are, therefore, unlikely ever to find their proposals commanding enthusiastic support among the organized Bar."[176]

It is surprising that the existing economic literature on the rules of procedure uniformly has ignored the possibility of self-interest and instead has presumed that judges exercise their considerable discretion to formulate procedural rules that promote the goals of economic efficiency. The lack of attention to self-interest is particularly surprising in light of the fact that studies of particular procedural rules from an economic perspective generally have not produced results consistent with economic efficiency.[177]

Starting with the assumption that judges seek to maximize self-interest, this article represents a preliminary attempt to develop a framework that will generate useful predictions about the likely contours of procedural rules. The article then compares the predictions generated by its model of self-interested judicial behavior with existing procedural rules. While the self-interest model developed here is not sufficiently well specified to generate quantitative results that yield the possibility of rigorous empirical refutation, the competing public-interest model is equally undeveloped.[178] However, useful comparisons between the self-interest model and the public-choice approach developed here still can be made by comparing qualitative descriptions of the effects of existing rules with the predictions generated by these rival approaches.

Having staked out a bold claim about the usefulness of the methodology developed in this article, qualifications are in order. First, over a wide range of issues, the self-interest model and the public-interest model of procedural rules will generate similar outcomes. It is only where the self-interest of judges conflicts with the public interest in efficient judicial administration that the differences between the two theories become important. Moreover, as developed more fully below, in certain contexts, the two theories will converge because judges have an interest in efficient administration. However, because judges do not fully internalize the costs of their own errors or the costs of an inefficient administration of justice, judges'

self-interest will conflict with efficiency values. It is where such conflict exists that a theory of procedure built on judicial self-interest has value.

Second, the theory of judicial self-interest discussed here does not conflict with the theory that substantive common law rules tend to be more efficient than statutes or administrative law rules. Indeed, as will be seen, the same self-interest that shapes procedural rules to reflect judicial preferences also causes judges to generate efficient common law rules. In particular, judges can reduce their caseloads and eliminate duplicative efforts by crafting clear rules where they are able. This, of course, contributes to efficiency. Moreover, a judge can enhance his or her prestige within the judiciary by fashioning creative, workable solutions to existing legal problems. This, too, contributes to the efficiency of the legal system.

This article begins with a general description of the likely preference functions of judges and considers how these preferences might influence the content of procedural rules. These observations are then compared with existing procedural rules. It seems that such rules are best explained with reference to judicial self-interest.

The Nature of Judicial Self-Interest

Any viable theory of judicial self-interest must account for the structural constraints on judicial behavior that restrict the ability of judges to serve their self-interest. Such a theory of judicial behavior must reflect the immutable characteristics of the federal jurisdiction. For example, as a structural matter, federal judges: (1) have general jurisdiction over a wide variety of substantive areas of the law; (2) enjoy life tenure; and (3) are paid salaries that may not be reduced in nominal terms.

In addition, judges inevitably will have made large, fixed, human capital investments in the form of their knowledge of existing law. This human capital investment produces two sets of legal skills, one set is specific and the other generic. As used here, a judge's specific skills consist of expertise in specialized areas of the law, such as securities regulation, admiralty, or criminal procedure.[179] A judge's generic legal skills consist of his or her expertise in areas of the law that are equally applicable across a wide range of cases. For example, the ability to conduct legal research is a generic legal skill, as is a detailed knowledge of the Rules of Evidence or the Rules of Civil Procedure.

On the basis of these simple observations about the nature of the judicial function, it is possible to develop three hypotheses about judicial pref-

erences. First, judges will try to maximize their ability to utilize their generic legal skills. To the extent that procedural rules are generic rather than specialized, *ceteris paribus*, judges will attempt to maximize the range of cases that can be terminated through procedural devices.

Second, because judges have lifetime tenure, they are less susceptible to the political pressures that affect the decisions of elected officials. This makes judges more likely to further their own self-interest by pursuing nonmonetary interests such as increasing leisure (reduction in workload), discretionary power to select which cases to consider, increased influence, and enhanced reputation within the legal community. This observation is consistent with Richard Posner's view that "judges, like other people, seek to maximize a utility function that includes both monetary and nonmonetary elements (the latter including leisure, prestige and power)."[180] As applied to the Rules of Civil Procedure, we would expect judges to opt for those procedural rules that maximize their ability to make discretionary decisions, and those rules that enable judges to make such decisions quickly and with a minimum of outside interference. This flexibility not only allows judges to maximize leisure, but also to reach legal results that maximize their own view of the good.

Finally, judges' considerable human capital investment in the legal system is likely to align their preferences with the preferences (and interests) of the legal community as a whole. Consequently, judges are likely to view procedural rules that maximize the demand for lawyers' services as socially desirable, not because of any cynical desire to pad the pockets of members of the bar, but because of a tendency to see the benefits of procedural rules and not the costs. This tendency is a result of the fact that judges, like lawyers, internalize the benefits of procedural rules but externalize the costs on clients and on society generally. This article will now consider each of these sources of judicial preferences with respect to procedural rules.

Procedural Rules and Judicial Specialization

As noted above, a complete theory of how judicial preferences influence procedural rules must account for the structural features of the judiciary. In particular, federal judges are, by and large, judges of general jurisdiction. As such, a federal judge must decide cases involving a complex mix of state and federal laws, ranging from admiralty to bankruptcy to securities regulation.[181]

The task of judging has been made more difficult over time because of the rapid expansion in the number and complexity of federal statutes.[182] The explosion in statute making has made it impossible for federal judges to master the substantive rules of law in all of the fields of law in which they must generate legal opinions. Procedural rules can serve the self-interest of judges by permitting them to use procedural grounds as a basis for deciding cases, thereby avoiding the necessity of acquiring detailed specialized knowledge of substantive areas of law.

The theory developed here has an empirical component because one would predict that an individual judge will be more likely to dispose of a case on procedural or technical grounds where he or she lacks particularly strong views or unique expertise in the substantive area of law at issue. A judge who has invested considerable human capital in learning the substantive law of securities regulation is less likely to dispose of a case involving securities law issues on technical, procedural grounds. Similarly, a judge with no expertise in admiralty will be more likely to dispose of cases involving admiralty issues on procedural grounds than those who have such expertise.

Thus, from the judges' perspective, procedural rules permit judges to dispose of unwanted cases, yet still allow them to utilize their substantive knowledge in those areas in which they have particular expertise or interest. This analysis is consistent with Professor Schauer's observation that the plain meaning rule is most often invoked when judges are called on to decide cases involving what many perceive as uninteresting, highly technical areas of the law, such as those involving the Employee Retirement Income Security Act, Social Security, and taxation. Substantive legal reasoning, however, is invoked by judges to decide more interesting cases involving such issues as flag burning, affirmative action, separation of powers, or patronage.[183]

Seen in this way, the rules of procedure serve as a substitute for other generic legal rules, such as the canons of statutory construction or the rule of stare decisis. All of these rules can be viewed as vehicles by which judges can decide cases using generic legal rules that do not require knowledge of the substantive legal issues involved in the underlying dispute.

Dismissal

The most obvious way for a trial judge to invoke the rules of procedure to dispose of a case that he or she does not wish to decide on the merits is by simply dismissing the case, either for failure to state a cause of action, or

for some other technical failure of pleading. For a variety of reasons, this is unlikely to be an effective strategy for trial judges seeking to maximize narrow self-interest. First, the fact that one judge finds the legal issues in a particular case uninteresting does not mean that other judges—including appellate judges—will find them uninteresting. The rulings of federal trial judges are subject to review by appellate panels of three judges. The availability of three-judge panels of review makes it three times as likely that one of the appeals judges reviewing the case will find the substantive issue involved to be interesting.

This means that the probability of reversal for simple dismissals is likely to be considered intolerably high for a trial judge. Judges will care about reversal in this context for two reasons. First, judges have an interest in avoiding being reversed because of the adverse reputational effect of a reversal.[184] In addition, when a case is reversed on appeal it generally is returned to the trial judge who originally ordered the dismissal. Consequently, dismissal on the pleadings, if reversed, will not permit the trial judge to avoid hearing the case.

An additional reason why procedural rules are not likely to be used to discharge cases on the pleadings is that lawyers involved in drafting procedural rules have a strong monetary interest in avoiding early dismissal. For this reason, even "trivial or incremental" alterations in the procedural rules that reduce the demand for lawyers' services are likely to "encounter enormous resistance."[185]

Moreover, as developed more fully below, judges' enormous human capital investment in the legal system leads them to see enormous intrinsic value in the legal process itself. Independent of the probability of reversal, a judge who summarily dismisses too many cases is likely to be viewed as a poor judge. This is a result that judges wish to avoid.

Settlement

Most importantly, dismissing cases on the pleadings is likely to be a rare occurrence because trial judges have a superior, low-cost alternative to such dismissals: inducing settlements. Inducing settlements is superior to dismissing cases from the judiciary's perspective because it drastically reduces the probability of reversal. Inducing settlements is also superior to dismissing cases from the perspective of the legal community. As Geoffrey Miller has observed, because attorneys will have superior information about the prospects for a case's success of than will the clients, the power over the settlement decision generally will be shared by the lawyer and the

client. Lawyers can be expected to shade their legal advice regarding settlement to suit their own interests.[186] Knowing this, judges can bring about the cooperation of the legal community in their efforts to obtain settlements by conducting settlement negotiations in such a way that it is in the economic interests of lawyers to encourage their clients to settle.

Interestingly, while judges who dismiss cases on the pleadings risk tarnishing their reputations, judges actually can enhance their reputations by devising "innovative" or "creative" settlements. For example, Rule 16 of the Federal Rules of Civil Procedure permits a trial judge to direct the attorneys for the parties to appear at a pretrial conference for the purpose of "facilitating the settlement of the case."[187] But judges can invoke Rule 16 simply to rid a case of what they regard as frivolous or uninteresting issues of fact and law, whether or not requested by one of the parties. Moreover, the Judicial Conference Committee on Rules of Practice and Procedure would have amended Rule 16 to authorize courts to require not only lawyers, but also the parties or their insurers both to attend settlement conferences and to participate in alternative dispute resolution procedures designed to foster settlement. Lawyers objected to this proposal, claiming that "explicit authority to require party attendance at settlement conferences would be misused by judges to coerce settlements."[188]

Consistent with Miller's analysis of the agency problems involved in settlement, it is notable that the lawyers do not object to judges facilitating settlements when the clients are not around. They only object when the clients can be there to observe the discussions of the division of gains from settlement. Put another way, if there were no agency costs in the attorney–client relationship, there would be no reason for lawyers to object to settlement discussions at which the clients would appear. As a compromise between the judicial interests in facilitating settlements and the bar's interests in controlling settlement negotiations, it was agreed that party representatives would be made accessible by telephone during settlement negotiations with the court. Moreover, the amendments to Rule 16 do not deter judges from exercising their inherent powers to compel parties to attend pretrial conferences or to participate in alternative dispute resolution procedures.

Rule 68, Discovery, and Automatic Disclosure

As noted above, judges are likely to use the rules of procedure to increase their control over litigation. Judges control litigation by retaining the power to dispose of unwanted cases by inducing settlements, and by ex-

panding their ability to dismiss cases without reference to the underlying substantive legal issues. In addition, building on the assumption that judges care about prestige and prefer important cases to trivial cases, we can expect procedural rules designed to raise the fixed costs of litigation in order to weed out small cases.

Under Rule 68, for example, a plaintiff who refuses a settlement offer, goes to trial, and obtains a judgment that is less favorable than the defending party's offer, must pay all of the defendant's post-offer costs. Such a rule is best viewed as a mechanism for reducing the incidence of small-stakes litigation, rather than as a mechanism for encouraging settlement. As Miller has observed, the popular justification for Rule 68, namely that the rule encourages settlements, is fallacious because it ignores the fact that defendants faced with Rule 68 simply will lower their settlement offers to plaintiffs.[189] Instead of encouraging settlement, such an outcome simply drives down the level of settlement offers.

The costs that courts may assess against plaintiffs choosing not to accept an offer of settlement under Rule 68 generally do not include variable costs such as attorneys' fees, but only fixed costs such as filing fees and the cost of deposition transcripts.[190] Consequently, although the effect of Rule 68 is to lower the expected value of cases to plaintiffs by raising expected costs, the costs involved are fixed, and thus they have a proportionately greater impact on small-stakes litigation. As a result, Rule 68 affects plaintiffs' incentives to bring cases in a way that discourages small cases more than large ones. Thus, Rule 68 not only shifts wealth from plaintiffs to defendants, but also shifts wealth from lawyers to judges. Cases that might be brought in the absence of Rule 68 will not be brought with the rule in place.

Recent analysis of Rule 68 reinforces the argument that the peculiar design of this rule can best be explained as a mechanism for maximizing judicial utility, rather than for maximizing the efficiency of the legal system. In a recent paper, Kathryn Spier provides a theoretical framework that indicates that Rule 68 will tend to increase the likelihood of settlement where the litigants disagree about damages but agree about liability and will tend to decrease the likelihood of settlement where litigants disagree about liability but agree about damages. This corresponds to the basic intuition that lawyers and judges will find liability (i.e., legal) issues more interesting than damages issues, which generally revolve around such nonlegal issues as the plaintiff's expected future earnings.[191]

The above arguments about Rule 68 apply with even greater force to the liberal rules for discovery. Under modern discovery rules, litigants can select whatever discovery tools they wish—interrogatories, depositions, document requests—and can conduct free-form investigations of their opponents' records without regard for the particularities of the pleadings or the precise nature of their positions.[192] The liberal rules of pretrial discovery involve "considerable to enormous waste."[193] In particular:

> [A] no-stone-left-unturned (sometimes a no-grain-of-sand-left-unturned) philosophy of discovery governs much litigation and imposes costs, usually without corresponding benefits. Costly discovery undertaken with only a marginal effect on the outcome of litigation constitutes an economic loss to society. Like any wasteful practice, it uses up resources that could be put to more productive uses.[194]

Perhaps the most common explanation for the survival of the patently inefficient rules of discovery is that they benefit lawyers at the expense of clients. Litigants become the victims of their lawyers' self-interest. The argument is that lawyers profit from more discovery because they are paid by the hour, and thus benefit both from more discovery and more litigation about discovery.[195] While this analysis has some explanatory power, it is not a complete explanation of the existence of liberal discovery because it ignores the fact that there are costs as well as benefits to lawyers from such rules. In particular, from the lawyers' perspective, liberal discovery rules increase the fees garnered in individual cases, but they decrease the overall demand for legal services by driving up the price of such services. Thus, plaintiffs' lawyers will be less able to convince prospective clients to file lawsuits because such clients will be aware of the enormous cost of discovery.

Even those who explain liberal discovery rules on the basis of the divergence of interest between lawyers and clients acknowledge that:

> [D]iscovery is sometimes used as a club against the other party. Unlimited discovery allows a party to impose costs upon an adversary solely to increase the adversary's expenses. The anticipation that bringing or defending a lawsuit will be costly, regardless of the merits, may cause a party with a meritorious claim or defense either not to sue, to give up early, or to settle for an amount less than defense costs.[196]

Similarly, one would predict that market forces would emerge to mitigate the agency cost problems that exist between lawyers and their clients. And they have. In recent years, corporate inside counsel has become more active in monitoring outside legal services. An entire cottage industry of consulting firms that specialize in auditing legal bills has emerged as well.[197] These developments can be expected to reduce lawyers' demands for open-ended discovery, and one would predict that these developments would lead lawyers to respond by voluntarily reducing the costliness of discovery.

Thus, it is hard to conclude that a rule that causes parties not to sue unambiguously benefits lawyers. On the other hand, it is clear that such rules benefit judges in two ways. First, the liberal rules of discovery reduce total litigation, thereby reducing judges' overall caseloads. Second, liberal discovery rules constitute fixed costs for bringing litigation because there is no legal rule that reduces strategic behavior by lawyers by limiting the extent of the discovery available in small-stakes litigation.[198] Consequently, the liberal rules of discovery will have a disproportionate impact on small-stakes litigation because discovery will constitute a higher percentage of the total expected recovery in such litigation.

Of course, the parties requesting discovery bear some of the costs associated with their discovery requests. We would, therefore, expect less discovery in small-stakes litigation because clients will only be willing to incur litigation costs up to the amount of any expected recovery. Cases with small expected recoveries will not justify elaborate discovery requests. Consistent with this analysis, a study by the Federal Judicial Center showed that discovery requests were recorded with the district court in fewer than one-half of 3,114 cases studied.[199] Moreover, this study revealed a positive correlation between the amount in controversy and the number of discovery requests.[200] Nonetheless, abuse of the discovery process is well documented, and it can be used to coerce settlements and to reduce the incidence of litigation, particularly small-stakes litigation.[201] However, given the rather limited use of settlement in small-stakes litigation, self-interested judges might try to develop another mechanism for reducing the percentage of their caseloads composed of such litigation.

The Advisory Committee on the Federal Rules of Civil Procedure recommended in 1992 that courts be permitted to limit discovery where:

> the burden or expense of the proposed discovery rule outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, and the importance of the proposed discovery in resolving issues.[202]

Rule 26 of the Federal Rules of Civil Procedure was amended to reflect this recommendation in 1993. This new rule can be expected to benefit both lawyers and judges. Judges benefit because they gain new power to control discovery. Judges will be able to permit broad discovery when they want to raise litigation costs and encourage early settlement. Lawyers can increase the supply of litigation by making a credible claim to clients that litigation costs can be reduced by limiting discovery.

More important, an additional amendment to Rule 26 requires automatic disclosure of certain core information in every case. This core information includes the names and addresses of witnesses, and the location and categories of documents "relevant to disputed facts alleged with particularity in the pleadings."[203] Critics of this amendment within the legal community argue that it will produce more confusion, delay, and expense than prior discovery rules because attorneys will be free to manipulate the standard without fear of penalty.[204] The legal community also has argued that the amendment will assist plaintiffs by requiring defense counsel to respond to every legal theory that might support the plaintiffs' complaints, including theories the plaintiffs had not considered.[205]

The amendments to Rule 26 will likely reduce judicial workloads by reducing the incentives of lawyers to bring small-stakes litigation in two ways. First, small-stakes cases will be deterred because these amendments impose yet another fixed cost on the litigation process. Second, and more important, the amendments require document production *in every case*, including the 50% of cases in which there was no document production at all prior to the implementation of the amendments. As such, the amendments to Rule 26 will have a disproportionate effect on small-stakes litigation by requiring the production of documents that would not have been produced in the absence of these amendments.[206] Ironically, a set of rule changes ostensibly designed to streamline the discovery process will result in even more document production than before. It is not surprising that many practitioners believe that these discovery reforms reflect an outcome in which lawyers' interests are being "sacrificed to the judicial agenda [of reducing the workload of the courts] without any airing of the issues."[207]

Chevron

Perhaps the most striking example of the judiciary's efforts to claim control of their own agendas is reflected in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*[208] *Chevron* involved the Environmental Protection Agency's (EPA) "bubble" policy, which contained a new way to

measure discharges of industrial pollution controlled by the Clean Air Act. The EPA's new policy gave the administration the authority to define the statutory term "stationary source" to mean either any polluting device within a plant, or an entire manufacturing plant. In some states, this interpretation had the effect of reducing manufacturers' costs of complying with the Clean Air Act.

At issue in *Chevron* was whether the EPA's new definition of the term stationary source violated the Clean Air Act. But the opinion contained sweeping language on the need for courts to defer to administrative agency interpretations of ambiguous statutes, including statutes on subjects far removed from the Clean Air Act. In what has been described as one of the "defining cases in the last twenty years of American public law,"[209] the court held that an administrative agency's construction of a statute would be upheld unless it is unreasonable or otherwise impermissible.[210] This case has been severely criticized as "a striking abdication of judicial responsibility" and "quite incompatible with Marshall's aphorism that "[i]t is emphatically the province and duty of the judicial department to say what the law is."[211] The criticism of *Chevron* is based on the fact that the decision creates enormous possibilities for judicial abdication of agency decisions.

From the perspective of the self-interest of the judiciary, however, *Chevron* must be viewed as an act of genius. The opinion increases dramatically the ability of judges to control their own agendas. As the court in *Chevron* made clear, courts may draw upon "traditional tools of [statutory] construction" when evaluating agency interpretations of statutes. In this respect, judges may defer to agencies when they want to. Alternatively, whenever a judge thinks that an agency's interpretation of a statute contradicts the plain meaning of the law, the overall structure of a statutory scheme, the relevant legislative history, or even the underlying purposes of a statute, he or she is free to ignore *Chevron*'s call for deference and overrule the agency.[212]

The decision in *Chevron* allows federal judges to invoke a generic procedural value—deference to the expertise of administrative agencies—whenever they wish to avoid considering the merits of an agency ruling. On the other hand, the ruling in *Chevron* is sufficiently flexible that judges who have developed a specialty in a particular area, or have strong preferences about the outcome of a particular case, are completely free to ignore the agency's interpretation.[213] Thus the court's ruling in *Chevron* allows judges simultaneously to take full advantage of any specific human capital

investments they have made in learning particular areas of the law and to decide other cases on the basis of generic legal skills. No judge will have the expertise or the inclination to handle all possible areas of substantive law.

Similarly, *Chevron* also serves the interests of judges who want to minimize the time and effort involved in judging. On the one hand, after *Chevron* one would expect that those judges with particularly strong tastes for leisure would invoke the *Chevron* invitation simply to defer to agency expertise. On the other hand, those judges with more ambition or conviction, or with a stronger agenda, are free to ignore the determinations of administrative agencies when they so choose.

Procedural Rules, Judicial Preferences, and the Public Interest

Although the theory developed in this article is based on judicial self-interest, the theory is descriptive rather than normative. Nothing in the theory would suggest that judges acting in their own self-interest will craft rules that are systematically inefficient.

By contrast, over a wide range of issues, the judiciary's influence on the development of procedural rules will move such rules in the direction of clients' and society's interest by offsetting the influence that lawyers have on the development of the law. For example, as noted above, judges' ability to streamline the discovery process will mitigate the agency-cost problem that exists between lawyers and their clients. Similarly, judges' power to force settlements on lawyers will benefit some clients by reducing the ability of lawyers to prolong litigation in order to amass more billable hours.

And the use of procedural rules to discharge cases on the basis of generic legal skills may be efficient because it reduces the cost to judges of specializing in certain areas of law. Because judges can dispose of a wide range of cases on the basis of generic legal skills, the opportunity cost of specializing in one area of the law is reduced. Thus, even judges of general jurisdiction can retain their specialties in particular areas of the law by disposing of cases in areas they know nothing about by inducing settlements or by invoking a decision rule, such as one of the canons of statutory construction, the rule of stare decisis, or some other procedural device that involves the application of a generic legal skill.

It would be wrong, however, to view the impact of judicial self-interest on procedural rules as providing only benefits and no costs. The preceding

analysis suggests that judicial self-interest causes some inefficiencies in the litigation process. For example, it appears likely that judges' tastes for leisure cause them to raise the costs of litigation above the socially optimal level. Rule 68 of the Federal Rules of Civil Procedure, along with the high fixed costs of discovery rules, move the threshold point at which the expected benefits of bringing a lawsuit are outweighed by the costs, particularly for small-stakes claims, to inefficient levels.

Similarly, litigation produces a public good in the form of legal precedent. Legal precedents are of general social value because they lower the transaction costs of doing business. Where judges' self-interest leads them to craft procedural rules that reduce the percentage of cases ultimately resolved on the merits, more cases are resolved on technical, procedural grounds, and the available supply of precedents is adversely affected.

Finally, to the extent that the procedural rules allow judges to obtain settlements in cases that would not otherwise be settled and to terminate cases on purely procedural grounds, or by merely looking at the files and then issuing an unpublished memorandum opinion, the risk that judges will decide cases willfully (i.e., on the basis of their own narrow preferences without regard to efficiency norms, or precedent, or other neutral principles), goes up. This is because when a judge is able to induce a settlement or to terminate a case on purely procedural grounds, he or she avoids having to justify the decision on the basis of a formal, written opinion.

The nature of judicial preferences also can help explain why judges have not gone further in pressing for changes that would reduce caseload growth. One suggestion for dealing with the explosion in judges' caseloads is the proposal to establish a new federal appellate court that would serve as a buffer between the circuit courts of appeal and the Supreme Court. As Richard Posner has pointed out, the creation of an additional tier of intermediate appellate courts, by making the judicial system more hierarchical, could provide an effective response to caseload growth.[214] In fact, it was the problem of caseload growth that led most states, as well as the federal authorities, to create an intermediate appellate court between the trial court and the Supreme Court.[215] However, the creation of such a court would benefit the Supreme Court at the expense of the federal appellate courts by reducing the caseload of the Supreme Court and the prestige of the lower federal courts of appeal. For this reason, the proposal to create a new appellate court just below the Supreme Court has been vigorously opposed by appellate court judges.

Similarly, it is interesting that Congress has responded to the federal courts' caseload problem not by imposing higher filing fees, but instead by setting minimum threshold levels for bringing lawsuits. The efficient solution to the caseload problem would be to impose filing fees.[216] A minimum amount in controversy requirement is equivalent to setting an infinite fee for cases below the minimum and a zero fee for cases above the level. However, no one actually collects such a fee. By contrast, a fixed fee imposes what is, in effect, a proportionally declining tax on lawsuits, thereby causing litigants to internalize the costs of using the court system.[217]

The minimum amount in controversy requirement used in the federal court system is inefficient compared with a filing fee system, because the requirement subsidizes litigation. If a case meets the minimum requirements, the litigants do not have to contribute to the costs of the judicial system.[218] However, judges are likely to prefer a minimum amount in controversy requirement because such requirements unconditionally prohibit small-stakes litigation and ensure that the small claims disfavored by judges will not be brought.

Turning Substantive Rules into Procedural Rules: Lessons from Corporate Law

Judges will tend to decide cases in ways that allow them to take advantage of their own skills and expertise. For example, while judges generally have little, if any, expertise in statistics or economics or finance, they have significant expertise in establishing procedural norms. Consequently, while a judge is unlikely to be able to evaluate the substantive terms of a particular transaction, or to determine whether a particular price is fair, the judge will be able to evaluate whether a preexisting set of procedural rules has been followed by litigants. Judges who wish to expedite the disposition of cases will replace substantive law analysis with procedural rules.[219] Judges will not only invoke procedural rules to dismiss cases, but they also will transform substantive rules of law into procedural rules. Thus, judges are likely to establish substantive legal rules that are, in effect, procedural.

For example, in *Smith v. Van Gorkom*[220] the shareholders of Trans Union Corporation filed a class action lawsuit against the firm's board of directors, seeking to set aside a merger between Trans Union and a wholly owned subsidiary of Marmon Group, Incorporated. This merger caused the plaintiffs to realize a return of more than 50% on the premerger price of their stock. The Delaware Supreme Court decided that the Trans Union

directors had acted in a grossly negligent manner in approving the merger proposal because they had not developed an adequate *procedural framework* for analyzing the proposal.

What is remarkable about the opinion is that despite the imposition of draconian damages on the individual directors who were defendants, the remedy prescribed was "purely a nostrum,"[221] because "corporate managers faced with a situation like that confronting the Trans Union board can insure against liability by creating a paper record demonstrating that the board has engaged in due deliberations."[222] In other words, corporate directors can engage in virtually any transaction they wish, without fear of challenge, simply by creating the procedural appearance of fairness. Lawyers create the appearance of fairness by ensuring that the corporate minutes reflect lengthy and thorough discussions of the proposed transactions and by providing the decision makers with all relevant documents. Of course, these procedures, while costly, "do not provide any reliable guarantee that the transaction will benefit shareholders."[223] What these transactions do accomplish is to allow judges to focus their decision making on issues with which they are comfortable.

Commentators have observed that these sorts of rules amount to a tax on corporate control transaction. This tax benefits both lawyers and judges. It benefits lawyers by increasing the demand for their services, and it benefits judges by allowing them to substitute a generalized judicial inquiry into the procedures used in a particular transaction for the difficult and fact-intensive analysis that otherwise would be required.

Perhaps the best example of the judiciary's efforts to substitute procedural rules for substantive rules of law lies in the corporate law rules regarding valuation issues. Despite the fact that sophisticated techniques of corporate finance have made valuation much more objective than ever before, courts have consistently emphasized that procedural rules are more important than substantive legal rules. For example, in *Weinberger v. UOP, Inc.*,[224] the Delaware Supreme Court decided that the procedures followed by a board of directors in evaluating the price paid by a majority shareholder for a corporation under its control was insufficient, even when the shares of the corporation being purchased were publicly traded and the price paid represented a 50% premium over the market price of the subsidiary's shares. *Weinberger* involved the purchase by Signal Corporation of shares in UOP, whose stock was traded on the New York Stock Exchange. Signal, which owned 50.5% of UOP's stock, wanted to increase its ownership to 100%. In evaluating the fairness of the transaction, the

court made it clear that the preoffer market price of UOP was of less importance than the procedures established by Signal for arriving at the price.[225] The rule established in *Weinberger* has resulted in a new set of procedures in cash-out merger transactions that increase the cost of consummating such transactions without any apparent benefit to the minority shareholders. The result in *Weinberger* can best be explained as an effort to transform substantive legal issues that judges find difficult to master into procedural rules that are easy for judges to administer.

Indeed, under existing corporate law, virtually any transaction can be insulated from legal challenge if a sufficient procedural framework is established and followed. It is impossible to justify the systematic "proceduralization" of substantive corporate law rules without taking account of the judges' preference for procedural over substantive rules.

Conclusion

The preceding analysis demonstrates that judges have considerable ability to control their own agendas by crafting decision rules that allow judges to dispose of cases quickly and cheaply. These rules also enable judges to winnow out undesirable, small-stakes litigation, to devote more energy to cases in which they are interested, and to spend less time on cases that are of little entertainment value.

Of course, judges have not captured the rule-making process completely. Lawyers and other interest groups, such as court reporters, insurance companies, and other large consumers of judicial services, inevitably influence the process. But as the above discussion has shown, the ability of members of the federal judiciary to control the process by which the Federal Rules of Civil Procedure are revised gives them a distinct advantage over competing interest groups in obtaining procedural rules that reflect their own self-interest.

Overcoming the Competence/Credibility Paradox in Judicial Impact Assessment: The Need for an Independent Office of Interbranch Relations

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Introduction: The Competence/Credibility Paradox and the Politics of Interbranch Relationships

Our governmental structure envisions legislative problem solving as a joint, if not cooperative, venture between the President and Congress. Except in the rare instance of the veto override, the two must come to terms and agree, if legislation is to be enacted. In contrast, the Constitution assigns no formal role to the judiciary in the development of legislation, relegating to it the task of interpreting laws after passage. If Congress and the President are analogized to a designer and installer of a guardrail at the top of a cliff, the judiciary is an ambulance driver positioned at the base.

Given this limited, reactive mission, it is unsurprising that much of the recent discussion concerning the proper scope of the judiciary's role in the legislative process has centered on statutory interpretation and how the courts should construe imprecise, defective, or ambiguous statutory text. Thus, when the guardrail gives way, causing some poor unfortunate to land with a disagreeable thud, the question becomes whether the paramedic is best advised to rescue the victim (the traditional approach); to report his vital signs and await further instructions (the modern conservative approach); or to back over him in the van, for emphasis (the textualist approach).[227]

In the last ten years, judges, legislators, and scholars have exhibited growing interest in improving the judiciary's ability to affect the development of legislation by increasing the quantity and quality of interbranch communication. The explanation for this growing interest is at least threefold. First, all badly drafted legislation exacts an unnecessary toll on the judiciary in the form of resources wasted on needless statutory interpretation. The sooner the problem is called to Congress's attention, understood,

and corrected, the better. Second, even well-crafted legislation can exert an impact on judicial resources by increasing caseload or otherwise altering the litigation landscape to an extent not anticipated by Congress. If Congress receives prompt and accurate forecasts of the impact of proposed legislation on the courts, it will be better able to assess whether a proposal's virtues justify the accompanying price tag. Third, as caseload and other burdens on the federal courts rise, so too does the need for thoughtful judicial reform legislation enabling the courts to better accommodate those burdens. If Congress is kept abreast of the judiciary's problems and is furnished with possible solutions, the continued health and well-being of the third branch can be better preserved.

In all three cases, the operating assumption of those interested in improving interbranch communications is that the judiciary is well situated to furnish the other branches with accurate information that may be helpful in developing legislation affecting the courts. In short, the legislative and executive folks at the top of the cliff may be experts at guardrail design and installation, but the judicial guy at the bottom, who is dodging debris and mopping up after accidents, is in a unique position to tell them a thing or two about where and why stuff keeps falling.

The judicial impact assessment is one means by which the judiciary can pass relevant information along to Congress. Whether these assessments can and do deliver accurate information is an issue addressed by other participants in this conference. Even assuming, however, that judicial impact assessments are accurate, there is reason to suspect that they will not be taken seriously by Congress when it matters most—not as long as a self-interested judiciary is solely responsible for their preparation and dissemination.

As a general matter, the fact that Congress is furnished information from a self-interested source does not mean that the source will be ignored. That a source is self-interested does not necessarily mean that it is untrustworthy or that the information it provides is inaccurate. Moreover, public and private sector lobbyists often have the power to attract Congress's attention, irrespective of their credibility or the accuracy of the information that they impart. When the President communicates with Congress on a pending bill, the relative trustworthiness of his information may ultimately give way to the political reality that, if the President goes unheeded, he will veto the measure. So, too, when a national lobbying organization furnishes Congress with information, Congress's inclination to be skeptical of a self-interested source may be tempered by the recognition

that if the organization is ignored, the millions strong it represents could vote en bloc against unmindful legislators.

Federal judges, in contrast, have neither the veto power of the President, nor the clout of a private organization capable of delivering votes or campaign contributions. If judges are to get their way, it is because the information they supply is trusted and accurate. Judges are respected constituents whose views are taken seriously by their respective representatives in Congress. By virtue of their past accomplishments and present station, their views have an aura of credibility that compensates, to some extent, for their lack of political power. At the same time, the more aggressively the judiciary advocates potentially controversial positions that coincide with its institutional self-interest, the greater the risk that this aura of credibility will become marred. From this it follows that judicial impact assessments produced by the judiciary alone are at risk of being called into question whenever the estimated impact is great enough to become an issue of political significance, to the extent that Congress perceives it to be in the judiciary's self-interest to exaggerate judicial impact.

The resulting paradox is that the judiciary, by virtue of its expertise and access to relevant information, may be in sole possession of judicial impact data critical to intelligent congressional decision making. At the same time, the judiciary, by virtue of appearing self-interested and being insufficiently powerful politically, risks being ignored if it acts alone in providing such information. In other words, what makes the judiciary a uniquely competent source of information also makes it an insufficiently credible source.

What this competence/credibility paradox suggests is the need for an entity close to, yet independent of, the judiciary to participate in the impact assessment process. At the risk of overstaying the welcome of the cliff analogy, the trick is to find a trusted intermediary, who can pass the paramedic's ideas along to the builders, unencumbered by the implications that those ideas are merely a product of the paramedic's desire to avoid work and simplify his life.

In the section following, I look at how the competence/credibility paradox played itself out over the course of the Federal Courts Study Committee's deliberations, culminating in its recommended creation of an Office of Judicial Impact Assessment (OJIA) within the judiciary. In the next section, I argue that locating the OJIA in the judiciary, particularly at a time when the judiciary was becoming embroiled in a series of unusually contentious disputes with the other branches of government, may have compromised the credibility of the judiciary's impact statements and re-

lated data in the eyes of Congress. In the third section, I briefly suggest the possibility of creating an independent Office of Interbranch Relations to screen and clear impact assessments prepared by the judiciary as one way to preserve the judiciary's role in developing impact assessments, while at the same time ensuring their credibility.

The Competence/Credibility Paradox on the Chalkboard: Development of the Federal Courts Study Committee's Recommendation of an Office of Judicial Impact Assessment

The development of the Federal Courts Study Committee's call for establishment of an OJIA within the judiciary illustrates tensions that the competence/credibility paradox creates.

The Federal Courts Study Committee was created by Congress through the Federal Courts Study Act of 1988.[228] The Act provided for the establishment of a committee within the Judicial Conference, composed of fifteen members selected by the Chief Justice, who were to be "representative of the various interests, needs and concerns which may be affected by the jurisdiction of the Federal courts." The marching orders of the committee were to: (1) study the federal courts and issue a report within fifteen months; (2) recommend any changes in the law deemed advisable; (3) develop a long-range plan for the judicial system; and (4) make any other recommendations deemed advisable.

Enhancing congressional responsiveness to the needs of the judiciary was on the committee's table from the very beginning. Initially considered were suggestions to establish a council of law revision within the executive branch—a proposal that has been advanced from time to time over the course of the past century.[229] On February 3, 1989, Committee Chairman Judge Joseph Weis, Jr., called the first meeting of the committee to order. The guest speaker at that meeting was Professor Daniel Meador, who made the following observation in his introductory remarks:

> In the countries of continental Europe and in England . . . they have offices . . . staffed by very able, high-ranking civil servants and lawyers who are constantly monitoring the judicial system, spotting its problems, recommending legislation to cure defects . . . . It may be that a permanent office in the Justice Department could be charged with this responsibility specifically by statute . . . . There may be various ways, but I do think [that this issue] is well worth your thinking about so that when you terminate

> your work, you leave in place . . . a permanent, ongoing mechanism for dealing with these problems.[230]

Chairman Weis concluded that first meeting by dividing committee work assignments among three subcommittees, giving to Judge Richard Posner and his Subcommittee on Role and Relationships the task of exploring, among other issues, "the partnership with Congress."[231] The next week, the Posner subcommittee met for the first time and resolved to explore whether:

> we can design a machinery that will enable the courts to communicate better with Congress—to give Congress feedback on the operation of its statutes in practice—and Congress to communicate better with the courts regarding the practicability of various proposals for judicial reform.[232]

In April 1989, subcommittee reporter Larry Kramer circulated a memorandum to subcommittee members, reiterating that "Congress should know how its laws are working in practice. This is true both for laws that regulate the courts and for substantive laws. A means to provide such information on a regular basis would be desirable."[233] To that end, Kramer resurrected Meador's suggestion that Congress create a commission on law revision akin to that in England.[234]

By June, the subcommittee had abandoned the executive branch in favor of "an arm of Congress—not an independent agency, but more along the lines of the comptroller" as the home for an agency or organization that would serve a number of functions.[235] Among its functions, Kramer told the committee, would be "to make recommendations for legislation Congress has proposed on how to structure it [legislation] to minimize judicial impact." To that end, Kramer solicited the assistance of Professor John Donahue to develop

> some general propositions about how to think about making predictions about not just what the effect of the law will be in terms of will it produce a lot of cases, but within the structure of the law, what kinds of cases can one expect to see more of than others, and then how we can think about structuring the law to minimize that impact.[236]

As of July 21, 1989, the Posner subcommittee proposal had jelled: "We recommend that Congress create an agency to engage in ongoing review of the use of federal judicial resources," called the Office of Judicial Impact Assessment.[237] Recognizing that "success depends on how the agency is

organized," the subcommittee recommended that the OJIA be "an independent support agency within the legislature, like the Congressional Research Service," with a staff removable only for cause.[238] Among the OJIA's tasks would be "to predict what kinds of cases are likely to arise under particular legislation."[239]

At the July 31 meeting of the committee, reaction to the proposed creation of the OJIA was guarded. "[W]hy is it in the legislative branch rather than the judicial branch[?]," inquired District Judge Jose Cabranes. "I have no problem with that," he continued, "but I suspect that some members of the judicial branch might wonder whether it wouldn't be, in a sense, too independent of judicial perspective or judicial interest or concern."[240] Judge Levin Campbell echoed the same concern:

> I [am] worried a little bit about whether an agency that was put in the legislative branch exclusively with tenured officials would, at some point, assert itself in a way to not intimidate the judiciary but to start getting a particular point of view expressed to the judiciary. Of course, the legislative branch is very powerful. It can be because they have what we need—money and resources—and there is always the possibility that people in an agency of that sort would develop a sense that they sort of ought to be running the show a little bit.[241]

The concerns of Judges Campbell and Cabranes underscore the competence component of the competence/credibility paradox: An entity completely divorced from the judiciary would be insufficiently attuned to the needs of the third branch to assess judicial impact effectively. It could develop other agendas that might interfere with accurate, good-faith impact forecasting. Moreover, to the extent that the judiciary would be suspicious of—and thus reluctant to share information with—such an office, the ability of the OJIA to gather relevant data from the judiciary would be further hampered.

On the other hand, the advantage of locating the OJIA in the Congress goes to the credibility half of the competence/credibility paradox: Legislators would perceive an independent agency within the legislature as credible and would take its impact assessments seriously. Although Congressman Carlos Moorhead's initial reaction to the Posner proposal was to say that, "I think we'd respond better if the courts [came] to us and [told] us they have a real serious problem that has to be taken care of than if we had just one more agency in the Congress,"[242] he was ultimately persuaded by Senator Charles Grassley, who disagreed:[243]

> [T]he power of the Congressional Budget Office just on appropriation is a leading indicator of an impact that an agency of Congress can have, because the estimates that they make on budget as it affects a particular program—if Senator X wants to stand up and suggest Program X, and if they say it is going to cost $1 billion instead of $100 million, it practically makes it impossible to get done. . . . And if you were thinking in terms of something that would force that sort of consideration on the part of Congress it could make a real difference.[244]

Asked, "What would be a meaningful kind of [judicial impact] statement to you?" Senator Grassley sounded the credibility theme explicitly: "I don't know whether it is the statement, itself, but it is respect for the statement," he replied, respect such as that accorded the reports of such congressional agencies as the General Accounting Office or the Congressional Budget Office.[245]

At the October 29 and 30, 1989, meeting of the committee, when a vote on the proposal was scheduled, Robert Feidler, then legislative and public affairs officer for the Administrative Office of the U.S. Courts, circulated to committee members a memorandum he had prepared for his director.[246] The memo stressed the relative competence of the judiciary to assess judicial impact: "All of the objectives [of the proposed OJIA] are now being done by the [Judicial] Conference,"[247] Feidler wrote. "When Congress asks for an impact statement . . . the [Administrative Office] has responded in a timely and thoughtful manner."[248] "There is simply no reason to believe that an agency within the Legislative Branch would be better capable of advising the Members than is the Judicial Branch directly."[249]

At the same time, the memo conceded that Congress would perceive as credible and take seriously the judicial impact assessments of a congressional OJIA to a far greater extent than assessments submitted by the Administrative Office or the Judicial Conference:

> To place these functions in the Legislative Branch in a support agency as envisioned by the subcommittee would eviscerate the role of the Judicial Conference in the legislative process. . . . To create a specific body within the Legislative Branch to perform these functions would make the Judiciary non-players in many decisions affecting the Judiciary.[250]

Given that the OJIA proposal did not call for the judiciary to discontinue preparing impact assessments as it had in the past, the proposal could

"eviscerate the role of the Judicial Conference" only to the extent that Congress would trust and rely on OJIA impact assessments to the exclusion of those prepared by the third branch.

In the vote that followed, the committee "recommended in substance that Congress create an agency to enhance inter-branch communications." The recommendation to locate the agency in Congress was defeated; in its place, a recommendation that the agency be within the "judicial branch" was approved.[251]

While the committee was evidently satisfied that the task of assessing judicial impact was one that had been and should remain in the competent hands of the third branch, the possibility that the judiciary would appear self-interested and that its impact assessments could therefore lack credibility with Congress remained a concern. On the basis of a November 15, 1989, report of the Subcommittee on Administration, Management and Structure,[252] a November 27 tentative draft of the committee refined the October 30 recommendation by proposing that the OJIA be located specifically in the Federal Judicial Center, rather than in "the judicial branch" generally.[253] Although impact forecasting had previously been undertaken by the Administrative Office, the tentative draft explained that the "advantage of placing this office in the Center is that it would be separate from operational entities and thus would be more likely to be perceived as being an objective agency rather than an advocate agency."[254] To that end, "the Office would not endorse or condemn legislation. It would confine itself to an analysis of the impact of that legislation."[255]

The tentative draft's refinement was approved by the committee on December 10, 1989. A subsequent draft, dated December 22, 1989, was disseminated for public comment, with the reference to the FJC as "an objective agency rather than an advocate agency" deleted.[256]

In response to this proposal, the committee of the Judicial Conference that oversees the Administrative Office objected to locating the OJIA in the FJC. Again the competence theme was emphasized: "The Committee on the Administrative Office of the Judicial Conference . . . does not support the recommendation to create an Office of Judicial Impact Assessment in the Federal Judicial Center," wrote Conference Committee Chairman Judge Harlington Wood, Jr., to the Federal Courts Study Committee.[257] "We believe this responsibility should remain under the direction of the Judicial Conference. Impact assessments are currently being made for the Conference by the Administrative Office which has firsthand familiarity with these matters."[258]

In the end, the position of the Committee on the Administrative Office of the Judicial Conference prevailed. On February 15, 1990, the committee voted to substitute "the judicial branch" for "the Federal Judicial Center," which is how the recommendation was phrased when the committee report was issued in April. Four of the committee's fifteen members dissented, arguing that the committee should have recommended locating an OJIA in Congress.[259]

The Competence/Credibility Paradox in Action: Implementing the Federal Courts Study Committee's Recommendation

In response to the committee's recommendation, the Judicial Conference established an Office of Judicial Impact Assessment within the Administrative Office. With the judicial OJIA in place, the critical question became whether the competence the OJIA brought to bear in forecasting judicial impact would be compromised by questions concerning its credibility.

The final draft of Posner's subcommittee report, issued after the full committee had concluded its OJIA deliberation, persisted in its support for a congressional OJIA, arguing that "precisely because [the Administrative Office is] not part of Congress, they have only a limited ability to demand attention and are often treated more like lobbies than helpmates."[260] The relevance of this observation was brought home by a series of contemporaneous events that politicized the Administrative Office, the Judicial Conference, and the federal judiciary in unprecedented ways.

First, the so-called "war" on drugs and crime waged by Congress and the President in the 1980s was taking its toll on the judiciary in the 1990s in a variety of ways: More prosecutions translated into burdensome caseloads;[261] sentencing guidelines limited judicial discretion in ways many judges deemed unfortunate;[262] and the rising percentage of essentially local street crime cases on the dockets had made judging a more routine and thus less interesting line of work.[263] The result was a highly publicized confrontation between judges and the Justice Department. As reported on the front page of the *Washington Post* Metro section:

> A long running feud between U.S. Attorney Jay Stephens and some federal judges in Washington flared anew at a judicial conference here today when Stephens suggested they don't work hard enough and shouldn't complain that he is loading dockets with small drug cases . . . "I think the American public has expressed itself very clearly," Stephens told the judges . . . . "While

> the court may be willing to substitute its judgment, that's not the way the system works."[264]

Second, Senator Joseph Biden's 1990 introduction of the Civil Justice Reform Act precipitated a severe reaction from the federal judiciary, which soured a previously amicable relationship between the third branch and the chair of the Senate Judiciary Committee. The task force that developed the bill included some former judges but no sitting federal judges—an inauspicious start, in the view of some judges.[265] As introduced, it would have imposed a civil case management system on all district courts, much to the chagrin of many federal judges, who criticized it as legislative "micromanagement" and a threat to judicial independence.[266]

Senator Biden delayed further action on the bill for several months, pending efforts to negotiate a mutually agreeable compromise with the Judicial Conference. Compromise was not forthcoming however, in part because different committees within the Judicial Conference were themselves at odds, and Senator Biden made his frustration with the judiciary's behavior known at a subsequent hearing on the bill.[267]

Third, acrimony over the Civil Justice Reform Act spilled over into a companion title of the 1990 Judicial Improvements package, which called for an increase in the number of federal judges. The Judicial Conference submitted its recommendations as to how many judgeships were needed and where. When the Senate Judiciary Committee deviated from Judicial Conference recommendations, some representatives of the judiciary publicly criticized the deviation.[268] As Judge Avern Cohn put it:

> [H]ere too, Congress appears to want to go its own way. The proposed increases do not follow the Judicial Conference recommendations, which are based on carefully considered workload statistics. Indeed, Title II calls for increases that lack justification in the most liberal of standards for determining the number of judges for some districts.[269]

This public criticism was not well received by Senator Biden:

> When it comes to judgeships, the Judicial Conference, as I said, seems to be of the view that the best defense is a good offense. For several weeks now, Judicial Conference officials and individual judges have had nothing but criticism, invective and complaints about the 77 judgeships that Senator Thurmond and I have proposed creating. They accuse us of patronage, of "doling out plums," and "playing politics."

> I think it is time, once and for all, that the curtain is lifted. When it comes to playing politics and doling out patronage, the Judicial Conference has no equal that I have seen before this Committee.[270]

Concluded one journalist:

> For the judiciary—which traditionally tries to avoid such public politicking—this spat is yet another in a series of troublesome encounters with Congress. The two branches have maintained a working relationship, but not without considerable strain.[271]

The confluence of these events could not have come at a worse time for the fledgling Office of Judicial Impact Assessment. "As for the Legislative Affairs Offices in the executive and judicial branches," Kramer observed in a 1991 article, "these are basically lobbies for their respective branches, and nothing would cripple a planning agency faster than to be seen as simply another lobby."[272]

While Kramer's point may be overstated, it is difficult to deny that the OJIA's efforts to establish its credibility with Congress have been complicated by the recent, high-profile political squabbling between the judiciary and the other branches of government. To be sure, the Administrative Office's forecasts of judicial impact have been accepted readily by members of Congress in cases where the estimated impact is slight, and sponsors can cite to the assessment in support of the legislation.[273] On the other hand, forecasts of significant impact—including but not limited to estimates formally presented as judicial impact assessments—have been greeted with greater skepticism.

One example of this skepticism occurred in the context of the previously discussed judgeships bill. After accusing the judiciary of having "no equal" when it came to "playing politics and doling out patronage," Senator Biden questioned the empirical basis for the Judicial Conference's judgeship recommendations:

> Every single recommendation regarding the court of appeals made by the Judicial Conference corresponds exactly to what the circuit council for each circuit asked for. The best example we could find—and I found astonishment in the Justice Department as well as here among Democrats as well as Republicans—the best example of the Judicial Conference's "whatever you want, you get" approach to court of appeals judgeships is the Sixth Circuit.

> In 1988, the Sixth Circuit judicial council asked for no new judgeships. The Judicial Conference rubber-stamped that request: no new judgeships. But after transmitting that recommendation . . . the Conference changed its mind. It bumped that recommendation from zero to five new judgeships overnight. There must have been one heck of an influx of cases in the Sixth Circuit.
>
> Or perhaps it is more accurate to say that the Sixth Circuit council changed its mind and decided it wanted more, and the Conference gave it more. . . .
>
> It sounds a lot more like patronage and politics to me than hard-core analysis—an analysis that just doesn't stand up.[274]

As a second example, the caseload statistics submitted by the judiciary in support of its 1994 annual budget request were recently called into question—this time by the Appropriations Committee:

> The Committee is concerned that the caseload statistics on which the Judicial Conference bases the budget request for the Federal Courts may be overestimated. As the Committee noted during the judiciary's fiscal year 1993 hearing in February, the budget submission overestimated criminal filings for 1991 by 14% and for 1992 by 16%. These overestimates are particularly problematic during periods of constrained budgets. The Committee expects that the courts will improve the process by which they estimate resource requirements.[275]

Third and finally, in the Senate Judiciary Committee Report accompanying the Violence Against Women Act, Chairman Biden challenged the accuracy of the judicial impact assessment. The impact assessment estimated that Title III of the legislation would generate 58,800 suits, with 13,450 reaching the federal courts at a cost of $43.6 million and 450 staff years—an obvious threat to the viability of the legislation, if true. The chairman and sponsor of the legislation was unconvinced:

> [T]he judicial impact statement of the Administrative Office of the Courts is based on [an] improper interpretation of the statute. Its wild estimates of 450 staff years and 53,000 cases are based on a reading of the statute that includes random crimes and domestic violence cases. Since those cases cannot be brought under title III, the judicial impact statement is obviously inaccurate.[276]

Overcoming the Competence/Credibility Paradox: The Establishment of an Independent Office of Interbranch Relations

That Congress has, on a number of recent occasions, challenged the judiciary's workload projections in impact assessments and elsewhere, does not necessarily call into question the judiciary's competence to make such projections or even the accuracy of the projections themselves.[277] The judiciary has readier access to caseload information than the other two branches of government. It has the most experience to date in gathering and interpreting such information, and is no less able than either of the other branches to retain qualified, technical support staff. It has, represented in its judges, the accumulated expertise and sensitivity requisite to assessing how given statutory changes may affect judicial administration or alter the pace or character of litigation. And it has the political independence to make assessments without regard to their public popularity. In short, if any branch of government is competent to assess the impact of legislation on the courts, it is the judiciary.

The problem is one of credibility, and as I have argued here, this is a problem that will not go away as long as judicial impact assessments are produced and distributed by the judiciary alone. One alternative worth considering is the creation of an independent entity that would, among other tasks, assist in judicial impact assessment. Such a proposal is nothing new. In fact, former circuit executive Paul Nejelski offered just such a suggestion in response to the credibility concern I raise here, in an article he wrote over a decade ago:

> No matter where we assign the responsibility, however, we must recognize the widespread fear of institutional bias—real or imagined. Some may feel that courts will err on the side of exaggerating the workload, or the Justice Department will overestimate the cost of granting attorneys' fees, or other groups will similarly bias the results . . . . A possible solution to this diversity of sources and the need for independence might be to create a consortium of the three branches.[278]

A detailed description of the office I propose creating may or may not be the subject of an article worthy of the trees that would sacrifice themselves for its publication. It is, in any event, beyond the modest scope of this effort. In general, however, I would recommend the creation of an independent Office of Interbranch Relations (OIR), with a rotating member-

ship comprised of representatives from the three branches of government (possibly the bar as well) and a limited support staff. Among its functions would be to review proposed legislation for the purpose of assessing judicial impact and recommending revisions to reduce untoward impact—the first of three functions identified by the Posner subcommittee for its ill-fated congressional OJIA. Unlike the Posner subcommittee proposal, however, the OIR would not develop its own judicial impact projections, but would limit itself to reviewing and then accepting, modifying, or rejecting judicial impact assessments prepared by the judiciary.

The potential advantages of this approach would be twofold. First, competence concerns would be satisfied, in that the judiciary would remain in charge of developing judicial impact projections. Second, credibility and the appearance of credibility would be ensured by the independence of the office. Experience with the Federal Courts Study Committee, where legislation implementing the committee's recommendations was enacted less than seven months after the committee had issued its report, suggests that Congress may be more receptive to recommendations made by an interbranch entity on matters of judicial reform. Impact assessments cleared by the OIR, as well as other reforms recommended, might thus be taken more seriously by Congress than if propounded by the judiciary alone.

There are at least two potential objections to establishing an OIR for the purpose of reviewing judicial OJIA assessments. First, it may be argued that creating an office to review impact assessments developed by another office would involve a substantial duplication of effort. Three responses come to mind: first, some duplication is tolerable to the extent it culminates in more credible impact assessments; second, the OIR could develop standards for reviewing OJIA assessments, possibly modeled after the Administrative Procedure Act, so as to keep unnecessary duplication of effort to a minimum; and third, if the OIR improves interbranch communications as intended, it is realistic to expect that the OJIA will coordinate its development of impact assessments with the OIR, further reducing the latter's need to reinvent the wheel.

A second potential objection is that the two-tier approach to impact assessment would be too cumbersome to provide Congress with timely information. Again, there are three responses: First, as alluded to in the preceding paragraph, if the OJIA coordinated its efforts with those of the OIR, unnecessary delays could be eliminated; second, many of the most significant pieces of legislation (in terms of their impact on the courts) percolate through the Congress over the course of a two-year period, render-

ing inconsequential the limited delays associated with OIR review; and third, there is nothing to prevent the judiciary from submitting an unreviewed impact assessment to Congress, should time be insufficient to permit OIR scrutiny.

While it is outside the scope of this paper, it is important to emphasize that the role of the OIR would by no means be limited to reviewing impact assessments. Rather, it would also be well positioned to serve the other two functions that the Posner subcommittee envisioned for its proposed congressional OJIA: to review decisions by the courts and recommend appropriate legislative reforms in light of those decisions and to improve communications between the branches.

The OIR would thus incorporate and implement a number of related proposals that have frequently been recommended in the past but never implemented, or implemented only sporadically. Reviewing bills with reference to a legislative "checklist"; recommending changes in proposed or enacted legislation to minimize unintended statutory ambiguities; and alerting Congress to significant judicial interpretations of federal statutes, are but a few of the services such an office could perform.[279] Moreover, such an office would improve interbranch understanding in ways that an office populated exclusively by representatives of a single branch could not.[280] By periodically rotating office membership, a significant number of judges, legislators, Justice Department personnel and their staffs would, over time, become exposed to the problems and perspectives of the other two branches. Moreover, judges reluctant to communicate with Congress directly may be willing to do so through the judiciary's liaison at the OIR.

Conclusion

The judiciary is a uniquely competent but, because of the self-interest that some may ascribe to its estimates of judicial workload, an insufficiently credible generator of judicial impact assessments. A congressional OJIA, favored by the Posner subcommittee of the Federal Courts Study Committee, would be in a position to offer credible service with diminished competence. On the other hand, a judicial OJIA, favored by the Federal Courts Study Committee as a whole, would be in a position to offer competent service with diminished credibility—a proposition at least anecdotally supported by experience to date with such an office. Assigning the task of reviewing impact assessments generated by the judiciary to an

independent Office of Interbranch Relations could potentially provide the optimal mix of competence and credibility.

Proceedings from the Theory Session

The following is a summary of those points addressed in the oral presentations or plenary discussions of the theory session that extend or supplement the material provided in the preceding written contributions.

How Does the Political Environment Affect Judicial Impact Assessment?

In response to Munger's and Belluck's assertions that judicial impact statements are being promoted primarily by judicial insiders, Krislov pointed out that judicial impact statements are neutral instruments that can be used "both ways." Stressing that "the impact statement is important because mindless avoidance of planning [in the courts] is a penalty on the public," he said, "I really don't believe there is anything inherently antidemocratic, antimajoritarian, and certainly not conservative about planning because the alternative [of lack of planning] is precisely what judges claim—that the recent emphasis on passing acts pertaining to priority criminal matters will drive out [of the courts] exactly the type of civil litigation that is meant to accomplish social ends."

Charles Geyh, associate professor of law at Widener University, observed that while judicial impact statements can be used simply to provide Congress with information on the cost of adopting a specific program, they can also be used to lobby against adoption of a program because of its "enormous cost." He said "the problem comes when pressure on the judiciary brought about by the caseload increases of the last decade cause it to go beyond the first use and couple information on the cost of a proposed program with the lobbying function in ways that create an antimajoritarian concern."

Finally, Nancy Potok emphasized that judicial impact statements are "just one small piece of a vast continuum" in the process of enacting legislation and effecting change in the courts. "Impact statements are useful in strengthening the legislative debate by providing information that should be available in an organized fashion, but probably would not be," she said. But "the idea that impact statements provide sufficient information to be the end-all-be-all for policy makers making decisions that have a significant effect on the court system and the public is not the case at all."

Where Do We Go from Here?

Munger and Belluck stressed that the judicial impact assessment process should be opened up to allow the participation of ordinary citizens and public interest organizations. They said such participation would counter the public's feelings of "a general isolation from government processes [and their perception of] special interest control over the democratic process of our country."

Krislov suggested that it is important for researchers to focus on the implications that legislative proposals have for the costs and benefits of bringing disputes to court. By doing this, he said, it may be possible to quantify the number of cases that new legislation "prices in" or "out of" the courts.

V. Applied Session

Panelists in the applied session of the conference were asked to discuss certain pragmatic issues involved in the production of judicial impact assessments, such as: When are judicial impact assessments needed? What methods should be used to assess impact? What data are required? and What is the appropriate audience for the assessment once it is produced? In addressing these issues, participants drew on their experience in performing judicial impact assessments in a variety of different environments and explained how the characteristics of those environments shape the type of assessment that is produced.

The first contribution to this session is from Nancy Potok of the Administrative Office of the U.S. Courts. Potok's paper discusses the issues that led to the creation of the AO's Judicial Impact Office and describes the procedures currently employed by the Judicial Impact Office to assess the effect of federal legislation on the U.S. courts.

The second contribution to this session is from Thomas Henderson, Marilyn Roberts, and Maria Schmidt of the National Center for State Courts (NCSC). Their paper summarizes a pilot project undertaken by the NCSC on behalf of the Conference of State Court Administrators. The purpose of this project was to explore the feasibility of performing impact assessments on the effect of federal legislation on state courts. According to the authors, because of the increasingly significant proportion of the state court docket that is attributable to federal legislation, there is an acute need for such analysis to support judicial planning at the state level.

The third contribution to this session is from Janet McLane, director, Judicial Services and Activities Division, Washington State Office of the Administrator for the Courts. McLane's paper describes the many constraints faced by state administrative offices in conducting judicial impact assessments. In addition, McLane explains how her office uses assessments of the impact of state legislation on the state court as one tool for educating a rapidly changing state legislature about the effects of legislative enactments on the courts.

The fourth contribution to this session is from William Jenkins of the General Accounting Office. Jenkins' paper presents a comprehensive typology of judicial impact methods. Jenkins also discusses insights he derived from his work on the Federal Criminal Justice System Workload

Model regarding how current data-collection methods should be altered so as to provide the ideal data necessary for judicial impact assessment.

Finally, the fifth contribution to this session is from Frank Arnett and Fletcher Mangum of the Federal Judicial Center. Their paper describes an exploratory retrospective analysis of the effect of existing federal legislation on the workload of the courts conducted by the Center's Planning and Technology Division. According to the authors, the purpose of this work is to enhance the ability of researchers to forecast the impact of proposed legislation by providing information on the judicial impact of existing legislation.

Development and Ongoing Operations

by Nancy Potok
Chief, Judicial Impact Office
Administrative Office of the U.S. Courts[281]

This paper provides a brief overview of the history and processes involved in the preparation of judicial impact statements by the Administrative Office of the U.S. Courts, as well as their use as a tool for communication in the relationships among the three branches of federal government.

Background

In 1989, the federal judiciary was facing a critical juncture, experiencing both a substantial increase in workload resulting from legislation that had been enacted since the late 1970s and a resultant severe shortage of funding and personnel, including judges, to carry out its mandates. It was clear that additional efforts had to be taken to secure sufficient congressional funding for the judiciary.

Up to that time, the need for judicial impact statements, done by either the judiciary or Congress, had been discussed within both branches of government for a number of years and had been studied extensively. However, numerous obstacles to this type of analysis frequently had been cited, and, as a result, the analyses were not done on a routine basis.

However, this work was being done informally within the Administrative Office. Because it was being done by various elements within the organization, the results, particularly the costs and related workload resulting from proposed legislation, had never been presented within a formalized, consistent framework. The director of the Administrative Office authorized the production of judicial impact statements in August 1989 to allow the analyses to proceed in a cohesive, systematic, easily recognizable, and usable manner. In 1990, the Federal Courts Study Committee, a congressionally mandated blue-ribbon commission studying the judiciary, reaffirmed the need for impact analyses of legislative proposals.[282]

In March 1991, as part of a major reorganization resulting from passage of the Administrative Office Personnel Act, the Judicial Impact Office was created, and I was selected as its chief. The office staff currently consists of myself and three analysts.

Initiation and Process

In a very short time, judicial impact statements have become an important advisory and policy-making tool in all three branches of the federal government. Judicial impact statements analyze proposed and enacted legislation and executive branch initiatives to determine how they will affect the federal judiciary. This includes the effect on court operations, workload, the number of cases filed in the courts, and federal jurisdictional questions, such as whether the legislation would federalize areas of law and policy that have traditionally been handled in state courts. The impact statements quantify these effects and contain estimates of the resources, both dollars and people, that would be needed by the judiciary to implement the proposals.

The decision to prepare an impact statement is made by a variety of sources. In most instances, the Administrative Office's Legislative, External, and Public Affairs Office identifies a bill that is likely to have an impact on the judiciary, based on its knowledge of the bill's contents, congressional or judicial interest and activity, and the likelihood of its passage. On occasion, members of the Judicial Conference or chairs of Judicial Conference committees request that an impact statement be performed on specific legislation. (The Judicial Conference is the policy-making body of the judiciary and consists of twenty-seven federal judges headed by the Chief Justice of the Supreme Court.) Judicial Impact Office staff also identify bills and executive branch initiatives that, based on their experience and analyses of similar activities, may result in significant impact on the federal judiciary and should receive heightened analysis.

Once the need for an impact statement has been identified, substantive information is gathered by the Judicial Impact Office staff from experts located both within and outside the judiciary. Within the Administrative Office, the program and statistics divisions and General Counsel's office provide in-depth analyses based on knowledge of court operations and programs. The Federal Judicial Center also contributes its analyses. The Judicial Impact Office gathers data, if needed, from executive branch agencies such as the Department of Justice, state and local court employees, legislative staff, and relevant issue-advocacy groups. Comparisons are also made, if possible, to similar legislation that has already been analyzed by this office. If there are conflicting views on the impact of the proposals being analyzed, the Judicial Impact Office acts to resolve these differences or presents the varying views in the impact statement.

Finally, in conjunction with the Budget Division of the Administrative Office, the Judicial Impact Office develops the resource costs or savings (staff and dollars) associated with the changes in workload and any other activities arising from the legislation. Separate breakdowns of costs for the various components of civil and criminal cases have been developed, using average workload measurement formulas, personnel ratios, and current fiscal year budgets, including any supplemental appropriations. In fact, one of the major accomplishments of the office has been to work with the program and budget divisions in the Administrative Office to develop and standardize costing methods for various types of cases.

The Judicial Impact Office then assembles a draft judicial impact statement incorporating the analyses and associated resource costs or savings. Each statement contains detailed assessments of both the potential and probable effects of each relevant section of the legislation. Sources of information, explanations of any analytical assumptions, and other factual data used within the analysis are also provided. The draft is reviewed by the experts who contributed to the analysis, comments are incorporated, and a final impact statement is then presented to the director of the Administrative Office for transmittal to the Judicial Conference, members of Congress, and congressional staff. The entire process can take anywhere from a few days to a few months, depending on the complexity of the proposal being analyzed and the time available.

Retention of Objectivity

Throughout the development and completion of the impact statements, the Judicial Impact Office strives to maintain its objectivity and impartiality. The impact statements produced by the office represent objective analyses of the effects of proposals. They do not represent or imply a position either supporting or opposing a particular proposal, even when the Judicial Conference has taken a position in that area. However, if the Judicial Conference has taken a position on a bill, that position is briefly described in a separate section within the impact statement.

We have worked very hard not to be perceived as either advocates or critics of the subjects being analyzed. Thus, a separation is maintained between the Legislative Affairs Office, which is responsible for representing the Judicial Conference position, if any, on legislation, and the Judicial Impact Office. One of the primary goals of the office has been to maintain the credibility of the analyses by resisting any attempts to shape the analy-

ses to support the Judicial Conference position. In fact, by establishing this modus operandi early on, efforts to influence the outcome of the analyses to conform to preexisting positions have been discouraged and have not materialized. As a result, impact statements have sometimes shown that proposals opposed by the Judicial Conference would have a small cost to the judiciary and vice versa.

Use and Distribution

Impact statements have been used by a wide range of policy makers throughout the federal government. Within the judiciary, they are used to assist the Judicial Conference when it is deliberating legislative proposals. Impact statements have also been used as part of the testimony of federal judges appearing at congressional hearings.

Members of Congress and their staff are provided copies of impact statements to assist them in understanding how proposed legislation may affect the judiciary. Impact statements often highlight potential problems in the legislation, including unintended results and technical errors or omissions, and legislation has been redrafted as a result. Impact statements have been introduced into hearing records by members of Congress and have been cited in congressional committee reports on legislation. Because impact statements contain cost estimates, they are often used by the Congressional Budget Office when it fulfills its statutory requirement to estimate the cost of proposed legislation.

Impact statements are also provided, upon request, to the Office of Management and Budget and to other executive branch agencies such as the Department of Justice. Although executive branch agencies have no jurisdiction over the judicial branch, it is often useful for policy makers in the executive branch to read an in-depth analysis of complex legislation from the judiciary's viewpoint, such as for the crime bills considered by Congress during recent sessions.

During recent sessions of Congress, impact statements were written on several bills, a few examples of which are the Violent Criminal Incarceration Act of 1995; Preliminary Assessment on the Comprehensive Regulatory Reform Act of 1995; the Violent Crime Control and Law Enforcement Improvement Act of 1995; the Violent Crime Control and Law Enforcement Act of 1994, which included the Violence Against Women Act; the Family and Medical Leave Act; the Health Security Act of 1994; the Smoke Free Environment Act of 1994; bills to provide for inter-

state enforcement of state child support orders; and a bill to extend authority for court-ordered arbitration to all district courts. Impact statements were also prepared on Operation Triggerlock, the Justice Department's initiative to bring firearms cases into federal court and on the Social Security Administration Streamlined Disability Appeals Process Proposal.

The Judicial Impact Office also conducted an in-depth review and cost analysis of the recommendations contained in the Report of the Committee to Review the Criminal Justice Act.

Earlier impact statements have analyzed a wide range of legislation, including: (1) omnibus crime bills; (2) the Federal Courts Study Committee Implementation Act; (3) compensation to victims of nuclear testing; (4) mandatory drug testing of defendants on post-conviction release; (5) establishing a right in federal court for victims of foreign torture; (6) civil justice reform; (7) changes in asset forfeiture statutes; (8) thrift and bank fraud prosecution; and (9) changes in courts' naturalization responsibilities.

Future Objectives

The Judicial Impact Office is constantly refining its data collection, impact-assessment methodology, and analytical assumptions underpinning its caseload and resource estimates. The office is currently comparing projections and estimates contained in impact statements made on bills enacted a few years ago with what has actually occurred since enactment. This will enable us to compare our projections against actual changes in caseloads to determine the accuracy of those projections.

We are also working with various Administrative Office program and statistics divisions to determine ways to enhance current data collection so as to improve our current baseline assumptions and caseload estimates. Finally, we hope to meet with users of impact statements to learn how we can improve our product and make it as user-friendly, informative, and credible as possible.

Carrying out judicial impact analysis is an evolutionary process. We have learned a lot during the past few years, and I have high hopes that we will continue to improve in the future.

The Impact of National Legislation on State Courts

by Thomas A. Henderson
with
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Introduction

The National Center for State Courts (NCSC), on behalf of the Conference of State Court Administrators (COSCA), is conducting a project to test the feasibility of preparing judicial impact statements on the effect of federal legislation on state judicial systems. The objectives of such statements are twofold: to contribute relevant state court information to the federal policy process for pending legislation and to assist state courts with planning for impact once the legislation has been enacted. In form, the COSCA statements look like those prepared by state and federal judicial agencies to assess the impact of their respective legislatures on their respective court systems. But the context of the COSCA statements is very different. A feasibility project was deemed necessary because of the complexity of the problems of identifying how national legislation can affect state courts, finding data that would represent the many jurisdictions involved, and conducting the analysis in a timely manner.

The inspiration for the project is grounded in the policy concerns and experiences of state officials. The project was initiated by several members of COSCA who successfully perform judicial impact statements within their own states. From their own experience, they are aware of how useful such statements can be to inform the legislature and to plan for the effect on the courts. The project was also a natural extension to two national conferences on judicial–legislative relations that were funded by the State Justice Institute, and cosponsored by the NCSC, the National Conference of State Legislators, the American Bar Association, and the Council of State Governments.[283] One of the recommendations from that conference was to encourage the development of judicial impact statements at the state level. Finally, the staff of the NCSC recognized the need for a vehicle

for objective information to support their efforts to inform Congress of state judicial issues and to alert state judicial leaders of national policies.

Need for the Project

An increasingly important source of workload for state courts is federal legislation. Bills are adopted in Congress that have a direct impact on state judiciaries with no recognition of the additional demand on state resources. Examples of recent bills with such implications include the Immigration and Naturalization Reform Act, which created new reporting requirements for courts; a series of child support enforcement laws that has dictated the grounds for determining support orders, mandated specific adjudicatory procedures, and increased the workload of courts; the 1988 Drug Control Act, which dramatically increased the workloads of courts without providing any additional support; and the Americans with Disabilities Act, which established civil rights for a class of citizens. In none of these instances was a formal analysis made of the potential effect of these bills on state courts to inform the deliberations over the design of the legislation or to support state planning to accommodate the implementation.

Given the fiscal constraints under which all levels of government operate, it is critical that choices are articulated and understood. For Congress, ignorance about the role of state courts may undermine the effectiveness of a national policy. For example, the Immigration and Naturalization Reform Act assumed a disposition reporting system that does not exist in most states. And the Drug Control Act expanded the resources available to law enforcement and prosecution but ignored the increased demand this placed on judicial resources. At the state level, scarce resources make it imperative that advance planning take place, whenever possible, to ensure effective implementation in the courts and to minimize the negative consequences of additional demands for judicial services.

Until recently, the published literature was not very encouraging about the prospect of developing effective models. In reviewing the feasibility of judicial impact statements, Boyum and Krislov observed in 1982:

> Faced only with issues of reliability and precision, few social scientists would be comfortable with the task. Fewer still would be sanguine about it if they were given the specification that this be done "routinely." And perhaps there would be none at all who would think the task simple in a situation where even the classification of persons is not a settled issue.[284]

Their assessment of the difficulty, if not impossibility, of the task is echoed by others writing at the time.[285] Boyum and Krislov argue that the fundamental weaknesses are the lack of theory and the paucity of data, themes common to the evaluation literature of the time as well.[286] Over the past decade, however, substantial improvements have been made in the availability and the state-to-state comparability of state court caseload data. A primary reason has been the development and widespread adoption of a model approach for collecting and using caseload information.[287] Such changes over the last decade suggest the time is opportune for another effort at judicial impact statements.

First, our understanding of court management, workload factors, and case flow has grown in sophistication and reliability in the ten years since Boyum's and Krislov's comments. In part this results from the empirical work of such authors as Barry Mahoney and David Neubauer, who were concerned with delay in the courts.[288] This has been reinforced by the *Trial Court Performance Standards*, which are in a substantial way a reflection of the consensus among practitioners of the critical components of the court as an organization, as well as a statement of intentions.[289] Not only do the *Standards* require courts to promptly implement changes in law and procedures, but they also require the courts to inform the community (including the legislature) of its programs and, most importantly, to anticipate new conditions or emerging events and adjust themselves accordingly.[290]

Second, improvements in the emerging conceptual framework also reflect the institutional changes that have occurred at the state level. In 1978–1980, when earlier authors were conducting their analyses, our understanding of courts as formal organizations was very limited. Management positions at the state and local level were still embryonic, making it difficult to conceptualize what would be affected by legislative action unless the jurisdiction of the bench was directly involved.[291] That is no longer the case. It is now taken for granted that state judicial systems will be managed as formal organizations. The target of judicial impact analysis is no longer an amorphous collection of independent judges with nominal connections to clerks and probation officers. There are now coherent judicial organizations in most states that will serve as the target institutions for legislative impact analysis.

The third change is that the literature on the impact of national legislation on state courts is much richer now than it was in 1982. Case studies are available that examine the effects on the judiciary of child support en-

forcement laws,[292] drug control efforts,[293] and changes in diversity jurisdiction.[294] Information from these efforts, which were conducted for very different purposes, is an empirical source for developing models of the different ways national legislation can affect states.

Fourth, we now also have examples of successful judicial impact statements to guide this effort. In 1978–1980, the only models available were the economic and environmental impact statements. It was difficult to translate those experiences into a judicial context. But now, for example, the Washington State Administrative Office of the Courts has developed and is using a standardized judicial impact process for evaluating state legislation. And the Administrative Office has established a Judicial Impact Office to use a standardized process to assess the potential impact of congressional action on the federal judiciary. These efforts, along with the fiscal impact statements prepared in other state administrative offices of the courts, provide a solid foundation on which to build.

Finally, our understanding of the purposes of judicial impact statements is far broader than in 1982. Impact statements are no longer seen as a means for vetoing legislation by marshaling objective evidence. Their purposes are both more modest (to increase the information available to allow legislators to make more informed choices) and more ambitious (to serve as the core of a planning document for the state judiciary).

Methodology

The technical problems of preparing a state judicial impact statement for national legislation is formidable. The prospect of drawing comparable information and data from multiple court systems on ad hoc issues within a short time frame is daunting. The experience in the states with judicial impact statements makes clear, however, that the significance of these efforts does not rest on a *quantitative* analysis of the potential effects on caseload, dispositions, or expenditures alone. Equally important is a need to identify: (1) whether a proposed law may impact state courts; (2) how the impact is likely to occur; and (3) whether that impact is significant. These questions are far more prevalent at the national level because the effect on state courts is likely to be incidental to legislation directed toward the federal judiciary (e.g., establishing a civil cause of action for gender-based violence directed at women), or a refinement of a national program (e.g., expanding the program criteria for drug treatment block or formula grant funds to include drug treatment for criminal offenders).

There still remain, however, the technical problems of preparing a judicial impact analysis for those laws that call for a quantitative analysis of impact. Over the last fifteen years, the COSCA Court Statistics Committee has been working with the NCSC to develop reliable, comparable measures of judicial activity. The result is a baseline of information on which estimates can be made for many issues areas, as well as a cadre of experienced state officials with a knowledge of statistics and data sources. Despite this progress, however, it can be assumed that in many instances a universe of states—or even a significant number—cannot be found with reliable, comparable data to estimate a given impact. This will be particularly true, for example, if detailed case attributes are required that have had little relevance for court management. In those instances, more imaginative strategies will be necessary to derive national figures.

Several techniques are available and have been used successfully in the past to make estimates when time and funds preclude a national survey of court files. In some instances, individual states will have relevant data—caseload, filings, staffing, expenditures—that can be used to estimate the impact. For example, the Virginia judiciary has already conducted an analysis of its caseload of child support orders. When a quick estimate is needed, it can provide a reliable estimate of the potential workload change caused by a requirement to conduct a periodic review and modification of such cases. Projecting the results in one or more states to a national figure can be done with some degree of confidence, although one would hope to project from more than a single state.

In other instances, inferences must be drawn from comparable experience. For example, the recent Immigration and Naturalization Reform Act will require courts to revise their system for reporting convictions. The cost and difficulty of this change can be estimated from other efforts to change information systems in state courts.

Finally, there will be those instances in which no state, or set of states, has data. Under these circumstances, a possible source could be informed estimates drawn from those directly involved in state courts—state court administrators, judges, and trial court administrators—through a telephone interview system, refined by use of a Delphi survey. In combination, these techniques hold the promise of providing reasonable estimates of the effect of a law.

Conclusion

The probable success of this effort depends on one's perspective. If we approach the issue of impact statements from a strict research perspective, the prospects are very gloomy, indeed. Most federal legislation is missing the administrative details necessary to make precise estimates of how an act will be implemented. It can be argued that one must await the administrative regulations before there is enough precision to develop indicators of impact.

The complexity of state judicial landscapes further confuses the analysis. Funding may come from state government in one state and from the county in another. The jurisdictional definitions vary widely from one state to the next. For example, in some states domestic issues are resolved in specialized family courts; in others, they are resolved in the court of general jurisdiction or an even lower court.

Although the states have made progress in obtaining state-wide statistics, lack of uniformity and incomplete data are still the order of the day. Many issues of critical importance at the national level (e.g., the number of domestic cases involving custody issues) are not data elements for court managers.

Any one of these issues is enough to give a responsible social scientist pause. In combination, they are the stuff of which researchers' nightmares are made. But social scientists' research criteria are not the only values to be maximized. As has been suggested earlier, the value of judicial impact statements resides as much in their ability to conceptualize the relationship between federal legislation and state courts as in the accuracy of their projection of cost or workload figures. Predictions of judicial overload may give members of Congress pause, but they are not going to be persuasive if an elected official is confronted with a popular issue. State judicial officials must be able to plan for the impact of these policies, regardless of their wisdom as public policy.

Given the necessity of estimating the effect of federal legislation on state courts, despite the difficulty of the analytical task, state judicial impact statements may be more of an art form than a research endeavor. But it is an art form informed by systematic analysis of empirical data and, as such, can be a major contribution to informed public policy at the federal and state levels of government.

Status of Judicial Impact Notes in Washington State

by Janet McLane
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Background

The use of judicial impact notes in Washington State was prescribed by the 1984 Court Improvement Act. Since that time, judicial impact notes have been used in a limited way to assess the impact of proposed legislation on the operational procedures of the courts. Although judicial impact notes, when prepared on selective bills, can be an effective tool in the relationship between the legislative and judicial branches, their use in Washington during recent years has been restricted by some of the following dynamics and developments.

Lack of Quantitative Tools

Although a wide range of caseload data is collected by the Office of the Administrator for the Courts (OAC), it is often not complete or precise enough to use in forecasting future impact of proposed legislation. Typically, the time frame available for production of a judicial impact note is quite short if the note is to be responsive to legislative action. This time constraint limits the capability of programmers to analyze existing data and produce special reports to see if, among the many pieces of information the courts report, there are data that will shed some light on the problem at hand.

In Washington, the weighted caseload methodology has proven to be the most successful quantitative tool for predicting the impact of a bill on judicial resources. However, its effective use is limited to those bills in which the number of new proceedings or hearings can be accurately predicted. For instance, to estimate the additional judges needed to hold prison release hearings for certain felons, a judicial impact note can effectively use the weighted caseload indicator. We know the exact number of felons who will eventually appear before the trial court (they are those felons sentenced prior to Washington's sentencing reform act), and we can

predict the length of each hearing (based on the length of such hearings currently conducted by a parole board).

A bill that creates a new cause of action for which there is little historical experience in terms of judicial time, however, will not likely benefit from a weighted caseload application. In this instance, we cannot anticipate the number or duration of new proceedings the bill may create.

When certain assumptions can be made about the bill to be analyzed, the weighted caseload methodology offers a reliable tool for predicting judicial resource impact. But when the bill introduces a unique new cause of action or procedural oddity, as is often the case, weighted caseload methodology is not as useful for predicting impact. Since the weighted caseload methodology is a tool for estimating judicial resource needs, it is not at all useful for projecting the impact of bills on nonjudicial aspects of court operations.

Fiscal Impact Notes

The Washington state legislature has rigorously required the use of fiscal impact statements on any bill expected to affect revenue or expenditures. Although designed to record the dollar impact of legislation, a supplemental narrative of the bill's overall impact is allowed. Fiscal notes, because they are systematically reviewed by legislative committees and are a familiar source of information for committee staff, have become the most common way to report both the quantitative (when it can be assessed) and the qualitative impact of bills on the courts.

As an example, during a recent legislative session a fiscal note was prepared on a bill that imposed a dedicated assessment on convictions, guilty pleas, or deferred prosecutions resulting from driving while intoxicated (DWI) charges. The OAC used the fiscal note process not only to predict the revenue generated from the new fee (an amount less than the recipient agency projected), but also to educate legislators about the ways judicial sentencing discretion is exercised in the types of cases affected by the bill. The fiscal note was used by the legislative committee in its deliberations on the bill, and, ultimately, the proposal was amended to reflect a more informed approach to a funding issue. In this instance, the fiscal note process was used to report on the revenue implications of the bill and also to correct a flawed assumption about judicial sentencing practices.

Increased Legislative Activity Among Judges

Washington judges have historically been reluctant to participate actively in the legislative process on bills other than the few that clearly encroach on the administration of the courts. With regard to such matters, judges have usually expressed their concerns through correspondence with legislators, rarely appearing in person before legislative committees. This trend is changing, however, largely because of the changing character of both the bench and the legislature.

Washington judges are increasingly recognizing the importance of an open line of communication with members of the legislature. In recent years, courts have been bombarded with legislation that has had a significant impact on the courts. Determinant sentencing, tort reform, family law revisions, and numerous new causes of action have prompted judges to analyze legislation more deliberately and inform legislators of the courts' perspective.

Another dynamic which, in fact, has forced judges to play a more active role in the legislative process is the downturn of Washington's economy and the impact of diminished resources on the judicial system. Washington courts face the potential of the same devastating reductions experienced by state court systems on the east coast and in neighboring California. Judges recognize that they must be willing to educate state and local legislators about the role of the courts and the level of resources necessary for the court system to perform its constitutional duty. The reality of legislative mandates and new causes of action that increase the courts' workload at a time of scarce resources has caused judges to reassess the role they should play with the legislature.

To a certain degree, the willingness of judges to analyze bills and appear in person before legislative committees has diminished the emphasis on judicial impact notes. When possible, the OAC helps judges prepare for their presentations with statistical or historical data that might otherwise be offered to the legislature in a judicial impact note. When this information is not available, judges often provide a retrospective view of the impact that comparable legislation has had on the courts. For example, during each of the past eight sessions, the Washington legislature has significantly amended the state's DWI statutes. Again this year, there are numerous and conflicting proposals being considered. Although it is difficult to predict the impact of the potential combinations of bills that may pass, judges have presented caseload data about the impact of previ-

ous legislation and offered persuasive testimony in support of allowing the law in this area to settle before amending it further.

Inexperienced Legislature

Increased willingness of judges to interact with the legislative process comes at a time when many of the "old guard" legislators are leaving office and being replaced with new, often young legislators, the majority of whom have little or no experience with the judicial system. (Only 10 of Washington's 150 legislators are attorneys.) These legislators are enthusiastic and many, displaying a pattern not unlike that at the national level, clearly have a commitment to change "business as usual." Their enthusiasm, coupled with little or no exposure to the courts, resulted in a certain amount of unpredictable and perplexing legislation during the 1993 session. In anticipation of this, Washington judges participated in a series of informal meetings with legislators, prior to the session, to explain the role and constraints of the courts and to establish their accessibility to legislators.

Governmental Affairs Officer

To give the judiciary a full-time presence in the legislative process and to continue building a structure for communication between the two branches, the OAC has created a governmental affairs position. This position will develop a range of dialogue opportunities for judges, including a more systematic use of judicial impact notes.

Future Role of Judicial Impact Statements in Washington

Although there is an unquestionable need for tools to quantify the impact of legislation on courts, judicial impact notes should not be disregarded for their less scientific purpose of generally educating legislators about the basic operation of courts. Washington legislators, with a few notable exceptions, have little understanding of the jurisdictional distinctions between the levels of Washington courts; they often fail to recognize the complex interdependencies among the key components of the criminal justice system; and they do not understand the significance of judicial independence. Most legislators simply do not know how courts work, and, to the extent judicial impact notes, even without precise quantitative measures, can play an informative role, they should be used for this purpose.

Washington's judiciary has not produced a large number of judicial impact notes in recent years for a variety of environmental reasons. However, as judges and court managers increasingly look for appropriate ways to comment on legislation, the note process will be revitalized. And, as simulation modeling and other tools are developed, the potential of the judicial impact note to inform the legislative process will become much greater. Our system's long overdue achievement of producing pending caseload reports will allow us to investigate more precisely the characteristics of cases that take the longest time to resolve, result in the most warrants, or are most suitable for alternative dispute resolution methods. Tools like these, and the staff resources to analyze the data, may yet give the judiciary the ability to describe and quantify the complex work of the courts.

Observations on Impact Models for the Federal Courts

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Impact analysis is neither new nor rare in Washington and takes a variety of forms. The Congressional Budget Office, created as part of the Congressional Budget Act of 1974, is required to estimate the budgetary impact of legislative proposals. The Office of Management and Budget (OMB) assesses the impact of agency budgetary proposals, including proposals to privatize certain programs, on the effectiveness and costs of program delivery. The recently abolished Competitiveness Council approved, altered, or killed proposed regulations based on an assessment of their anticipated impact on the private sector. Legions of interest groups and lobbyists routinely provide Congress with assessments of the impact of various legislative proposals on the interests and fortunes of their members and clients. The debate over health care reform is replete with conflicting analyses about the likely impact of various options under consideration, such as managed care, cost or price controls for physicians and hospitals, and a greater focus on wellness programs and preventive care.

An increasing portion of the General Accounting Office's (GAO) congressional request work focuses on the potential (prospective) impact of various programmatic options, such as expanding prison boot camps or a proposed restructuring of Veterans Administration health care services. This is a marked change from the generally retrospective analysis that has, until recently, characterized almost all of the GAO's work.

These two types of impact analyses—retrospective and prospective—are hardly mutually exclusive. A useful, realistic estimate of what may happen in the future must generally be grounded in a firm understanding of what has happened in the past and why. For example, we can develop a better estimate of the impact on the federal courts of doubling the number of firearms cases if we understand what impact the recent growth in those cases has had already on the courts and their operations—including judges, clerks' offices, defender services, jury fees, and so forth. We would, of course, also need some means of estimating whether the experience to date with firearms cases is likely to grow linearly—more of the same—or

whether something is likely to occur that will alter prior trends and lead to a somewhat different result. For example, is the percentage of firearms cases going to trial likely to remain constant? If so, why? If not, why not?

Thus, the most reliable and accurate estimates of the future impact a particular policy (legislative or administrative) may have are likely to flow from (1) a firm understanding of what has happened in the past and why; (2) a careful assessment of how the current proposal is similar to and different from prior legislation or policies whose actual impact is known; and (3) how those similarities and differences—even the sheer volume of cases—affect the usefulness of prior experience as a guide to the impact this particular proposal may have.

While legislators, the bar, and the courts themselves are generally the intended audiences of most judicial impact analyses, the appropriate audience for any particular impact analysis very much depends on its objectives—what it is intended to accomplish. Certainly, litigants seeking access to the courts are interested in jurisdictional issues and the resources available to the courts—how long it takes to get a hearing or trial, for example.

This paper focuses briefly on four issues in assessing legislative impact on the courts: (1) the types of impact that should be considered; (2) the methods that can or should be used to assess judicial impact; (3) the data required for assessment of judicial impact, including some discussion of available versus ideal data; and (4) the problems in verifying judicial impact statements.

Since my experience is principally with operational impact analysis—the impact on court workload—my perspective tends to be quite "nuts and bolts."

The Types of Impact To Be Considered

Legislative impact on the judiciary can be considered along a continuum. Perhaps the most narrow—though hardly simple—is assessing whether the legislation is likely to increase, decrease, or have no effect on the number of cases flowing into the courts. Beyond raw case filings are the impacts that different types of cases—a change in the composition of the case mix—may have on case processing, such as discovery, plea bargains, and trials. For example, are there more trials in cases where the charged offense carries a mandatory minimum sentence? Associated with such case processing impacts are particular costs in time, money, staff, and so forth that

may or may not be considered in any particular analysis of changes in case processing.

Perhaps at the broadest level are such impacts as a weakening or strengthening of the public's perception of the courts as fair, accessible forums in which to seek redress for disputes. A statute may, for example, deprive some categories of litigants access to the courts, provide what is perceived to be special access, or provide such unfettered judicial discretion that the applicable law seems to depend principally on the ruling judge(s). It may take a number of years, plus several widely publicized (though not necessarily representative) cases, for the public perception to crystallize sufficiently to foster a legislative reaction. One important impetus for federal sentencing reform in 1984 was the public's perception that, at least for some offenses, the sentencing judge was a better predictor of incarceration than the defendant and the crime. The federal sentencing guidelines have had two clear impacts on the courts: markedly reduced sentencing discretion for judges and an increase in the number of sentences appealed. Other impacts, such as whether the guidelines have actually reduced sentencing disparity, are still being debated.[296]

Case filings, processing flows, and costs are generally appropriate—indeed necessary—topics for much of the analyses of the impact of actual and potential legislation on the courts. But such analyses are not quite as narrow as they may first appear. Estimating case filings alone requires an understanding of why specific types of cases are filed, and, if the litigants have a choice of federal or state courts, why they may choose one forum over the other. The flow of cases into the courts is dependent on the discretion exercised by a variety of players—civil litigants who may choose arbitration over litigation, investigative agencies that often can choose to refer cases to federal or state/local authorities, prosecutors who do not prosecute every case referred to them, judges who may throw certain cases out on procedural and other grounds, and so forth.

For example, most types of drug offenses, and many weapons offenses, are violations of both state and federal statutes. The U.S. attorney has considerable discretion in choosing which cases are brought to the federal courts, regardless of whether those cases are referred by federal or state authorities. Investigative agencies simply do not refer some cases to the U.S. attorney for prosecution if they know that the quantity of drugs or the dollar amount of the fraud involved falls below the levels at which the U.S. attorney will consider the case. Thus, the Drug Enforcement Administration (DEA) may refer some drug cases directly to state and local

prosecutors because it knows the local U.S. attorney's "declination policy" is to decline cases below a certain threshold of drugs seized. For example, one U.S. attorney, until recently, would refuse any cocaine case in which less than five kilos of cocaine was seized. This was ten times the amount that would trigger a prosecution in some other districts.

The courts themselves can, to some extent, affect the impact of any particular change in case mix or total workload. Judges are not without influence on the nature of litigation in their courts. While U.S. attorneys, for example, have considerable discretion over the number and type of criminal cases they bring in federal courts, they are not oblivious to the clues they receive from judges, including judicial displeasure with certain types of cases the judges believe are more appropriately handled at the state level.

Moreover, local rules are not, or at least should not be, sacrosanct. Indeed, the Civil Justice Reform Act of 1990 requires each U.S. district court to review the causes of delay and expense of civil litigation in their districts and to prepare a Civil Justice Expense and Delay Reduction Plan that includes steps for reducing both. The Act requires each court to do the following: conduct a thorough assessment of the court's civil and criminal docket; identify the principle causes of cost and delay in the district; examine the impact of new legislation on the court's ability to process civil cases efficiently; recommend measures, rules, and programs for decreasing any cost and delay; and consider various litigation management techniques outlined in the Act, such as mediation and arbitration.

The district plans are developed with the assistance of a Civil Justice Advisory Group, which is to be "balanced and include attorneys and other persons who are representative of major categories of litigants" in the court. The various district plans developed under this statute should be useful in understanding how the judges, local bar, U.S. attorney, local federal defender (where such offices exist), and major categories of litigants view the work of the courts and the data that should be considered in evaluating the impact of legislative action on the courts.

Impact Models and Their Uses

Impact models can be useful when quick response to a variety of "what if" scenarios is needed and when one is trying to model more than one step in the litigation process. Such models can be designed to provide highly aggregated or very detailed impact estimates. All models are abstract repre-

sentations of reality. For operational and budgetary reasons, most models attempt to capture the most important aspects of that reality. What is most important is, of course, a matter of judgment based on the available empirical knowledge of how the process one is trying to model may work. Because our knowledge is imperfect, models always include important assumptions about the process(es) they represent.

Where little is known, the basic constructs of the model may be based on the advice of experts within the system, such as judges, litigants, and members of Congress. The practical, hands-on experience that the members of expert panels have is valuable and can help to identify a range of potential impacts legislation may have or has had, key decision points to include, and potential sources of data. While such panels can be a useful part of empirical analysis, including model building, they are no substitute for hard data, such as case filings and operations and cost data. It has been my experience that the analysis of such data sometimes leads to very different conclusions than what the experts say has happened or is likely to happen.

As noted earlier, one characteristic of the judicial process complicates estimates of case flows through the process: key participants—private litigants, prosecutors, judges, and others—have considerable discretion in the exercise of their responsibilities. The use of that discretion—which cases to file or the decision to go to trial rather than settle or plea bargain—affects workload and costs at every step of the process. Models can be useful means of estimating the impact of change(s) in the use of that discretion by one or more participants. But, as discussed later, the more comprehensive (another way of saying ambitious) the model, the more data required and, consequently, the more problems one is likely to have developing the model. The more imperfect the data the more assumptions the model must include to produce its estimates.

A Basic Typology of Criminal Justice Models

William Rhodes has offered a useful typology of criminal justice impact models that is also useful as a basis for discussing operational impact issues.[297] Rhodes groups these models into three basic types, roughly in increasing order of complexity and detail:

- *Statistical models* use data to measure past trends (patterns) and project those trends into the future. Most statistical models assume that the trends revealed by the statistical analysis will continue into the future. Using multivariate analysis, it is possible to

control for changes in the model's specific variables to determine how such changes may affect the model's projections. Of course, such analysis is limited to the variables in the model. For example, a model based on changes in budgetary resources, such as staff and dollars, could not control for changes in demographics, such as race, age, and gender.

- *Disaggregated simulation models* classify units of analysis into groups (e.g., burglary defendants or cases) and simulate criminal justice operations by modeling flows between important processing steps, such as arrest, arraignment, and plea/trial verdict. These models can be simple or complex, depending on the number of steps in the model and the number of possible results in each step. For example, the model may or may not include the decision to grant bail. If this step is included, the choices could be simple (yes, no) or detailed (yes could include subcategories on the type of bail granted, such as surety or personal recognizance). Examples of such models are JUSSIM, IMPACT, and the Community Corrections Planning Simulation. Somewhat different versions of JUSSIM are used in several local jurisdictions to simulate resource demands based on specific case flows.[298] The IMPACT model, developed by the Criminal Justice Statistics Association, is most widely used to project correction stage populations—jail, prison, probation, and/or parole.
- *Microsimulation models* process units of analysis, such as defendants or cases, one at a time rather than in groups. These models have most frequently focused on the correction stage, mostly prison populations, and often require very detailed data about the crime and/or defendant (such as prior criminal history and whether a gun was used in the commission of the offense). Examples include the National Council for Crime and Delinquency (NCCD) model, Justice Impact Analysis, JUSTICE, and the Federal Sentencing Simulation that is used to estimate the prison impact of the federal sentencing guidelines. Through fiscal year 95, a version of that model was used by the Bureau of Prisons to estimate capacity needs.

Models may, of course, combine attributes of more than one of these types. They may focus on the entire criminal justice process, from arrest through release from post-prison supervision, or only a portion of the process, most frequently corrections. Models may attempt to estimate flows

and/or stocks at one or more stages of the process. *Flows* are the number of cases or defendants who move from one step to the next (such as arrest to arraignment) during a particular period of time (such as a month or fiscal year). *Stocks* are the inventory of one or more steps in the process at a point in time (such as the number of defendants awaiting sentencing at the end of the month or year). Estimating stocks generally requires estimates of (1) how many cases or defendants there are at the beginning of the period, (2) how many enter the stage during the period, and (3) how many exit during the period.

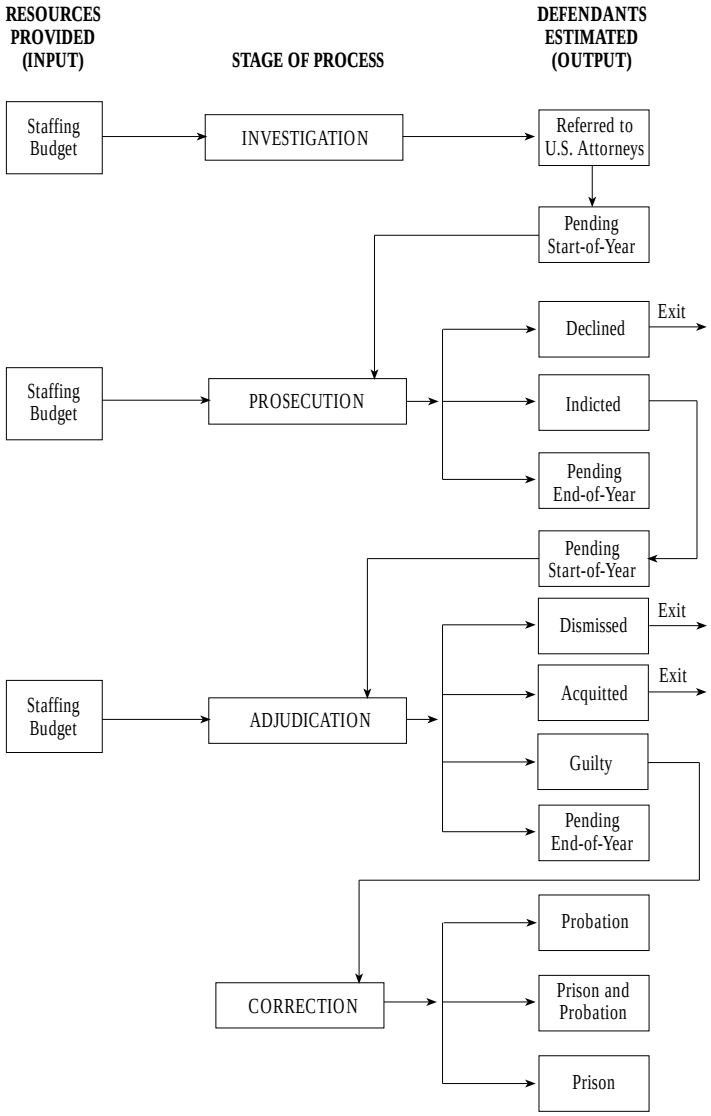
Models also vary in the data they use. Some microsimulation prison projection models require exceptionally detailed data on the characteristics of the crime committed (such as the amount of drugs involved) and the defendant (such as age, education, and prior criminal history). The level of detail required for model development is largely dependent on the objectives for which the model is developed and how difficult and expensive it is to get the necessary data to fulfill those objectives.

In this age of budgetary constraints, model development has the drawback of generally being both time consuming and rather costly—data are not a free good. If they are to remain useful, given the evolving nature of the case mix, court operations, and so forth, models must be regularly updated and retested for validity. With all the other demands for resources, it can be hard to justify the expense of model development, unless a model's potential usefulness to policy makers can be demonstrated.

Some Basic Data Lessons from One Model Building Effort

The 1988 Anti-Drug Abuse Act directed GAO to develop a model that could be used to help "maintain balance in the Federal criminal justice system."[299] The model's basic purpose was to assist members of Congress to assess the potential impact that increasing or decreasing budgets (staff and dollars) for one or more parts of the system—such as the Federal Bureau of Investigation and/or the U.S. attorneys—would have on the rest of the system, such as the courts and prisons (see Figure 1). The provision was placed in the Act by a senator who was a former governor and was appalled by the paucity of data available to Congress for examining the impact of its decisions on the federal criminal justice system as a whole. As a governor from a state that had an offender-based tracking system, he had much better data on his state's criminal justice system.

Figure 1


RESOURCES PROVIDED (INPUT)
STAGE OF PROCESS
DEFENDANTS ESTIMATED (OUTPUT)
Staffing Budget
INVESTIGATION
Referred to U.S. Attorneys
Pending Start-of-Year
Declined
Exit
Staffing Budget
PROSECUTION
Indicted
Pending End-of-Year
Pending Start-of-Year
Dismissed
Exit
Acquitted
Exit
Staffing Budget
ADJUDICATION
Guilty
Pending End-of-Year
Probation
CORRECTION
Prison and Probation
Prison

The model we developed combined features of both statistical and disaggregated simulation models. It was a statistical model in that it used regression analysis of fiscal years 1979–1989 resource and workload data to develop most of its aggregate estimates—such as the total number of persons the U.S. attorneys indict in a given fiscal year. The model assumed that the relationships represented by those regression equations would remain constant in the near term.

Ours was also a disaggregated simulation model in that it estimated the total number of defendants[300] who would move (flow) from the investigation, prosecution, and adjudication stages of the criminal justice process during the fiscal year and enter the correction stage. The model broke those totals into seven major crime types and estimated the flows using branching ratios in the form of probabilities. For two stages of the process—prosecution and adjudication—it also estimated stocks in the form of the total number of defendants pending at the end of the fiscal year in each stage.

The model we developed was more satisficing than satisfying. However, its development proved to be a valuable learning experience. We learned much about the rather considerable constraints that existing federal data place on anyone trying to develop useful models for policy making, especially models that cut across agencies or steps in the criminal justice process.[301] The observations in this paper are based on that effort, as well as other work we have undertaken to assess why the intended and anticipated effects of legislation are, more often than not, different from the actual effects of that legislation.

Selected Data Problems Encountered

Because the available data are so critical, it is worth discussing some of the problems that existing data limitations place on the types of impact analyses possible. The only constant in impact analysis is that what we do know or can say with any reasonable degree of assurance is generally dwarfed by what we do not know. It is difficult enough, given available data, to assess what *has* occurred, much less predict what is likely to occur as a result of a particular policy proposal. The more comprehensive and detailed the impact analysis desired, the greater the data problems and the more qualified one's conclusions must be.

1. Data Are Too Aggregated for Many Types of Analyses. Generally, available federal data are at once both too aggregated and too fragmented for many types of analyses. Some of the major problems can be illustrated

by using examples from our model-building efforts. The aggregation of available data masks a lot of important differences and details. A number of federal agencies, such as the U.S. Customs Service and the Bureau of Alcohol, Tobacco, and Firearms, have both civil and criminal law enforcement responsibilities. Some of these agencies do not either justify their budgets or track expenditures separately for civil and criminal enforcement activities. Thus, obtaining data on criminal enforcement staff and costs may require relying on fairly rough estimates.

Even where data on criminal enforcement activities and costs are maintained separately (as the U.S. attorneys do), the agency may have limited staff and cost data by major type of case. But changes in the mix of cases can have profound resource implications, as both the U.S. attorneys and the courts, for example, acknowledge in their budget requests to Congress. Both plausibly argue that prosecuting and adjudicating drug cases is more costly and time consuming than most other types of criminal cases. However, neither has much consistent, reliable data on the impact such cases have on their workload *and* resources. The same limitations generally apply for data from the major federal investigative agencies, such as the Federal Bureau of Investigation (FBI) and the DEA.

2. Data Are Also Often Fragmented, Making Comparisons Difficult. Data are also fragmented in a variety of ways. For example, available data are generally not comparable among different agencies with similar responsibilities. The DEA and FBI do not keep comparable data on their drug enforcement efforts, nor do the U.S. attorneys and the federal courts keep comparable data on criminal cases. Even the criminal case categories vary. The U.S. attorneys have about sixty criminal case codes, while the courts have about twice as many. It is possible to make some reasonable linkage using the title and section of the U.S. Code associated with each crime code. We used a program developed by Abt Associates for this purpose. Finally, the court data include misdemeanor traffic cases—around 8,000 annually—that are not included in the U.S. attorney database because the U.S. attorneys do not prosecute those cases.[302]

Moreover, through 1992, the court database was kept on a July 1 to June 30 year, while all other federal data, including that of the U.S. attorneys, were maintained on fiscal years (October 1 to September 30). While it was possible to use date field(s) to convert the court database to federal fiscal years, there were still problems in comparing counts between the two databases. At the end of the fiscal year, the executive office of the U.S. attorneys made a concerted effort to clean up stale or missing data, espe-

cially on cases that had been closed during the year, and to update the database. Thus, there was usually a surge of data entry in the U.S. attorney database at the end of the fiscal year, a surge that would not show up in the U.S. courts database, which was finalized each year on a different schedule.

To track the disposition of referrals from investigation agency through final disposition by the courts, as we tried to do, is not easy. The U.S. attorneys have an investigative agency identifier in their database, permitting one to identify the agency that referred the case for prosecution. The U.S. courts' master criminal file has no such identifier, because the courts have no need for one.

However, one cannot necessarily conclude from the referring agency code in the U.S. attorney database that this was the agency that actually incurred the expense of the investigation. We found, for example, that the Immigration and Naturalization Service apprehended a number of drug "mules" (couriers) at the border but then turned them over to the DEA or Customs. The DEA or Customs was then credited in the U.S. attorney database with the referrals. If one wished to track agency referrals through the criminal justice system—whether the defendant was actually indicted and found guilty—one had to rely on the U.S. attorney database because of the absence of an agency identifier in the court database.

To obtain sentencing data required accessing a separate database maintained by the courts.[303] At this point, virtually all linkages with the prior stages of the process were lost. Thus, in our model, we estimated sentences by type of crime only. We could not link those sentences to sets of cases initiated by particular investigative agencies.

Finally, data are often not comparable within the same agency for the same activity over time. Program categories are redefined and more often than not crosswalks between the old and new categories are unavailable. Constructing such crosswalks is time-consuming at best and frequently virtually impossible. The U.S. Marshals Service, for example, redefined its program categories several years ago, making it extremely difficult to compare workload and costs before and after that transition. Or the same activity may have been funded differently over time, affecting the consistency of the data reported. The Organized Crime Drug Enforcement Task Forces (OCDETF), for example, have been funded by appropriating money directly to the participating agencies for their OCDETF activities and also by appropriating money to the executive office of the task forces, which would then reimburse agencies for their costs.

Thus, one encounters a number of problems. Data—cost and/or workload—are not necessarily available on the actual activity that may be affected by a change in policy. The data, if available, may not be comparable across time, making trend analysis difficult. The data may not be comparable among individual components within an agency—for example, among district courts, U.S. attorneys offices, or DEA field offices—that may be important for the analysis. And if the analysis requires data from more than one agency, it is highly unlikely that the available data are comparable, even though the data are supposedly counting the same thing, such as dispositions.

Given such problems, the data either must be adjusted, assuming there is some reasonable, defensible way of doing it—such as using the title and section to match criminal codes in the U.S. attorneys and U.S. courts criminal databases—or critical assumptions must be made about the data. For example, one may need to assume that the referring agency listed in the U.S. attorney database is indeed the agency that expended the resources on investigating the cases for which it is credited.

The Data Needed Reflect the Scope of the Analysis

Though a truism, it is worth restating that the data needed for an impact analysis are dependent on the scope of the analysis. The proper scope is in turn dependent on (1) the audience to whom it is addressed, (2) the purposes for which it is done, and (3) how quickly the results are needed. Congress and others can always pose far more questions than it is possible to answer quickly or with reasonable certainty.

Audiences for Impact Analysis

Generally, the immediate audience for most federal judicial impact analyses is Congress, although members of the bar and other groups, including those in academia, have an interest as well. Certainly, we in the GAO are interested in such analyses. But each audience has somewhat different interests and needs. Academics generally have an interest in building coherent theories of behavior. Members of the bar are generally interested in the impact changes may have on their clients, access to the courts, and, consequently, judicial remedies. Judges have an interest in the impact that legislative changes may have on their workload and the resources available to process it. The GAO's interest is quite eclectic and practical, focusing primarily on operational impact issues.

To some extent, the appropriate audience for a judicial impact statement depends on what one wishes to accomplish with it—both immediately and in the longer term. Impact analyses are also useful for a variety of audiences, internal and external to the courts. Internally, they are useful to judges, the Federal Judicial Center and various offices within the Administrative Office of the U.S. Courts. Impact statements, for example, can help to identify gaps in existing data and areas that may need strengthening to better manage the courts. Externally, they are generally useful to a whole variety of groups with interest in the jurisdiction of and access to the federal courts.

However, for most federal impact analyses, Congress is the immediate customer and user, and the goal of the analysis is most frequently to alert Congress to the workload and resource implications of legislation under consideration—most commonly nonbudgetary legislation, such as expanding the number of offenses that carry mandatory minimum sentences. Congress tends to be interested in the operational impact of proposed legislation. What is the likely additional or decremental workload resulting from the legislation or policy change? If additional workload is likely, can the courts handle the increase within existing resources? If not, why not, and what additional resources would be required?

Less frequently, Congress is interested in the probable effect of the change on state courts. Members who are former governors or mayors are the most likely to have such concerns. Congress may also be interested in the substantive effect of a proposed change. One example is the debate concerning the impact on death penalty defendants of more limited access to federal courts via habeas corpus proceedings.

The purpose and scope of the analysis may be broad or narrow depending on who will use the analysis and why they want it. The analysis is different, for example, if one is looking at budgetary decisions rather than the impact of various alternative dispute procedures on litigants.

Suppose the appropriation committee asked about the resource impact of eliminating diversity jurisdiction in the federal courts. In other words, would this reduce the need for resources? The committee is most likely to want the answer organized by appropriation account and, perhaps, object class (such as personnel or travel) because these are the categories it uses to appropriate funds. This may itself affect the way one goes about the analysis. It certainly affects the data one is likely to want and use.

An authorization committee, such as the Judiciary Committee, may ask a related but somewhat different type of operational question: What im-

pact would eliminating diversity jurisdiction have on civil case backlogs, especially civil cases awaiting trials, in the federal courts? Faced with questions from local mayors and judges, the authorization committee might also want to know how the elimination of such jurisdiction is likely to affect state courts as litigants formerly suing in federal courts turn to the state courts for redress. To answer this question, one would need data on workload but not necessarily costs. However, to answer the appropriation committee's question, one would need cost as well as workload data.

Timing of the Analysis: How Quickly Is It Needed?

The authorization and appropriation committees may also have very different deadlines for a response. The appropriation committee, faced with mark-up on the appropriation bill, would need the analysis quickly, while the authorization committee may have posed the question as part of its preparation for oversight hearings several months later.

The scope and type of analysis undertaken are very much dependent on timing—when is the answer needed? Given the legislative calendar, "quick and dirty" is often all that is possible to deliver the information to decision makers in enough time so it can be used to affect the outcome of the legislative process.

When a quick response is needed, one must generally make do with whatever data is readily available. With more time, it may be possible to create the data needed for analysis by merging and matching databases or developing original data through questionnaires, case tracking, or creating special reporting mechanisms—a process used to develop new district court case weights.

Some Characteristics of Ideal Data for Impact Analyses

The characteristics of ideal data for impact analysis will, of course, vary with the type of analysis undertaken. No database could include all the variables that one might need for impact analyses. In general, however, there are certain characteristics that the "ideal" data should have. The data should:

- be at the lowest level of analysis that makes analytical sense (generally by individual case or defendant);
- link workload (what types and how many of each), time (how long), and cost (how much),[304] in a consistent way;

- be organized so that it can be readily aggregated in a variety of ways for analysis (such as groups of cases, program, appropriation account, individual court); and
- be comprehensive.

The characteristics described here assume that the cost to compile and maintain the data is not a consideration. In the real world, of course, it is an important constraint. The more detailed the data, the more ways they can be aggregated, disaggregated, and analyzed, and thus, the greater the cost to create and maintain the data.

Cases, whether criminal or civil, vary considerably in their complexity and cost and the time required to process them. Analytically, the data needed for judicial impact analysis are not that dissimilar from the data needed for analyzing medical care cost and outcomes (the quality of care delivered for any specific cost). Once a patient makes contact with the medical care system—whether through a doctor's appointment or arrival in an emergency room by ambulance—a variety of data are kept on the patient. The workload data include the various tests and procedures used to diagnose and treat the patient, the identity of the doctors, nurses, and others who perform the tests and procedures, the costs[305] (materials, equipment, personnel, etc.), and ultimate outcome—death and complete cure being the two polar extremes.

Clearly, it does not cost the same to treat a patient for acute appendicitis as it does to treat one for arterial blockage, even though surgery may be required in both cases. Nor does it necessarily cost the same to treat two heart patients who have heart bypass surgery. One may have complications, while the other may not.

Similarly, an ideal judicial process database would have data on a litigant or case from the time first contact is made with the legal system—the plaintiff who seeks a lawyer for a tort or the person who becomes the subject of an investigative agency inquiry, whether civil or criminal. It would include data, by case or offender, on the procedures (discovery, pretrial settlement conferences, plea negotiations), used in processing the case, who participated in these procedures and for how many hours, the costs, as well as the results of the case (defendant was found guilty but the conviction was voided on appeal or civil case settled before trial).

Analytical Potential of Ideal Data

A database that captured criminal case data by offender and civil data by case type (including number and identity of litigants in the case) would

capture data at a very useful level of analytical detail. For criminal offenders, the system would capture all workload and cost data from arrest (investigative costs would be even better) through the final day of supervision on probation or supervised release. For civil cases, it would capture similar data from date of filing through final appeal.[306] This would permit a wide range of analyses, including, for example:

- the impact of the use of discretion on the flow of different types of defendants and cases through the system, such as the charges included in the initial and all superseding indictments or the granting of bail in criminal cases; or, for civil cases, the scope of discovery and use of pretrial settlement conferences;
- the time lapsed from one step of the process to the next—such as filing to trial, trial to sentence or judgment order, and the costs associated with those times;
- analysis of offense, race, gender, and age effects on criminal case outcomes;
- comparisons between areas of the country (individual district courts or U.S. attorneys offices); and
- costs for different types of defendants or litigants and offenses or case types.

Such data could be used to develop fairly detailed models of the process that would permit a wide range of "what if" analyses, including the costs of moving different types of offenders or cases from one step in the process to another; the potential cost savings of reducing the time cases are in process; or the costs of alternative sentences, such as various mixes of probation, home confinement, community confinement, and prison.

While some state and local jurisdictions have offender-based systems of varying detail and usefulness, the federal system provides very little capacity to trace specific offenders or groups of offenders through the system, much less to determine the costs of processing those offenders through the system from arrest through final release from the supervision of the federal criminal justice system (whether it be the Justice Department's Bureau of Prisons or the judiciary's Probation Service).

The data on civil litigation are even more diffuse and difficult to gather and organize. In part, this is because there are many more parties involved in civil litigation, and the government generally plays a less central role. One result is that estimating civil case filings, particularly by specific district or case type, is more complex than it is for criminal cases.

Validating Impact Analyses

It is generally the case that data systems are designed more to capture the data one needs today than the data one may need in the future, if for no other reason than it is usually easier to justify and obtain needed funds based on demonstrated actual need, rather than potential future need. When budgets and workload are growing incrementally, there may be little need for information systems that facilitate a variety of impact analyses. However, when changes are frequent (the biennial crime bills of the 1980s) and/or not so incremental (implementation of the federal sentencing guidelines), the limitations of existing data are more apparent.

Validating impact analyses—in particular, the operational impacts that have been the focus of this paper—is in no small part a data and cost issue. Using available data, one might predict a rise of 6,000 cases at a cost of $20 million to the courts because of a particular legislative action. If no mechanism exists for tracking the filing of such cases and the cost to process them, it will be difficult to validate the estimate. Such can be the case today because the courts' regular systems have limited capability to track and cost specific types of cases or actions. The workload data available are generally more detailed than the cost data, which are geared more to the appropriations process and traditional object class accounting classifications (personnel, travel, etc.).

For judges and staff trying to keep up with a growing workload, it can be frustrating to be asked to maintain special, ad hoc data systems designed to validate and analyze different anticipated impacts arising from several major legislative actions. However, if one expects a particular legislative action or set of actions (such as a number of provisions in a major crime bill) to have a major impact on court operations and costs, it may very well be worth the time, trouble, and cost to establish systems that track the impact of that legislation. Without such data, it may be difficult to support substantial budgetary increases based on that impact when it occurs.

In its budget justifications and other documentation provided to Congress, the judiciary emphasizes that its workload is largely dependent on the actions of others, whether it be new jurisdiction conferred by Congress, new criminal law enforcement policies, the incidence of a particular type of crime in a local jurisdiction, or simply the sudden onslaught of a particular type of civil suit, such as asbestos claims. For any agency that exercises such limited control over its workload, it seems especially

important that there be a means of analyzing the impact(s) that may result from changes in the actions of those who have the greatest control over that workload.

Conclusions

Impact analyses are growing, in part because the demand for them is growing. Yet our ability to provide accurate and reliable estimates of the impact of legislation on workload, costs, and time is considerably limited by the data available for such analyses. There are large gaps in our knowledge about what is currently occurring and why. We have limited data on the actual operational impacts of the sentencing guidelines, for example, much less the effect the guidelines may be having on sentencing disparity. Consequently, it is extremely difficult to estimate the probable impact(s) of any changes on the operation of the guidelines.

The broader the scope of the impact analysis, the more difficult the problems the analyst faces, and the more assumptions that one must make. Indeed, clearly explaining the assumptions on which an analysis is based is key to understanding the limitations of any analysis. The model that the GAO developed has some critically important assumptions and limitations that are described in the report.

No database could ever include all the variables that one might need for impact analyses. However, an extremely useful database, at least for operational impact analyses, would be one that included workload, time, and cost data at the individual case or defendant level. Such data offer a variety of data elements that could be aggregated in a number of ways for impact analyses, as well as be used to validate those analyses. However, such data would also be expensive to create and maintain.

There are, we are told, four basic stages of learning: unconsciously incompetent, consciously incompetent, consciously competent, and unconsciously competent. While in certain narrow areas of workload and costs, impact analysis may have evolved to the stage of consciously competent, we are in many ways still consciously incompetent. We are aware of the many limitations and difficulties of conducting impact analyses that produce reliable, accurate impact estimates. Because it is unlikely that data problems discussed in this paper will disappear any time soon, I, at least, expect to remain at the consciously incompetent stage for the foreseeable future.

Preliminary Findings: A Retrospective Analysis of the Effect of Legislation on the Workload of the U.S. Courts

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Introduction

In this report we present the preliminary findings of an exploratory retrospective analysis of the effect of federal legislation on the workload of the U.S. courts. As far back as the 1980 National Academy of Sciences report, and as recently as the 1992 publication of the Institute for Court Management's *Guidebook for Legislative–Judicial Relations*, judicial impact analysts have viewed the creation of a retrospective database on the impact of legislative enactments as a critical step in moving their efforts forward. Because all forecasts are simply probabilistic assessments of what will happen in the future given what has happened in the past, the more that is known about the impact that various types of legislation have had on the courts in the past, the easier it is to forecast the impact that proposed legislation will have in the future.

The data employed in this analysis are derived from available filing data (from the Administrative Office for the U.S. Courts) for both criminal and civil district court cases. As will be demonstrated below, categorizing statutory cause-of-action information contained in these data and associating it with relevant case-weight information may shed some light on the historical impact of some criminal and civil statutes on district court workload.

It is important to note from the outset, however, that this is an exploratory effort. Because of limitations in the currently available data and operational problems encountered in mapping the precise relationship between statutes and court workload, the clarity of this light varies significantly across various statutes. Because of this, it is not possible to assume that the picture of judicial impact developed in this report is either complete or definitive. Instead, the purposes of our analysis are more modest: (1) to evaluate the usefulness and limitations of using currently available statutory cause-of-action data in combination with other available filing data to enhance our understanding of judicial impact, and (2) to gain

some perspective on how currently available data might be revised to enhance future efforts in judicial impact assessment.

Preliminaries

Filing Data

To properly interpret the potential usefulness and limits of the findings presented in this report, it is important to have a basic understanding of the data from which they are derived. The criminal case-filing data were obtained from information submitted by the district courts to the Administrative Office on the JS-2 and JS-3 Forms and then entered onto computer tapes. Because of Speedy Trial Act requirements, these data are available for criminal cases since 1977. The civil case-filing data originated from data submitted to the AO on the JS-5 Form.[307] For the current purpose, which is to identify a case filing with a specific statutory cause of action, these data are available only for a six-year period covering statistical year 1987 through 1992.[308] The findings presented in this section for both criminal and civil cases are based on this six-year period.

For each case filing, the AO data report an Offense Code (F-Code) for criminal cases or a generic code for the general Nature of Suit (NOS-Code) in civil cases. These codes are used to map case filings into general case types, the aggregate statistics for which are then presented in the Annual Report of the Director of the AO. In addition, the data also report, for most criminal filings and many civil filings, the single most important statutory provision on which the case is brought as listed by the filing attorney. This statutory cause of action is listed in the data as "cause."[309] The cause indicator provides the data employed in this study to map criminal and civil filings into the specific legislative enactments under which they were brought.

The principal advantage to using statutory cause of action, as opposed to F-Code or NOS-Code, is that it allows us to connect a case more directly with the specific legislation under which it was brought. This provides a picture of how particular legislative enactments affect the workload of the court. The clarity of this picture, however, varies significantly across different titles and sections of the U.S. Code and depends, in part, on how accurately the data are reported. In this regard, there are two important points to bear in mind regarding the statutory cause of action data on which the findings presented in this report are based.

First, "cause" is currently an optional field on the filing form. This means that it is not always filled out, and even when it is filled out, the entry is not verified by the AO. With respect to criminal filings, this does not appear to present much of a problem; the proportion of filings for which a statutory cause of action is listed is generally quite high, almost 100%. With respect to civil filings, however, the proportion of filings for which a statutory cause of action is listed is much smaller, although it has improved over time. In SY 1987 this proportion was 22%; in SY 1988, 26%; in SY 1989, 27%; in SY 1990, 32%; in SY 1991, 41%; and in SY 1992, 47%. To generalize the results we obtain from this subset of civil filings to all civil filings, it is necessary to make the strong assumption that this subset is both accurate and representative of the whole.[310]

The second point to bear in mind regarding these data is that only one statutory cause of action is listed. As a result, it is possible to attribute only one statutory cause of action to each filing even when more than one exists. This is a particular drawback in assessing the impact of criminal statutes, given that charges are often brought under more than one count. A good example of the difficulties caused by this limitation can be found in 18 U.S.C. § 2. Although the data show that the frequency of filings listing 18 U.S.C. § 2 as cause is quite high, this is essentially a boilerplate charge in every case involving two or more defendants and provides no information on the substantive charges of the case. Moreover, this implies that estimates of the judicial impact of those statutes providing the substantive cause(s) of action under which these filings were brought are understated by the data.

Another factor that affects the reliability of statutory cause-of-action data in assessing judicial impact is how well cases brought under a given statute correspond to some meaningful subcategory of judicial workload. As a general rule, the more specific a given statutory cause of action is relative to the appropriate F-Code(s) or NOS-Code(s) for that statutory cause of action, the more information we are able to gain from analyzing it. The following examples demonstrate this point.

In 1989, the Seventh Circuit reviewed a suit brought under the Federal Tort Claims Act by a state prisoner whose personal belongings, valued at $50, had been damaged by guards.[311] Codified at 28 U.S.C. §§ 2671–2680, this Act covers a broad spectrum of cases for different plaintiffs, not just prisoners, seeking to sue the U.S. government for damage to property. The court's subsequent opinion contained some discussion regarding the magnitude of the workload imposed on the courts by prisoners' small

claims brought under the Act.[312] In circumstances such as this, because the statutory cause of action is very specific relative to the relevant NOS-Codes for these case filings, it is possible to use statutory cause-of-action data to develop a picture of the judicial impact imposed by a particular statute that is simply not possible using either F-Code(s) or NOS-Code(s).[313]

For instance, the data show that in SY 1987, 170 suits were filed in U.S. district court (accounting for 0.32% of the civil caseload) that listed 28 U.S.C. §§ 2671–2680 as cause. In SY 1988, 179 suits were filed (accounting for 0.29% of the civil caseload) listing this cause of action; in SY 1989, 174 (accounting for 0.28% of the civil caseload); in SY 1990, 202 (accounting for 0.28% of the civil caseload); in SY 1991, 391 (accounting for 0.45% of the civil caseload); and in SY 1992, 464 (accounting for 0.43% of the civil caseload). These data provide a clearer picture of the impact of the Federal Tort Claims Act as a whole than would be possible using NOS-Code data. Moreover, when these data are cross-referenced with the relevant NOS-Codes for prisoner petitions (NOS-Codes 510–550), a fairly precise accounting of the number of prisoner petitions that were brought under the Act is obtained. Here the data show that no more than ten cases in any one year were brought under 28 U.S.C. §§ 2671–2680 that were also classified according to NOS-Code as prisoner petitions. Although these data seem to suggest that the impact of prisoners' claims under the Federal Tort Claims Act is relatively insignificant, a final determination would require more complete analysis of the pleadings of cases brought under the Act.

Statutory cause of action can be similarly revealing even in those circumstances where there is an apparent one-to-one correspondence between a particular statute and a particular F-Code or NOS-Code. A good example of this is the relationship between cases brought under 20 U.S.C. § 1080 (Default of Student Under Federal Loan Insurance Program) and the pertinent NOS-Code 152 (Recovery of Student Loan Defaults). As one might expect, there is a close correspondence between this particular statutory cause of action and NOS-Code. Of the 660 cases filed in U.S. district court in SY 1992 that listed 20 U.S.C. § 1080 as cause, almost all (96%) also listed NOS-Code 152.[314] This relationship is not reciprocal, however. In SY 1992, there were a total of 6,146 cases filed under NOS-Code 152 (and also listed some statutory cause of action). Of these 6,146 filings, the majority (89%) did *not* list 20 U.S.C. § 1080 as cause.[315]

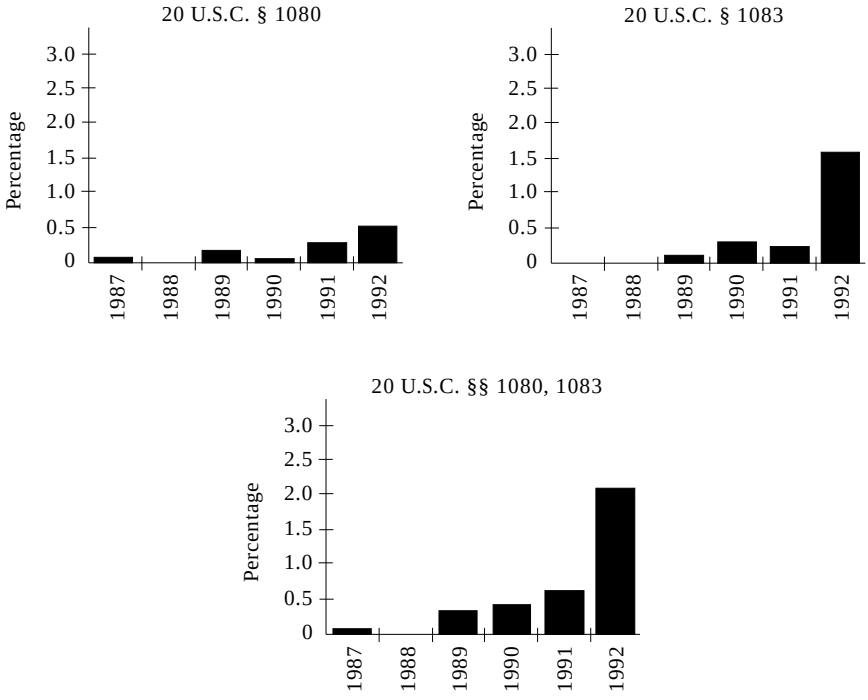
When one looks at the statutory causes of action listed in the cases filed under NOS-Code 152 for SY 1992, two interesting findings emerge. First,

a large number of the filings (1,640) were brought under a different, but closely related, statute, 20 U.S.C. § 1083 (Student Loan Information by Eligible Lenders). What this shows is that even in those situations where the appropriate NOS-Code or F-Code is somewhat narrowly defined, statutory cause-of-action data can still be useful in illuminating the specific legislative channels through which cases are brought into court. By using these data to analyze trends in the relative judicial impact of individual statutory provisions, we are able to gain some perspective on the factors that give rise to this litigation and how those factors may be changing. This point is demonstrated in the following graphs, where filings brought under 20 U.S.C. § 1080 and 20 U.S.C. § 1083 are shown as a percentage of all civil filings for SY 1987 through SY 1992.

As illustrated by these graphs, not only did cases brought under 20 U.S.C. § 1083 generally increase over the period as a proportion of the district courts' civil caseload, but perhaps more importantly, a sudden jump in cases brought under this particular statute was responsible for the equally sudden jump in student loan default cases that occurred in SY 1992. Investigation of the circumstances surrounding this sudden increase in filings reveals that it is directly attributable to a pilot program in the eastern district of Michigan where private law firms are being contracted by the U.S. attorney to pursue these cases.[316]

The second interesting finding to emerge from an examination of the statutory causes of action listed for cases filed under NOS-Code 152 in SY 1992 is that the bulk of these cases (3,692) were brought under the purely jurisdictional statute 28 U.S.C. § 1345 (U.S. Plaintiff). What this demonstrates is that, in spite of specific instructions provided by the AO to filing attorneys that the purely jurisdictional statutes contained within 28 U.S.C. §§ 1251–1631 (Jurisdiction and Venue) should be listed as cause only "when no other Federal statutes apply," these provisions frequently do appear as cause, even when other statutes do apply. In effect, this misuse generates missing information that produces underestimates of the judicial impact of those nonjurisdictional statutes that should have been listed as the statutory cause of action but were not. As a practical matter this makes interpretation of current statutory cause of action data much more difficult in the case of civil filings than in criminal filings.

Filings Brought Under 20 U.S.C. §§ 1080, 1083 as Percentage of Total Civil Filings



In sum, the filing data for statutory cause of action that we present in this report can be quite useful. They make it possible to derive a picture of the effect of specific legislative enactments on the workload of the court in a way that has heretofore not been possible. It is important to realize, however, that the clarity of this picture will vary across various titles and sections of the U.S. Code as a function of the accuracy with which the cause data are reported, the specificity of the particular statutory cause of action being analyzed, and the extent of the "noise" induced in the data by the incorrect reporting of jurisdictional statutes as cause. For these reasons, the picture of judicial impact developed in this exploratory phase of our analysis should not be taken as either complete or definitive.

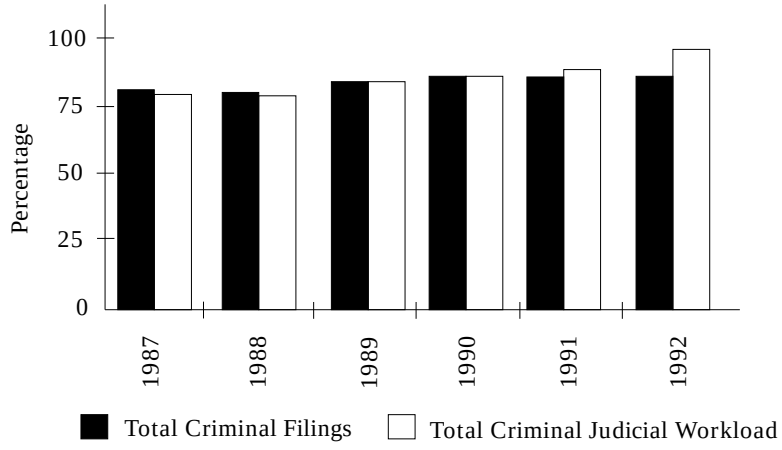
Workload Data

All of the graphs presented below contain estimates of the impact of various statutes as a proportion of the total criminal or civil judicial workload of the courts. These judicial workload estimates are derived from preliminary data coming out of the Federal Judicial Center's District Court Time Study Project and may be subject to change.[317]

Criminal Statutes

In our analysis of the effect of individual criminal statutes on the workload of the courts, we ordinally ranked statutes according to the number of filings brought under each statute as a proportion of all criminal filings and the workload created by these filings as a proportion of total criminal workload. One of the general findings that emerged from this ranking is that a small number of statutes account for a large proportion of the federal court's criminal workload. As demonstrated by the graph below, cases brought under the top twenty-five ranked criminal statutes generally accounted for around 85% of total criminal filings and up to 95% of total criminal judicial workload.

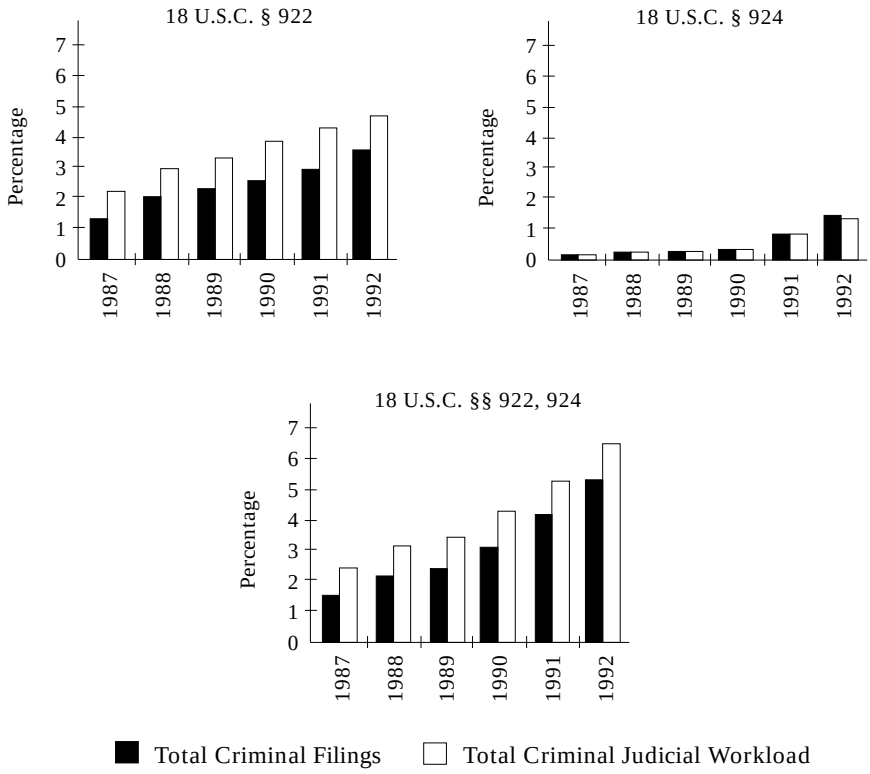
Filings Brought Under the Top 25 Criminal Statutes



Of these top twenty-five criminal statutes, several exhibited filing trends over the period that have significant implications for the federal courts.

One example of this can be found in 18 U.S.C. § 922 (Firearms, Unlawful Acts) and 18 U.S.C. § 924 (Firearms, Penalties). The graphs below depict the proportion of all criminal filings (and the proportion of total criminal judicial workload accounted for by these two statutes. As is readily seen, these proportions rose dramatically over the period. Whereas in SY 1987 the two statutes combined accounted for 1.57% of all criminal filings and 2.33% of total criminal judicial workload, by SY 1992 these proportions had risen to 5.25% and 6.43%, respectively.

Filings Brought Under 18 U.S.C. §§ 922, 924

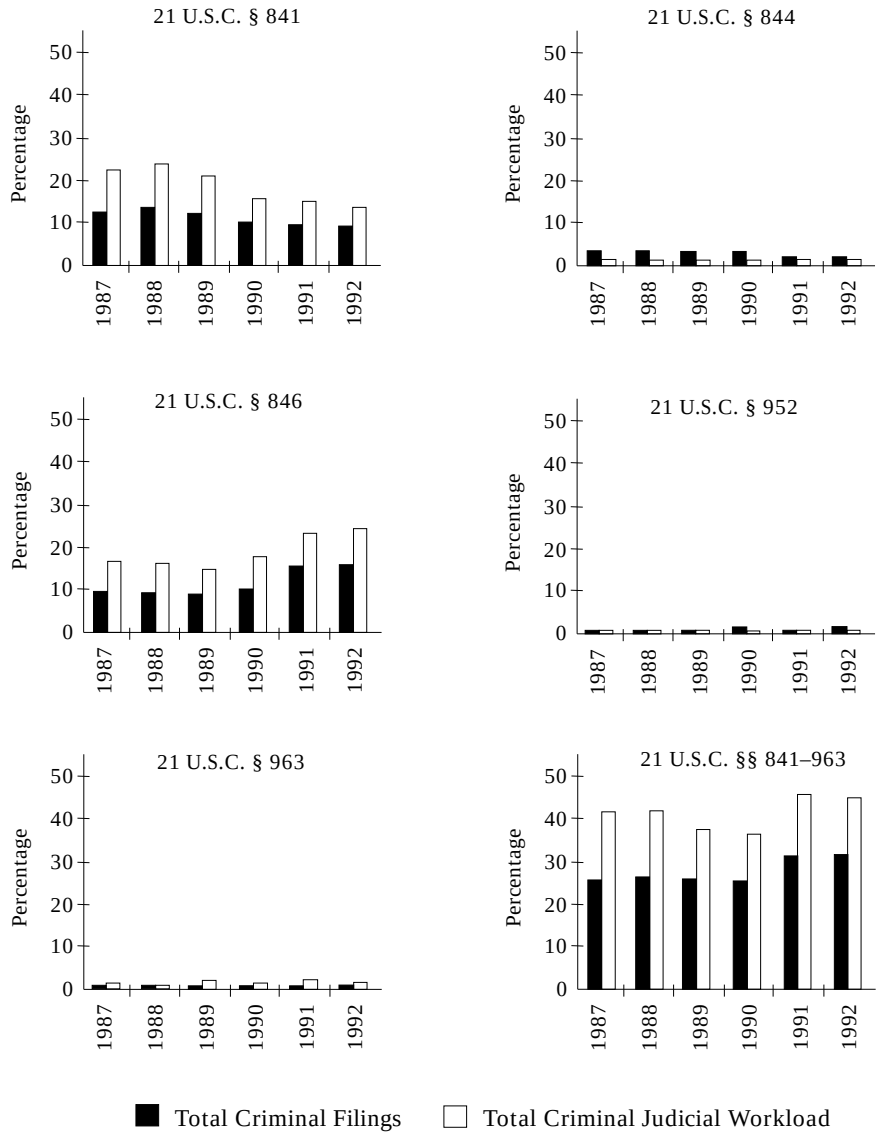


Another example of significant filing trends over the period SY 1987 to SY 1992 can be found in Title 21 drug cases. As shown in the graphs below, whereas the proportion of all criminal filings and total criminal judicial workload accounted for by 21 U.S.C. § 841 (Unlawful Acts, A) and 21 U.S.C. § 844 (Possession) exhibited significant downward trends over the period, the proportion of all criminal filings and total criminal judicial workload accounted for by 21 U.S.C. § 846 (Conspiracy) rose markedly. An additional point of interest is the relatively large case weight associated with filings under both 21 U.S.C. § 841 and 21 U.S.C. § 846.

The net effect of these inverse trends was to increase the proportion of all criminal filings accounted for by these five statutes from 25.76% in SY 1987 to 31.27% in SY 1992 and to increase the proportion of the total criminal judicial workload from 41.27% in SY 1987 to 45.06% in SY 1992.

Another area where statutory cause of action data can be informative involves the imposition by Congress of statutory mandatory sentencing minimums. For example, 18 U.S.C § 924(c)(1), as passed in 1988 and amended in 1990, provides for the addition of a five-year prison term if an offender uses or carries a firearm when committing certain crimes. The data reveal that since the addition of this subsection there has been a significant increase in the frequency with which the § 924 statutory provision is listed as cause. Whereas in SY 1987, the year before passage of § 924(c)(1), there were 95 filings that listed 18 U.S.C § 924 as cause (accounting for 0.16% of all criminal filings), by SY 1989, one year after passage of this subsection, the number had increased to 250 (accounting for 0.39% of all criminal filings), and by SY 1992 to 1,037 (accounting for 1.52% of all criminal filings). Although this is an interesting change, and indicative of the kind of information that can be derived from the analysis of statutory cause of action data, it is insufficient in and of itself to show a causal relationship between passage of § 924(c)(1) and the increased filings under § 924. Such a determination would require further investigation to control for other factors that could have caused this increase in filings.

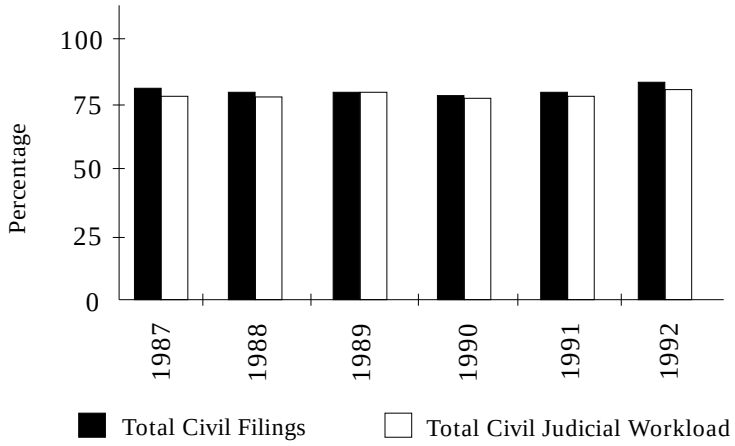
Filings Brought Under Title 21



Civil Statutes

We also ordinally ranked civil statutes according to the number of filings brought under each statute as a proportion of all civil filings and the workload created by these filings as a proportion of total civil workload. As with the graph presented earlier for criminal statutes, the graph below shows the combined proportion of all civil filings and proportion of total civil judicial workload, accounted for by the top twenty-five ranked civil statutes for SY 1987 through SY 1992.

Filings Brought Under the Top 25 Civil Statutes

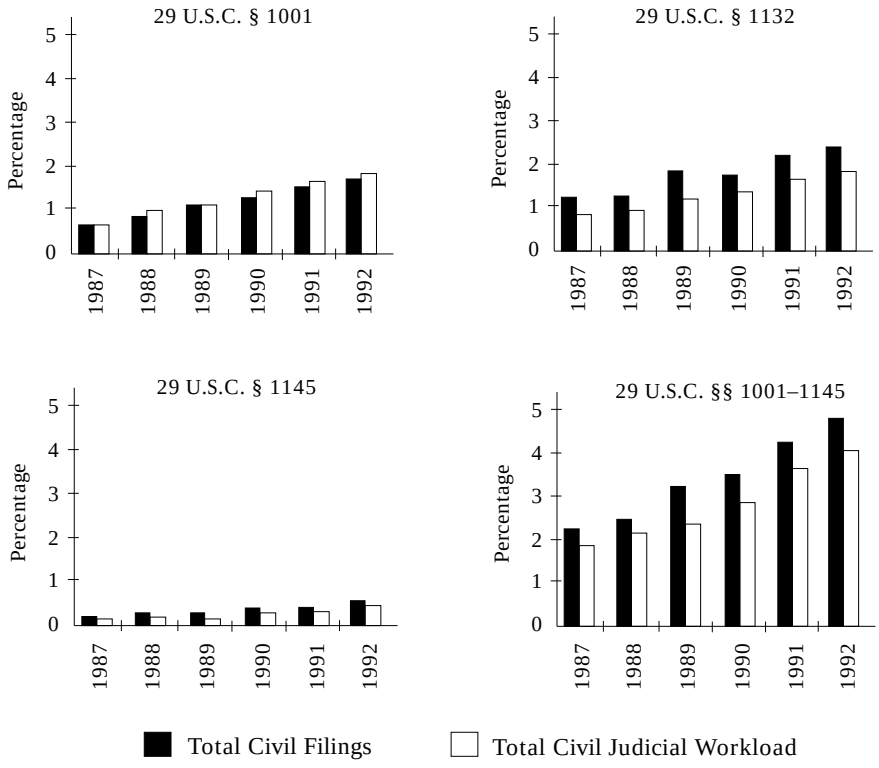


The results again show that a relatively small number of statutes account for a relatively large proportion of the federal courts' civil workload. Cases brought under the top twenty-five ranked civil statutes generally accounted for around 80% of both total civil filings and total civil judicial workload. As examples of some of the significant trends exhibited by cases brought under these top twenty-five civil statutes, we present below data on the Employee Retirement Income Security Act (ERISA) and the Racketeer Influenced and Corrupt Organizations Act (RICO).

To obtain a full picture of the case filings under ERISA, which covers statutory sections 29 U.S.C. §§ 1001–1371, it helps to recall that the title or section information is largely determined by the filing attorney. In some instances, the filing attorney may simply wish to indicate that a case is an ERISA suit and, therefore, list cause as 29 U.S.C. § 1001 (the title and

definition statute), or the filing attorney may list as cause a number of other statutes in the ERISA law. The graphs presented below provide filing and workload data for 29 U.S.C. § 1001, 29 U.S.C. § 1132 (Civil Enforcement), 29 U.S.C. § 1145 (Delinquent Contribution Actions), and 29 U.S.C. §§ 1001–1145 (a representative cluster of significant statutory provisions within the Act) for SY 1987 through SY 1992. Both civil filing data and civil judicial workload data are again presented as proportions of all civil filings and total civil judicial workload.

Filings Under the Employee Retirement Income Security Act (ERISA)



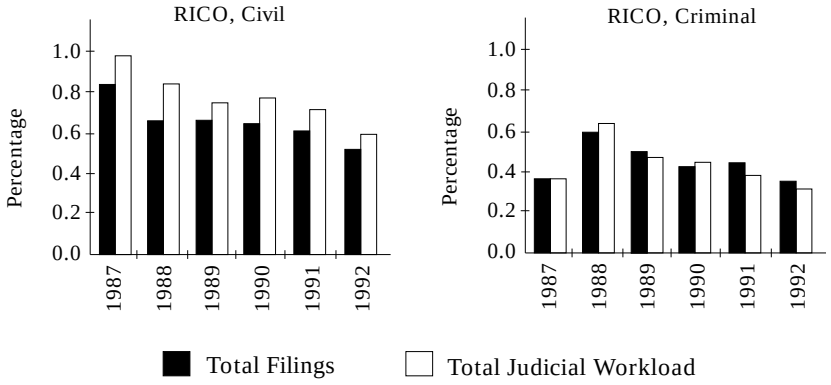
As is apparent from these graphs, ERISA filings and the workload they imposed on the courts exhibited significant increases over this period. The

proportion of all civil filings accounted for by 29 U.S.C. §§ 1001–1145 rose from 2.23% in SY 1987 to 4.86% in SY 1992, and the proportion of total civil judicial workload rose from 1.85% to 4.10%.

Another example of significant trends in civil filings can be seen in cases brought under RICO (18 U.S.C. §§ 1961–1968). When the RICO Act was passed in 1970, Congress made it a federal crime to use income derived from a pattern of racketeering activity to operate or control an enterprise. At the same time, RICO allows for civil remedies so that any person injured by a RICO violation may recover treble damages and attorney fees. By 1985, it became clear to many observers that RICO was being used routinely for purposes beyond those originally contemplated by Congress. In that year, a series of hearings on civil RICO held by the Subcommittee on Criminal Justice of the House Committee on the Judiciary gave voice to these concerns.[318]

The degree of dissatisfaction with the way in which civil RICO was used may have led to the trends seen in both civil and criminal RICO filings since 1986. Although the enforcement provisions of RICO have remained in force, the proportion of filings accounted for by this statute fell significantly on both the civil and criminal sides after 1986. In SY 1987, the earliest year for which we have statutory data, civil suits reported under RICO statutory provisions accounted for 0.82% of all civil case filings. By SY 1988, actions brought under these statutory provisions had fallen to 0.65% of all civil case filings. On the criminal side, RICO filings demonstrated an even greater decrease, from 0.72% of all criminal case filings in SY 1986 to 0.36% in SY 1987. As shown in the graphs below, these trends continued over the period for both filings and judicial workload.

Filings Brought Under Racketeer Influenced and Corrupt Organizations Act (RICO)



These data suggest that what appeared to many as a runaway statute in 1985 may have been harnessed or tamed. What these data do not show are the numbers of RICO actions that are contained in pleadings but not listed as the primary cause of action by the filing attorney. As a result, further study would be needed to determine the full extent of court workload devoted to dealing with the effects of RICO legislation.

Recommendations for Future Data Collection

The preceding analysis has brought to light three limitations inherent in current Administrative Office filing data, which, if corrected, would greatly enhance the usefulness of these data in judicial impact assessment. First, the "cause" field on the criminal JS-2 and JS-3 filing forms and the civil JS-5 filing form should be made mandatory rather than optional. This would ensure that data were provided on the statutory cause of action for each case entering the federal system and, in time, facilitate creation of a highly useful retrospective database on the judicial impact of various types of existing legislation. Second, the "cause" field should be subject to verification by the clerk of the court or AO personnel. This would help to eliminate many of the errors found in the currently available data—such as the listing of purely jurisdictional statutes as cause when other federal statutes apply. Third, multiple "cause" fields should be provided on the JS-2, JS-3, and JS-5 filing forms to permit the listing of more than one statutory cause

of action in those instances where more than one applies. This would be particularly helpful with respect to criminal cases where charges are often brought under more than one count.

Summary

Currently available statutory cause-of-action data can provide some information on which statutes are causing significant impact on the caseload of the courts, and what the trends of that impact have been. Moreover, when these statutory cause-of-action data are combined with case-weight information, we are able to gain some insight regarding the judicial workload created by these statutes.

Limitations inherent in the current data, combined with limitations in our current knowledge of the causal relationship between statutes and court workload, however, dictate that any conclusions predicated on these insights must be the subject of a healthy dose of skepticism. Because of this, the findings presented in this report and the framework of analysis that was used to develop them should be viewed as an intermediate, rather than final, step toward the ultimate goal of aiding the courts in forecasting the judicial impact of proposed legislation by providing information on the impact of previously enacted legislation.

What the current analysis does demonstrate, however, is (1) that in certain circumstances, statutory cause-of-action data can provide a clear picture of the judicial impact of specific statutes; (2) that in a broader set of circumstances, statutory cause-of-action data can usefully augment other available filing data to enhance our understanding of judicial impact; and (3) how currently available data might be revised to facilitate development of a retrospective database on judicial impact and thereby enhance future efforts in judicial impact assessment.

VI. Summary

To briefly summarize, the FJC Conference on Assessing the Effect of Legislation on the Workload of the Courts brought together a broad spectrum of individuals with a shared interest in judicial impact assessment for the purpose of exchanging information and ideas. In the final analysis, at least three principal benefits emerged from this effort.

First, researchers currently engaged in work on judicial impact assessment gained many practical insights on how the quality of that work might be improved.

Second, the exploration by participants of the appropriate role of judicial impact assessment as a vehicle for interbranch communication provided many insights regarding how the content of assessments and the structure of the institutions charged with creating those assessments affect their value as a communication tool.

Finally, perhaps the most lasting benefit to be derived from this conference is the example it provided of what Maria Schmidt called the "economies of scale" that can be derived from state–federal and interbranch cooperation. By providing a forum in which some of the individuals working in this area in federal and state government, within the judicial and legislative branches, as well as in academia and other nongovernmental institutions, could share their experiences and thoughts about the future, the conference helped foster a cooperative endeavor that may lead to substantial improvements in the science of judicial impact assessment in the future.

Endnotes

1. Ruth Bader Ginsburg, *A Plea for Legislative Review*, 60 S. Cal. L. Rev. 996 (1987).

2. A statistical year is a twelve-month reporting period ending June 30. Administrative Office of the U.S. Courts, Annual Report of the Director, at Table C-2, U.S. District Courts Civil Cases Commenced, by Basis of Jurisdiction and Nature of Suit (1961 & 1971). According to the classification scheme used by the Administrative Office, district court civil cases are divided into five general categories: contract actions, real property actions, tort actions, actions under statutes, and other. "Actions under statutes" are cases filed under acts passed by Congress, such as antitrust, civil rights, securities, and Social Security. In the twenty years since the chief justice's speech, the number of civil actions under statutes filed in U.S. district courts has continued to grow rapidly, reaching 132,818 (58% of the civil caseload) in statistical year 92. Administrative Office of the U.S. Courts, Annual Report of the Director, 1992.

3. The Panel on Legislative Impact on Courts was convened in October 1977, under the aegis of the National Research Council's Committee on Research on Law Enforcement and Criminal Justice. National Research Council, Forecasting the Impact of Legislation on Courts at vii (Keith Boyum & Samuel Krislov eds., 1980). The National Research Council was established by the National Academy of Sciences in 1916.

4. For additional information on why judicial impact statements failed with regard to judgeship forecasts, see Paul Nejelski, *Judicial Impact Statements: Ten Critical Questions We Must Not Overlook*, 66 Judicature 134 (Sept./Oct. 1982).

5. *See* Hans A. Linde, *Observations of a State Court Judge*, *in* Judges and Legislators: Toward Institutional Comity 117 (Robert A. Katzmann ed., 1988). Linde lists several reasons why "[t]he active participation of state judges in the policy process is much more taken for granted and much less controversial than the involvement of federal judges in the national government." Among the reasons are: many state judges are elected and, therefore, do not consider themselves above the fray, and state judges are in closer geographical proximity to their state capitals.

6. For a description of the work being done by this office, see Nancy Potok, *Development and Ongoing Operations*, in this publication.

7. Linda K. Ridge et al., Seeking a New Partnership: Guidebook for Legislative–Judicial Relations 14 (National Center for State Courts 1992).

8. For a description of this project, see Thomas A. Henderson et al., *The Impact of National Legislation on State Courts*, in this publication.

9. Conference of State Court Administrators, Preparing State Court Impact Statements for National Legislation (August 1994).

10. Benjamin N. Cardozo, *A Ministry of Justice*, 35 Harv. L. Rev. 113, 114 (1921).

11. *See* Ridge et al., *supra* note 7, at 2; *see also* Robert A. Katzmann, *The Underlying Concerns*, *in* Judges and Legislators: Toward Institutional Comity 7 (Robert A. Katzmann ed., 1988).

12. Robert A. Katzmann, *Summary of Proceedings*, *in* Judges and Legislators: Toward Institutional Comity 162 (Robert A. Katzmann ed., 1988).

13. Cardozo, *supra* note 10, at 125.

14. Keith Boyum & Samuel Krislov, *Judicial Impact Statements: What's Needed, What's Possible?,* 66 Judicature 137 (Sept./Oct. 1982).

15. Paul Nejelski, *Judicial Impact Statements: Ten Critical Questions We Must Not Overlook,* 66 Judicature 123, 125 (Sept./Oct. 1982).

16. Warren Burger, *The State of the Federal Judiciary–1972*, 58 A.B.A. J. 1049 (1972).

17. Nejelski, *supra* note 15, at 130 n.19.

18. *See, e.g.*, Nejelski, *supra* note 15; Boyum & Krislov, *supra* note 14; Cornelius Kerwin, *Justice-Impact Statements and Court Management: And Never the Twain Shall Meet*, *in* The Analysis of Judicial Reform 171 (Philip L. Dubois ed., 1982); and Susan M. Olson, *Judicial Impact Statements for State Legislation: Why So Little Interest?,* 66 Judicature 147 (Sept./Oct. 1982).

19. Federal Courts Study Committee, Report of the Federal Courts Study Committee 89–90 (April 2, 1990).

20. The ABA resolution supported "legislation by each state legislature and the United States Congress mandating the preparation of judicial impact statements to be attached to each bill or resolution that affects the operations of State or Federal courts"; urged each state legislature and Congress "to establish a mechanism within its budgeting process to prepare judicial impact statements determining the probable costs and effects of each bill or resolution that has an identifiable and measurable effect on the dockets, work loads, efficiency, staff and personnel requirements, operating resources and currently existing material resources of appellate, trial and administrative law courts"; and urged that judicial impact statements be attached to bills affecting the courts before committee hearings were permitted to proceed. American Bar Association Resolution, Report No. 302, adopted by the House of Delegates, August 12–13, 1991.

21. 1992 Wisconsin Judicial Conference Resolution: Judicial Impact Statement, prepared and offered by Circuit Judge Harold V. Froehlich, Outagamie County, Wis. The resolution cited the "overpowering need for the Legislature to recognize the workload burden being placed on the judiciary when passing legislation," and endorsed the creation of a judicial impact statement by the legislature "to measure and expose the effect of legislation on the judiciary."

22. According to a survey of state legislative staff, most view judicial impact statements as the information provided by the judiciary for use in fiscal notes that are prepared by the legislative staff. Ridge et al., *supra* note 7, at 15.

23. *Id.* at 14.

Nejelski, *supra* note 15, at 132–33, and Boyum & Krislov, *supra* note 14, at 139, caution against placing so much emphasis on the costs of new legislation that its benefits are overlooked. "Legislators," Boyum and Krislov advise, "should know not only the number of new cases that new legislation may bring, but they should also know the social costs of doing nothing. . . . There may be cases presently on dockets which are less deserving than those which would arrive as a result of new legislation." Boyum & Krislov, *supra* note 14, at 146.

24. For a discussion of the intangible impacts, see Boyum & Krislov, *supra* note 14, at 138.

One might ask whether the legislature needs the information about nonbudgetary matters or whether such issues are of concern only to the internal administration of the courts. The answer may be that these less tangible impacts often have long-run fiscal effects. For example,

changes in a job function will affect the qualifications required of applicants and may eventually lead to salary adjustments. Less tangible impacts also affect persons outside the courts, including litigants, who are concerned with access to the courts, the speedy processing of cases, obtaining opportunities to tell their stories to tribunals, and the administration of justice.

25. Ridge et al., *supra* note 7, at 15.

26. A. Fletcher Mangum & Frank Arnett, The Impact of Legislation on the Courts 3 (Report to the Long Range Planning Committee of the Judicial Conference of the United States, September 1992).

27. The Wisconsin Legislative Reference Bureau attorney who drafts a bill makes the initial determination of whether the bill requires a fiscal estimate. If the attorney concludes that no fiscal estimate is needed, none is normally developed, but members of the legislature may ask the legislature's presiding officer to review the attorney's decision. Wis. Legislative Reference Bureau Info. Bull 90-IB-6, 1991 Legislative Session Fiscal Estimate Manual at 3 (Dec. 1990).

28. 1967 Wis. Laws ch. 291, § 2, creating Wis. Stat. § 13.10(2) (1967), presently Wis. Stat. § 13.093(2)(a) (1991–1992). For the legislature's directives regarding fiscal notes, see also 1977 Assembly J. Resl. 23 and modified by 1987 S. J. Resl. 48, reprinted in Wis. Legislative Reference Bureau Info. Bull 90-IB-6, 1991 Legislative Session Fiscal Estimate Manual at 18–21 (Dec. 1990).

29. In about half the states, the legislature retains dominion over all fiscal notes (perhaps requesting data from agencies). In other states, the state agencies and the judicial branch prepare fiscal notes for submission to the legislature. Ridge et al., *supra* note 7, at 15.

30. Office of the Wisconsin Director of State Courts, Fiscal Estimate, 1991 Assembly Bill 622 (Feb. 19, 1992) (prepared by Sheryl Gervasi).

31. District Attorney's Fiscal Estimate, 1991 Assembly Bill 622 (Oct. 22, 1991) (prepared by Linda Seemeyer).

32. State Public Defender's Fiscal Estimate, 1991 Assembly Bill 622 (Feb. 2, 1992) (prepared by Evelyn Mazack).

33. Department of Health and Social Services Fiscal Estimate, 1991 Assembly Bill 622 (Jan. 10, 1992) (prepared by Ellen Hadidian).

34. Wis. Legislative Reference Bureau Info. Bull 90-IB-6, 1991 Legislative Session Fiscal Estimate Manual at 6 (Dec. 1990).

Paul Nejelski observes that judicial impact statements "may be prepared in a totally biased fashion for political purposes but be *cloaked* in the guise of scientific neutrality and objectivity." Paul Nejelski, *Judicial Impact Statements: Ten Critical Questions We Must Not Overlook*, 66 Judicature 123, 127 (Sept./Oct. 1982).

35. The importance of the fiscal estimate to the passage of the bill can be seen in the Wisconsin procedure for submitting the fiscal estimate to the author of the bill. After the Wisconsin Legislative Reference Bureau submits a fiscal estimate to the author of a bill, the author has five days in which to request a revised fiscal estimate. The primary author of the bill may also request a supplemental fiscal estimate from the Legislative Fiscal Bureau or the Department of Administration if the primary author disagrees with the agency's estimates. Wis. Legislative Reference Bureau Info. Bull 90-IB-6, 1991 Legislative Session Fiscal Estimate Manual at 6 (Dec. 1990).

36. Paul Nejelski suggests that centralizing the preparation of judicial impact statements might improve the preparers' ability to learn from the process. "The cumulative development of statements," he notes, "should lead to improved methodology and a better understanding of the data and its limitation." Nejelski, *supra* note 34, at 129. He further observes that statements prepared by an interbranch unit would "benefit from a diversity of inputs, would contain fewer real or perceived biases, and would insulate the preparers from interested parties." *Id.* at 131.

37. Paul Nejelski notes that the best simulations of potential impact are "done by persons knowledgeable in both legal procedures and substance as well as social science quantification." Nejelski observes that social scientists "may err in developing very elaborate and superficially convincing models that do not take into account the reality of the law or its administration," while "[l]awyers without a quantitative sense may overlook important system problems." Nejelski, *supra* note 34, at 129. This observation suggests that teaming members of the judiciary with persons skilled in the social sciences would create a synergy of skills.

38. As illustrated by the fiscal estimates for the Wisconsin parental consent bill, caseload forecasting requires identification and analysis of the social, political, economic, or demographic factors relevant to a particular piece of legislation. "To move from the number of persons potentially affected by a new law to the number of persons likely to pursue a dispute under the new law to the point of a court case requires an understanding of all the various and complex reasons why people litigate." Olson, *supra* note 18, at 148. *See also* William Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming...*, 15 Law & Soc'y Rev. 631 (1980–1981).

39. Paul Nejelski observes that impact statements adopted without careful planning may become our masters, rather than our servants. It would be a mistake, he asserts, to require an impact statement for all legislation because we cannot currently produce the quality of results we need, because the cost is too great to justify a universal requirement, and because they "rest on the weak theoretical foundation that the current system is perfect and its only response to new responsibilities is 'more of the same.'" Nejelski, *supra* note 34, at 124–25.

40. Eliminating deficiencies could reduce the workload of the judiciary by reducing the need for statutory interpretation. However, the impact of this improved drafting on the judiciary may be difficult to calculate. Mangum and Arnett conclude that "[t]he ambiguities inherent in statutory interpretation make prospective forecasting of judicial impact rather difficult. Because of this, the impact of poorly worded and ambiguous statutes will likely remain the province of written judicial opinions." Mangum & Arnett, *supra* note 26, at 13.

Statutory ambiguities arise in various forms. Statutes may have gaps if no statutory provision deals with an issue. Statutes may be vague if a statutory provision covers an issue but its meaning is unclear. Statutes may overlap if more than one statutory provision deals with an issue, but the provisions suggest different interpretations. *See* Robert A. Katzmann, *Bridging the Statutory Gulf Between Courts and Congress: A Challenge for Positive Political Theory*, 80 Geo. L.J. 653, 658–60 (1992).

41. An issue might be deliberately ignored or suppressed to ensure passage of a bill. Or the legislation may set general policy ground rules, leaving the agencies or courts to fill in the details in the context of individual fact situations. *See* Gregory E. Maggs, *Reducing the Costs*

of Statutory Ambiguity: Alternative Approaches and the Federal Courts Study Committee, 29 Harv. J. on Legis. 123, 132–33 (1992).

42. The Federal Courts Study Committee's checklist includes the following items:

- the appropriate statute of limitations;
- whether a private cause of action is contemplated;
- whether preemption of state law is intended;
- the definition of key terms;
- the men's rea requirements in criminal statutes;
- severability;
- whether a proposed bill would repeal or otherwise circumscribe, displace, impair, or change the meaning of existing federal legislation;
- whether state courts are to have jurisdiction and, if so, whether an action would be removable to federal court;
- the types of relief available;
- whether retroactive applicability is intended;
- the conditions for any award of attorney's fees authorized;
- whether exhaustion of administrative remedies is a prerequisite to any civil action authorized;
- the conditions and procedures relating to personal jurisdiction over persons incurring obligations under the proposed legislation;
- the viability of private arbitration and other dispute resolution agreements under enforcement and relief provisions; and
- whether any administrative proceedings provided for are to be formal or informal.

Federal Courts Study Committee, *supra* note 20, at 91–92.

Professor Gregory Maggs adds the following items:

- extraterritorial application;
- availability and calculation of interest;
- remedies for government violations (sovereign immunity);
- official immunity;
- availability of jury trials;
- reviewability of agency actions and standard of review;
- standing issues;
- relief available to plaintiffs; and
- meanings of references to other laws or rights.

See Maggs, *supra* note 41, at 142–51.

It is clear from a cursory glance that the items on these checklists arise in many statutory interpretation cases. Thus, the use of checklists in drafting should be helpful in reducing litigation.

In addition, checklists work best at exposing gaps in the statutes. They probably do not work as well for statutory vagueness or overlapping provisions.

43. Federal Courts Study Committee, *supra* note 20, at 91.

44. The legislation proposed that each congressional committee include with any bill or resolution a "judicial impact statement" certifying that the items in the checklist—referred to as "legislative and judicial impact issues"—had been considered. The bill also proposed that, to the greatest extent practicable, each member of Congress should consider these legislative

and judicial impact issues for any bill or resolution, and any amendment to a bill or resolution. S. 1569, 102d Cong. (1991) (introduced by Sen. Howell Heflin).

45. Senior Legislative Drafting Seminar, Nov. 18–21, 1992, sponsored by the National Conference of State Legislatures in conjunction with the University of Florida College of Law.

46. Telephone interview with Peter Dykman, deputy chief, Wisconsin Legislative Reference Bureau, by Gabrielle Lessard (April 14, 1993).

47. Wis. Legislative Reference Bureau Info. Bull 90-IB-6, 1991 Legislative Session Fiscal Estimate Manual at 15–17 (Dec. 1990).

48. Statutory ambiguities involve costs outside as well as inside the courts. The people governed by the law incur costs by determining how to conduct themselves. The legislature may incur costs because of frustrated objectives brought about by either the public's or the courts' interpretation. The legislature may also incur costs through reexamining and revising the legislation to achieve its goals. *See* Maggs, *supra* note 41, at 126–30.

49. Congressman Benjamin L. Cardin of Maryland has stated that it would be better if the legislature understood the canons of construction and the problems its bills can create for the courts, while judges could be better in understanding the legislative process. Proceedings of the Forty-Ninth Judicial Conference of the District of Columbia Circuit, 124 F.R.D. 241, 317 (1988) [hereinafter Proceedings].

50. Karl N. Llewellyn illustrated this problem in his classic discussion of the canons' "thrust and parry." Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Construed*, 3 Vand. L. Rev. 395, 401–06 (1950).

51. Congressman Benjamin L. Cardin expressed his concern that members of Congress don't realize that colloquies, which they often perform "for the local audience or to cover a . . . member politically, or in some cases to help a federal bureaucracy in interpreting and enforcing our laws" are being used to discern legislative intent. He advised courts to look at the statutory product rather than the process through which it is made, since "[m]any times members get up and talk on the floor, without real deep thought. We obviously don't have briefs to argue different positions before we cite to what we think a statute means." Proceedings, *supra* note 49, at 315.

52. Robert A. Katzmann, *Bridging the Statutory Gulf Between Courts and Congress: A Challenge for Positive Political Theory*, 80 Geo. L.J. 653, 658–60 (1992).

53. Judge Henry Friendly discussed the gap between judicial knowledge of needed statutory modification and legislative inaction in *The Gap in Lawmaking—Judges Who Can't and Legislators Who Won't*, 63 Colum. L. Rev. 787 (1963). Then-Judge Ruth Bader Ginsburg updated Friendly's exploration—noting the absence of progress—in *A Plea for Legislative Review*, 60 S. Cal. L. Rev. 995 (1987).

Perhaps a team of retired judges, lawyers, scholars, and legislative drafters might review proposed legislation, not for the wisdom of the proposal but with the goal of clarifying the bill for the public and the courts that must interpret them.

54. See TVA v. Hill, 437 U.S. 153 (1978), discussed in William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 Yale L.J. 331, 389 (1991).

55. Eskridge, Jr., *supra* note 54, at 351. Eskridge found that "decisions that were overridden were more likely to have relied on a statute's plain meaning or the canons of construc-

tion than either decisions not scrutinized or decision[s] scrutinized but not overridden. Interestingly, decisions scrutinized but not overridden tended to have more legislative history reasoning than the other two categories, while purpose and policy reasoning was greatly overrepresented in the unscrutinized decisions category." *Id.* at 351.

56. The Supreme Courts of New York, Minnesota, and Illinois have recently expressed their agreement with this approach. *See, e.g.*, Bjerga v. Maislin Transport & Carriers Ins. Co., 400 N.W.2d 99, 100 (Minn. 1987); *In re* Sarah K., 66 N.Y.2d 223, 242, 487 N.E.2d 241, 251 (1988); *In re* Estate of Cooper, 125 Ill.2d 363, 370, 532 N.E.2d 236, 239 (1988). *See* Hans A. Linde, *Observations of a State Court Judge*, *in* Judges and Legislators: Toward Institutional Comity 125–26 (Robert A. Katzmann ed., 1988).

57. Robert A. Katzmann studied congressional staff awareness of fifteen significant statutory opinions of the D.C. Circuit Court of Appeals and found that staffers were unaware of twelve of the fifteen decisions. Proceedings, *supra* note 49, at 323–24 (remarks of Robert A. Katzmann).

58. Eskridge, Jr., *supra* note 54, at 361. In his study of Congress and the U.S. Supreme Court, Eskridge found that interest groups focus generally on decisions of the U.S. Supreme Court, not other federal courts, and on the cases' holdings. They tend to overlook other messages to legislators that may be embedded in the text of the opinions.

59. Justice John Paul Stevens has noted that judicially identified needs for statutory repair often "involve issues that have little or no political significance in the partisan sense." Letter from Hon. John Paul Stevens, Hearings on S. 704, quoted in Ginsburg, *supra* note 53, at 1013. Judge Ginsburg has commented that "[y]ou don't score points with most voters for cleaning up commas and gaps and glitches." Proceedings, *supra* note 49, at 332.

60. Ginsburg, *supra* note 53, at 997, quoting Young v. Community Nutrition Institute, 476 U.S. 974 (1986) (Justice Sandra D. O'Connor).

61. Federal Courts Study Committee, *supra* note 20, at 90.

62. The U.S. Court of Appeals for the D.C. Circuit is currently engaged in an experimental effort to improve its communication with Congress. Working through Brookings Institution Fellow Robert A. Katzmann, the D.C. Circuit Judicial Conference has established a Project on Statutory Revision. Under the project, the circuit's chief staff counsel selects opinions of interest to Congress and sends them to the House Legislative Counsel, which ensures that the opinions reach the speaker, the minority leader, the parliamentarian, the general counsel to the clerk, and the appropriate persons in the relevant committees. Katzmann, *supra* note 40, at 665.

63. For a discussion of these mechanisms, see Shirley S. Abrahamson & Robert L. Hughes, *Shall We Dance? Steps for Legislators and Judges in Statutory Interpretation*, 75 Minn. L. Rev. 1045 (1991).

64. Okla. Stat. Ann. tit. 74, § 20a (West 1993).

65. Ill. Rev. Stat. ch. 63, para. 29.5 (1985).

66. Minn. Stat. § 3C.04.3 (1993).

67. Abrahamson & Hughes, *supra* note 63, at 1063–64.

68. Alaska Stat. §§ 24.20.010, 24.20.020, 24.20.065 (a) and (b) (1992).

69. Wis. Stat. § 13.93(2)(d) (1990–1991).

The current revisor refers all cases in which the court states that a statutory provision is ambiguous. Telephone interview with Bruce Holway, assistant revisor of statutes, by

Gabrielle Lessard (April 14, 1993). However, a judicial statement that a statute is ambiguous or unambiguous for purposes of applying Wisconsin's canons of statutory construction may not necessarily be intended by the court to imply that legislative review of the statute is required.

70. Interview with Janice Baldwin, senior staff attorney, Wisconsin Legislative Council, by Gabrielle Lessard (April 14, 1993).

71. Abrahamson & Hughes, *supra* note 63, at 1079.

72. *Id.* at 1075.

73. *Id.* at 1076.

74. Andrew D. Christie & Nancy C. Maron, *Find a Better Way To Work with the Legislature*, 30 Judges' J. 15, 17 (Summer 1991).

75. Federal Courts Study Committee, *supra* note 20, at 89–90.

76. Abrahamson & Hughes, *supra* note 63, at 1072. These states are Mississippi, Idaho, and Illinois.

77. Ill. Const. art. 6, § 17.

78. Proceedings, *supra* note 49, at 326 (remarks of Robert A. Katzmann).

79. *Id.*

80. Cardozo, *supra* note 10.

81. Abrahamson & Hughes, *supra* note 63, at 1071.

82. *Id.* at 1075–81.

83. Deanell Reece Tacha, *Judges and Legislators: Renewing the Relationship*, 52 Ohio St. L.J. 279 (1991).

84. Proceedings, *supra* note 49, at 334–35.

85. Christie & Maron, *supra* note 74, at 17.

86. The October 1989 national conference titled "Legislative–Judicial Relations: Seeking a New Partnership" produced a set of recommended mechanisms to promote and improve interbranch communication. The mechanisms included: (1) judicial testimony before legislative committees; (2) legislative involvement in planning long-range court system improvement; (3) educational programs for legislators on court system issues; (4) judicial liaisons to the legislature; (5) legislative/judicial representation on task forces and committees; (6) state and regional conferences on legislative-judicial relations; (7) judicial impact statements; and (8) ground rules for interbranch communication. Ridge et al., *supra* note 7, at 9.

87. Katzmann, *supra* note 11.

88. Ridge et al., *supra* note 7, at 7.

89. When a proposal to remove manufacturing restrictions on the regional Bell operating companies was pending in the U.S. Senate, Illinois Senator Paul Simon wrote to federal Judge Harold Green, who had presided over the AT&T breakup, seeking advice. Judge Green responded that he believed it inappropriate to comment, outside his opinions, on pending legislation that might come before his court. However, he went on to say that he felt comfortable assisting the senator by summarizing the relevant portions of his published opinions, and he proceeded to do so in his letter.

Senator John Breaux subsequently criticized Judge Green's letter on the Senate floor. According to Breaux, it was "highly unusual" and "probably improper" for the senators to have the judge's past views on matters that were the subjects of pending legislation. Senator Ernest Hollings joined the fray, stating that he found it "totally uncalled for and inappropri-

ate" for Judge Green to respond to Senator Simon's inquiry. Annual Meeting of the American Judicature Society, Panel, *Building Bridges Instead of Walls: Fostering Communication Between Judges and Legislators*, 75 Judicature 167, 173–74 (1991).

90. Christie & Maron, *supra* note 74, at 16. Judge Tacha contends that "[t]he perceived limitation on interaction between branches goes far beyond what the constitution expressly requires." Tacha, *supra* note 83, at 282.

91. Linde, *supra* note 56, at 123.

92. Maeva Marcus & Emily Field Van Tassel, *Judges and Legislators in the New Federal System, 1789–1800*, *in* Judges and Legislators: Toward Institutional Comity 33 (Robert A. Katzmann ed., 1988).

History is replete with examples of dialogue between the branches serving the development of the law. *See* John W. Winkle III, *Judges as Lobbyists: Habeas Corpus Reform in the 1940s*, 68 Judicature 263 (1985).

93. Linde, *supra* note 56, at 117–19. *See also* Henry Glick, *Policy-Making and State Supreme Courts: The Judiciary as an Interest Group*, 5 Law & Soc'y Rev. 271 (1970).

Susan Olson observes that informal communication between state courts and legislatures is so common that assessment of legislation's impact on the courts is intertwined with advocacy for or against its implementation. "In fact," she notes, "so many court systems already lobby on behalf of court-related legislation that they often confuse those efforts with efforts to assess impact." Olson, *supra* note 18, at 148–49.

For a study of personal communications between legislators and judges, see John D. Felice & John C. Kilwein, *High Court–Legislative Relations: A View from the Ohio Statehouse*, 77 Judicature 423 (1993).

94. Christie & Maron, *supra* note 74, at 15–16.

95. Model Code of Judicial Conduct, Canon 4A, B, C(1) at 18–19 (1990).

96. Judge Ruth Bader Ginsburg has noted that there are over 600 federal judges, and most of them don't know the structure of the numerous congressional committees. Proceedings, *supra* note 49, at 332. A similar situation undoubtedly exists at the state level.

97. Linde, *supra* note 56, at 125–26. *See also* Robert A. Katzmann, *supra* note 12, at 163, noting judges' beliefs that it was their First Amendment right to express their views on proposed legislation.

98. I am indebted to Prof. Charles Geyh for this phrase.

99. Samuel Krislov & Paul Kramer, *The Future of the California Civil Courts*, 66 S. Cal. L. Rev. 1915 (1993), esp. 1928–37.

100. This is based on personal and conference comments over a period of years.

101. Lawrence Friedman & Robert Percival, *A Tale of Two Courts: Litigation in Alameda and San Benito Counties*, 10 Law & Soc'y Rev. 267 (1976). This gem of an article has provoked a rich literature both on the theoretical and applied side and is genuinely seminal.

102. Wayne McIntosh, *150 Years of Litigation and Dispute Settlement: A Court Tale*, 15 Law & Soc'y Rev. 823 (1980–1981).

103. On differentiating claims and case type, see, e.g., Keith Boyum, *The Etiology of Claims*, *in* Empirical Theories About Courts 143–60 (Keith Boyum & Lynn Mather eds., 1983). *See also* Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—and Why Not?*, 140 U. Pa. L. Rev. 1147 (1992).

104. *See, e.g.*, Heleen F. P. Ietswaart, *The International Comparison of Court Caseloads: The Experience of the European Working Groups*, 24 Law & Soc'y Rev. 571 (1990) *and* David Engel, *Litigation Across Space and Time*, 24 Law & Soc'y Rev. 333 (1990).

105. *See* Frank Munger, *Trial Courts and Social Change: The Evolution of a Field of Study*, 24 Law & Soc'y Rev. 217 (1990) *and* Ietswaart, *supra* note 104.

106. *See, e.g.*, Lawrence Friedman, *Courts Over Time: A Survey of Theory and Research*, *in* Empirical Theories About Courts 7–50 (Keith Boyum & Lynn Mather eds., 1983).

107. *See* Samuel Krislov, *Theoretical Perspectives on Case Load Studies: A Critique and a Beginning*, *in* Empirical Theories About Courts 160–87 (Keith Boyum & Lynn Mather eds., 1983) *and* Munger, *supra* note 105.

108. McIntosh, *supra* note 102.

109. *See Spurned Lovers Suit Goes to Trial*, Chic. Trib., Nov. 4, 1993, § 2S, at 11.

110. For these and other examples of the multiple changes that occur with new legal issues, see National Research Council, Forecasting the Impact of Legislation on the Courts (Keith Boyum & Samuel Krislov eds., 1980).

111. McPherson v. Buick Motor, 217 N.Y. 382, 111 N.E. 1050 (1916).

112. *See* John Haley, *The Myth of the Reluctant Litigant*, 4 J. Japanese Stud. 359 (1978). He has modified his thesis a bit in his *Authority Without Power* (1991), suggesting less direct intention by government, but his data as to the flow of events seems conclusive. His work flies in the face of "cultural" explanations and has produced a spate of work admirably summed up in Setsuo Miyazawa, *Taking Kawashima Seriously: A Review of Japanese Research on Japanese Legal Consciousness and Disputing Behavior*, 21 Law & Soc'y Rev. 219 (1987).

113. *See* Friedman, *supra* note 106, *and* Krislov, *supra* note 107; *see also* Stephen Daniels, *Ladders and Bushes: The Problem of Caseloads and Studying Court Activities Over Time*, 1984 Am. B. Found. Res. J. 751 (1984).

114. Marc Galanter, *Case Congregations and Their Careers*, 24 Law & Soc'y Rev. 371 (1990).

115. Friedman & Percival, *supra* note 101; José Juan Toharia, *Economic Development and Litigation: The Case of Spain*, 4 Jahrbuch für Rechtssoziologie und Rechtstheorie 25 (1976); and Wolf Heydebrand & Carroll Seron, *The Rising Demand for Court Services: A Structural Explanation of the Caseload of U.S. District Courts*, 11 Just. Sys. J. 303 (1986).

116. *See* Krislov, *supra* note 107, *and* Joseph Sanders, *The Interplay of Micro and Macro Processes in the Longitudinal Study of Courts: Beyond the Durkheimian Tradition*, 24 Law & Soc'y Rev. 241 (1990).

117. Munger, *supra* note 105, at note 26.

118. Wolf Heydebrand & Carroll Seron, Rationalizing Justice: The Political Economy of Federal District Courts (1990).

119. National Research Council, Forecasting the Impact of Legislation on the Courts (Keith Boyum & Sam Krislov eds., 1980).

120. *Special Issue: Longitudinal Studies of Trial Courts*, 24 Law & Soc'y Rev. (Frank Munger ed., 1990).

121. Sanders, *supra* note 116; *see also* Albert Reiss, Jr., *Longitudinal Study of Trial Courts: A Plea for the Development of Explanatory Models*, 24 Law & Soc'y Rev. 345 (1990).

122. *See* Sanders, *supra* note 116.

123. Haley, *supra* note 112.

124. *See* Robert A. Kagan, *The Routinization of Debt Collection: An Essay on Social Change and Conflict in the Courts*, 18 Law & Soc'y Rev. 323 (1984).

125. Friedman, *supra* note 106.

126. Lawrence Friedman & Robert Percival, *A Tale of Two Courts: Litigation in Alameda and San Benito Counties*, 10 Law & Soc'y Rev. 267 (1976).

127. Galanter, *supra* note 114.

128. Friedman & Percival, *supra* note 126.

129. Austin Sarat, *Alternatives in Dispute Processing: Litigation in Small Claims Court*, 10 Law & Soc'y Rev. 339 (1976).

130. *See* Social Indicators (Raymond Bauer ed., 1966).

131. Krislov, *supra* note 107, and *Spurned Lovers*, *supra* note 109.

132. Keith Boyum & Samuel Krislov, *Judicial Impact Statements: What's Needed, What's Possible*, 66 Judicature 137 (Sept./Oct. 1982).

133. Marc Galanter, *Case Congregations and Their Careers*, 24 Law & Soc'y Rev. 371 (1990).

134. National Research Council, Forecasting the Impact of Legislation on the Courts (Keith Boyum & Samuel Krislov eds., 1980).

135. Austin Sarat, *Judicial Capacity: Courts, Court Reform, and the Limits of the Judicial Process*, *in* The Analysis of Judicial Reform 31 (Philip Dubois ed., 1982).

136. Cornelius Kerwin, *Justice-Impact Statements and Court Management: And Never the Twain Shall Meet*, *in* The Analysis of Judicial Reform 171 (Philip Dubois ed., 1982). The question of the appropriate size of the federal judiciary arose again in the early 1990s. *See* Gordon Bermant et al., Imposing a Moratorium on the Number of Federal Judges: Analysis of Arguments and Implications (Federal Judicial Center 1993).

137. Gunther Teubner, *Substantive and Reflexive Elements in Modern Law*, 17 Law & Soc'y Rev. 239, 270–71 (1983).

138. James O'Connor, The Fiscal Crisis of the State (1973); Wolf Heydebrand & Carroll Seron, Rationalizing Justice: The Political Economy of Federal District Courts (1990).

139. Lawrence Friedman, Total Justice (1985).

140. Jurgen Habermas, Legitimation Crisis (Thomas McCarthy trans., 1975).

141. Lawrence Friedman, *Law Reform in Historical Perspective*, 13 St. Louis U. L.J. 351 (1969); *see also* Magali Sarfatti Larson, The Rise of Professionalism: A Sociological Analysis (1977).

142. *Huge Backlog of Federal Cases Frustrates All Parties Involved, Sharp Increase in Criminal Trials, Shortage of Staff in Courts Offer Little Hope of Relief to Clogged System*, Buff. News, Mar. 27, 1993, at 1.

143. Keith Boyum & Sam Krislov, *Judicial Impact Statements: What's Needed, What's Possible?*, 66 Judicature 137, 143 (1982).

144. Council on Competitiveness, Report on Judicial Reform 9 (1991) and Larry Kramer, *"The One-Eyed Are Kings": Improving Congress' Ability To Regulate the Use of Judicial Resources* (Program in Civil Liability, Working Paper 124, Yale Law School 1990).

145. *Hearings on S. 1569 Before the Subcomm. on Courts and Administrative Practice of the Senate Comm. on the Judiciary*, 102d Cong., 1st Sess., Oct. 3, 1991 & Oct. 17, 1991.

146. ABA Special Committee on Funding and the Justice System, Crisis in the Justice System 3 (Aug. 1990). For example, "actual dollars allocated to justice agencies declined in 23 states" in the past year. *Id.* at 5.

147. *Id.* at 16.

148. Report of ABA Special Committee on Funding and the Justice System (1992); J. Michael McWilliams, *Crisis in the Courts? Our Justice Deficit*, Trial 19 (April 1993).

149. Wall St. J., Mar. 18, 1993, at B6.

150. *Federal Judiciary Tries Hand at Raising Money,* Nat'l L.J., Mar. 29, 1993, at 5.

151. *Id.*

152. McWilliams, *supra* note 148, at 20.

153. Heydebrand & Seron, *supra* note 138.

154. Kenneth P. Holland, *The Twilight of Adversariness: Trends in Civil Justice*, *in* The Analysis of Judicial Reform 17 (Philip Dubois ed., 1982).

155. *Id.*

156. Mich. Lawyers Wkly., Jan. 11, 1993, at 1.

157. Hearings on S. 1569, *supra* note 145, at 318.

158. N.Y. L.J., Aug. 5, 1991, at 2.

159. William Greider, Who Will Tell the People? The Betrayal of American Democracy (1992).

160. *Id.*

161. *Id.*

162. *Id.*

163. Ruth Bader Ginsburg, *A Plea for Legislative Review*, 60 S. Cal. L. Rev. 996 (1987).

164. Felix Frankfurter & John Landis, The Business of the Supreme Court: A Study in the Federal Judicial System (1968).

165. *See generally* Donald L. Bartlett & James B. Steele, America: What Went Wrong? (1992); Greider, *supra* note 159.

166. Bernard Rosen, Holding Government Bureaucracies Accountable 4 (1st ed. 1982).

167. Frankfurter & Landis, *supra* note 164, at 2.

168. Greider, *supra* note 159.

169. *Id.*

170. Joanne Doroshow, The Case for the Civil Jury 2 (1992).

171. Center for Study of Responsive Law, Banding Together: How Check-Offs Will Revolutionize the Consumer Movement (1983).

172. I am grateful for conversations with Kevin Clermont and Geoffrey Miller.

173. Richard Posner, Economic Analysis of Law 549 (4th ed. 1992).

174. *See, e.g.,* Mark A. Cohen, *Explaining Judicial Behavior or What's "Unconstitutional" About the Sentencing Commission?*, 7 J.L. Econ. & Org. 183, 184 (1991).

175. Judicial Conference of the United States agenda, Sept. 1994.

176. Ralph K. Winter, *In Defense of Discovery Reform*, 58 Brook. L. Rev. 263, 277 (1992).

177. *Id.* (arguing that existing pretrial discovery rules are inefficient); Geoffrey P. Miller, *An Economic Analysis of Rule 68*, 15 J. Legal Stud. 93 (1986) (concluding that the rule is in-

effective in achieving its intended result of encouraging settlements and suggesting a more efficient rule).

178. Richard Posner, Economic Analysis of Law 550 (4th ed. 1992).

179. Jonathan R. Macey, *The Internal and External Costs and Benefits of Stare Decisis*, 65 Chi.-Kent L. Rev. 93, 95 (1989).

180. Richard Posner, Economic Analysis of Law 505 (3d ed. 1986).

181. *See* Jonathan R. Macey & Geoffrey P. Miller, *The Canons of Statutory Construction and Judicial Preferences*, 45 Vand. L. Rev. 647, 660 (1992).

182. For descriptions of the magnitude and nature of the explosion in statute making at the federal level, see Henry J. Friendly, Federal Jurisdiction: A General View 4 (1973) and Guido Calabresi, A Common Law for the Age of Statutes (1982).

183. Frederick Schauer, *Statutory Construction and the Coordinating Function of Plain Meaning*, 1990 Sup. Ct. Rev. 231, 247 (1990).

184. Posner, *supra* note 178, at 534.

185. Winter, *supra* note 176, at 263.

186. *See* Geoffrey P. Miller, *Some Agency Problems in Settlement*, 16 J. of Legal Stud. 189, 214 (1987).

187. Fed. R. Civ. P. 16(a)(5).

188. Letter from Sam C. Pointer, Jr., chairman, Advisory Committee on Civil Rules, to Hon. Robert E. Keeton, chairman, Standing Committee on Rules of Practice and Procedure 6, attach. B (May 1, 1992).

189. Geoffrey P. Miller, *An Economic Analysis of Rule 68*, 15 J. Legal Stud. 93, 94 (1986).

190. This general rule does not apply where the applicable substantive statute includes attorney fees as part of costs. Marek v. Chesny, 473 U.S. 1, 9 (1985).

191. Kathryn E. Spier, Pretrial Bargaining and Fee Shifting Mechanisms: A Theoretical Foundation for Rule 68 (June 1992) (unpublished manuscript).

192. Jeffrey J. Mayer, *Prescribing Cooperation: The Mandatory Pretrial Disclosure Requirement of Proposed Rules 26 and 37 of the Federal Rules of Civil Procedure*, 12 Rev. Litig. 77, 85 (1992).

193. Winter, *supra* note 176, at 263.

194. *Id.* at 264. As Deborah Rhode has observed, lawyers engage in a great deal of discovery. In her words, lawyers leave "no stone unturned, provided, of course, they can charge by the stone." Deborah Rhode, *Ethical Perspectives on Legal Practice*, 37 Stan. L. Rev. 589, 635 (1985).

195. Winter, *supra* note 176, at 277.

196. *Id.* at 264.

197. David P. Land, *Reasonableness and Auditing Legal Fees*, N.Y. L.J., Feb. 25, 1993, at 5.

198. Rule 26(b)(2)(iii) does, however, permit a judge to limit discovery where "the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation …" Of course a judge is free to decline to invoke this rule when he or she wants to induce a settlement.

199. Paul Connolly et al., Judicial Controls and the Civil Litigative Process: Discovery 28 (Federal Judicial Center 1978). It should be noted, however, that these 3,114 cases include prisoner appeals, administrative appeals, and other cases in which discovery would not be expected.

200. *Id.* at 51.

201. Winter, *supra* note 176, at n.17 (discussing how discovery can be used as a "club" to coerce settlements).

202. Proposed Fed. R. Civ. P. 26(b)(2)(iii). Proposed Amendments to the Federal Rules of Civil Procedure and the Federal Rules of Evidence, submitted to Standing Committee on Rules of Practice and Procedure by Advisory Committee on Civil Rules, May 1992.

203. Fed. R. Civ. P. 26(a). It should be noted that the language of this 1993 amendment permits federal courts to "opt-out" of Fed. R. Civ. P. 26(a) through local rule. As of March 1994, at least thirty-three federal districts had either provisionally, or nonprovisionally, taken this route, and others were considering it (*see* Donna Stienstra, Implementation of Disclosure in the Federal Courts, with Specific Attention to Courts' Responses to Selected Amendments to Federal Rule of Civil Procedure 26 (Federal Judicial Center 1994)).

204. Mayer, *supra* note 192, at 113.

205. Winter, *supra* note 176, at 267.

206. I am grateful to my colleague Kevin Clermont for this point.

207. Laura A. Kaster & Kenneth A. Wittenberg, *Rulemakers Should Be Litigators,* Nat'l L.J., Aug. 17, 1992, at 15.

208. *Chevron,* 467 U.S. 837 (1984).

209. Cass R. Sunstein, *Law and Administration After Chevron,* 90 Colum. L. Rev. 2071, 2075 (1990).

210. *Chevron,* 467 U.S. at 843–45.

211. Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law,* 1989 Duke L.J. 511, 513–14 (1989) (quoting Marbury v. Madison 5 U.S. (1 Cranch) 137, 177 (1803)).

212. Jonathan R. Macey, *Separated Powers and Positive Political Theory: The Tug of War Over Administrative Agencies,* 80 Geo. L.J. 671, 681 (1992).

213. Sunstein, *supra* note 209, at 2092 (whenever a court "has a firm conviction that an agency interpretation violates the statute, that interpretation must fail").

214. Posner, s*upra* note 178, at 580.

215. *Id.*

216. *Id.* at 581.

217. *Id.*

218. *Id.*

219. Stephen Reinhardt, *Too Few Judges, Too Many Cases,* A.B.A. J. 52 (Jan. 1993).

220. 488 A.2d 858 (Del. 1985).

221. Jonathan Macey & Geoffrey Miller, *Trans Union Reconsidered,* 98 Yale L.J. 127, 134 (1988).

222. *Id.*

223. *Id.*

224. 457 A.2d 701 (Del. 1983).

225. *Id.* at n.5.

226. I am especially indebted to Leigh Hunt Greenhaw and Emily Field Van Tassel for their insightful comments and their willingness to offer them on such short notice.

227. For a recent compilation of material relating to statutory interpretation, see *Statutory Interpretation and the Uses of Legislative History: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Administration of Justice of the House Comm. on the Judiciary*, 101st Cong., 2d Sess. (1990).

228. Federal Courts Study Act, Pub. L. No. 100-702, 102 Stat. 4644 (1988).

229. Larry Kramer, *"The One-Eyed Are Kings": Improving Congress's Ability to Regulate the Use of Judicial Resources*, 54 Law & Contemp. Probs. 73, 92–93 (Summer 1991) (Attributing to Roscoe Pound, who in turn attributed to Jeremy Bentham, early calls for establishment of entities akin to law revision commissions).

230. Proceedings of the Federal Courts Study Committee 27–28 (February 3, 1989) (remarks of Prof. Daniel Meador).

231. *Id.* at 32.

232. Memorandum from Richard A. Posner to members of the Subcomm. on Role and Relationships of the Federal Courts Study Committee (Feb. 16, 1989).

233. Memorandum from Larry Kramer to members of the Subcomm. on Role and Relationships of the Federal Courts Study Committee 6 (Apr. 12, 1989).

234. *Id.* at 8.

235. Proceedings of the Federal Courts Study Committee 59 (June 5, 1989) (remarks of Prof. Larry Kramer).

236. *Id.* at 62.

237. Memorandum from Larry Kramer to members of the Federal Courts Study Committee 5 (July 21, 1989).

238. *Id.* at 7.

239. *Id.* at 6.

240. Proceedings of the Federal Courts Study Committee 74 (July 31, 1989) (transcript).

241. *Id.* at 77.

242. *Id.* at 80.

243. Congressman Moorhead was among those who dissented from the committee's ultimate recommendation that the OJIA be located in the judicial branch—he argued that the office would be better situated in Congress. Report of the Federal Courts Study Committee 92–93 (1990).

244. Proceedings of the Federal Courts Study Committee 81 (July 31, 1989) (transcript).

245. *Id.* at 87.

246. Memorandum from Robert W. Feidler to Ralph Mecham (Oct. 30, 1989). This memorandum was, in effect, submitted in response to a request from Chairman Weis that Feidler "give us your ideas." Proceedings of the Federal Courts Study Committee 88 (July 31, 1989).

247. Memorandum from Robert W. Feidler to Ralph Mecham 1 (Oct. 30, 1989).

248. *Id.* at 2.

249. *Id.* at 1.

250. *Id.*

251. Memorandum from William Slate to members of the Federal Courts Study Committee 6 (Nov. 2, 1989).

252. Report of the Subcomm. on Administration, Management and Structure to the Federal Courts Study Committee 28–29 (Nov. 15, 1989).

253. Because of the closeness of the October 30, 1989, vote and the absence of four members, the Posner proposal was included in the tentative draft as a second option. The second option was rejected at the December 10 , 1989, meeting.

254. Report of the Federal Courts Study Committee, Tentative Draft No. 1 86–87 (Nov. 26–27, 1989).

255. *Id.*

256. Federal Courts Study Committee Tentative Recommendations for Public Comment 126–27 (Dec. 22, 1989).

257. Letter from Harlington Wood, Jr., to Joseph F. Weis, Jr. (January 9, 1990).

258. *Id.*

259. Report of the Federal Courts Study Committee 89–93 (1990). The four were Representative Robert Kastenmeier, former Solicitor General Rex Lee, Representative Carlos Moorhead, and Judge Richard Posner. Because a number of committee members chose not to draft or sign dissents from recommendations they opposed in the committee, it is probably *not* safe to assume that the final vote on the proposal was eleven to four.

260. Federal Courts Study Committee Working Papers and Subcommittee Reports 138 (July 1, 1990).

261. "[T]he expanded federal effort to reduce drug trafficking has led to a recent surge in federal criminal trials that is preventing federal judges in major metropolitan areas from scheduling civil trials, especially civil jury trials, of which there is now a rapidly growing backlog." Report of the Federal Courts Study Committee 6 (1990).

262. "The guidelines, we were told again and again, do not give the sentencing judge clear or adequate authority to adjust sentences in light of all factors that judges and others regard as pertinent for a just sentence." *Id.* at 137.

263. As Chief Judge Abner Mikva was reported to observe, "These are the kinds of drug cases which are not challenging to your intellect." Tracy Thompson, *Stop Complaining, Stephens Tells Judges*, Wash. Post, June 8, 1991, at Bl.

264. *Id.*

265. Avern Cohn, *A Judge's View of Congressional Action Affecting the Courts*, 54 Law & Contemp. Probs. 99, 102 (Summer 1991) (identifying the fact that "no federal judge served on the task force" as among the "various weaknesses" of the task force report).

266. *Federal Courts Study Committee Implementation Act and Civil Justice Reform Act: Hearing on H.R. 5381 and H.R. 3898 Before the Subcomm. on Courts, Intellectual Property, and the Administration of Justice of the House Comm. on the Judiciary*, 101st Cong., 2d Sess. 384, 391 (1990) (letter from Judge William Hungate to Michael Remington (April 4, 1990)) ("The price of a truly independent judiciary is the occasional appointment of a complete damn fool. Apparently, that cost now appears to be too high. Of course the people, through their Congress, have the right to remove that independence. It is only important that they recognize what they are doing. When King John signed Magna Carta, he gave us our rights, as of old, so now we are free to do as we like, as long as we do what we're told."); 431, 432 (letter from Judge G. Thomas Eisele to Representative Robert W. Kastenmeier (August 23, 1990)) ("The tendency for the Legislative Branch to micro-manage the Judicial Branch should be resisted by those who truly see the value of an independent judiciary");

434, 435 (letter from Chief Judge Barefoot Sanders to Representative Robert W. Kastenmeier) (August 28, 1990) ("The effect of Title I is the micro-management of the federal courts"); *see also* Avern Cohn, *supra* note 265, at 100, 103 (charging that Biden's strategy reflected a "quite deliberate and . . . successful effort at agenda control," in support of a proposal "driven by special interests"); and Ann Pelham, *Biden Takes Judiciary to Task*, Legal Times, July 2, 1990, at 7 ("Most judges felt Congress was trying to micro-manage the judiciary—and said so, often quite bluntly").

267. *The Civil Justice Reform Act of 1990 and the Judicial Improvements Act of 1990: Hearings on S. 2027 and 2648 Before the Senate Comm. on the Judiciary*, 101st Cong., 2d Sess. 310 (1990) ("Given the over-wrought response that greeted the legislation initially, I do not find the Conference's position surprising. Of course, I had hoped that by modifying the substance of the bill to meet many, many of the concerns of the Conference, I might persuade them to reexamine their rhetoric. Regrettably, it now appears that the Conference's objections remain, regardless of the changes in the substance of the bill").

268. "In a May 21 speech to the Judicial Conference of the D.C. circuit, Mecham spoke about the way Biden had allocated judgeships with an eye toward getting the bill passed. 'Virtually every Republican on the Senate Judiciary Committee received an extra judgeship for his state,' Mecham told the roomful of several hundred lawyers and judges, who laughed appreciatively at Mecham's insight." Pelham, *supra* note 266.

269. *See, e.g.* Avern Cohn, *supra* note 265 ,at 100.

270. *The Civil Justice Reform Act of 1990*, *supra* note 267, at 308.

271. Pelham, *supra* note 266.

272. Larry Kramer, *supra* note 229, at 73, 95.

273. *See, e.g.*, 136 Cong. Rec. S. 12117 (daily ed. August 3, 1990) (statement of Senator Reid, quoting a judicial impact statement prepared by the Administrative Office in support of the proposition that "[t]he repeal of the Warner amendment will not create a burden for the courts").

274. *The Civil Justice Reform Act of 1990*, *supra* note 267, at 308–09.

275. S. Rep. No. 331, 102d Cong., 2d Sess. 79 (1992).

276. S. Rep. No. 197, 102d Cong., 1st Sess. 70 (1991).

277. Indeed, with respect to the judiciary's forecasts in connection with the judgeships bill, the Violence Against Women Act, and the budget bill, each was defensible on the merits. *See* David Cook, *Report on Statistics Estimates*, Ct Admin. Bull. 6 (March 1993) (responding to Appropriations Committee concerns).

278. Paul Nejelski, *Judicial Impact Statements: Ten Critical Questions We Must Not Overlook*, 66 Judicature 123, 130–31 (Sept./Oct. 1982).

279. Proposals for creation of an office charged with reviewing laws and/or court decisions and recommending revisions include: Henry J. Friendly, *The Gap in Lawmaking—Judges Who Can't and Legislators Who Won't*, 63 Colum. L. Rev. 787 (1963) (proposing the creation of a council on a ministry of justice, council of law revision, or its equivalent); Ruth Bader Ginsburg, *A Plea for Legislative Review*, 60 S. Cal. L. Rev. 995 (1987) (proposing that a "Second Look at Laws Committee" be established within each house of Congress); William E. Cooper, *A Proposal for a Congressional Council of Revision*, 12 Seton Hall Legis. J. 233 (1989) (proposing a council of revision composed of former judges and legislators); and

Benjamin Cardozo, *A Ministry of Justice*, 35 Harv. L. Rev. 113 (1921) (proposing the creation of a ministry of justice to review and recommend revisions to laws passed).

Proposals for creation of a legislative "checklist" include: S. 1569, 102d Cong., 1st Sess. §102 (1991) (proposing that each committee report be accompanied by a "judicial impact statement" representing that a list of fifteen specified issues had been considered by the committee); Report of the Federal Courts Study Committee 91–92 (1990) (recommending that Congress consider a checklist for staff to use in reviewing proposed legislation, with eighteen suggested list items); and letter from Thomas Boyd, acting assistant attorney general, to Representative Robert W. Kastenmeier, attach. 8 (April 22, 1988) (communicating the Reagan administration's proposed "judicial impact statement" legislation, requiring congressional committees to assess reported legislation with reference to a twelve-item list of considerations).

280. This likewise has been a consistent refrain of commentators interested in court reform issues. Deanell Reece Tacha, *Judges and Legislators: Renewing the Relationship*, 52 Ohio St. L.J. 279 (1991); J. Clifford Wallace, *The Future of the Judiciary: A Proposal*, 27 Cal. W. L. Rev. 361 (1991); Shirley S. Abrahamson & Robert L. Hughes, *Shall We Dance? Steps for Legislators and Judges in Statutory Interpretation*, 75 Minn. L. Rev. 1045 (1991); Kramer, *supra* note 229, at 73; Mark W. Cannon & Warren I. Cikins, *Interbranch Cooperation in Improving the Administration of Justice: A Major Innovation*, 38 Wash. & Lee L. Rev. 1 (1981); and Judges and Legislators: Toward Institutional Comity (Robert Katzmann ed., 1988).

281. The views and opinions expressed in this paper are solely those of the author and do not reflect any official views of the Administrative Office of the U.S. Courts or the Judicial Conference of the United States.

282. *See* Federal Courts Study Committee, Report of the Federal Courts Study Committee 89 (April 2, 1990).

283. Linda K. Ridge et al., *Legislative–Judicial Relations: Seeking a New Partnership* (National Center for State Courts 1992); *see also* Donna Hunzeker, *Legislative–Judicial Relations: Seeking a New Partnership*, National Conference of State Legislatures (July 1990).

284. Keith Boyum & Samuel Krislov, *Judicial Impact Statements: What's Needed, What's Possible?*, 66 Judicature 139 (Sept./Oct. 1982).

285. Cornelius Kerwin, *Justice-Impact Statements and Court Management: And Never the Twain Shall Meet*, *in* The Analysis of Judicial Reform 171 (Philip Dubois ed., 1982); Susan M. Olson, *Judicial Impact Statements for State Legislation: Why So Little Interest?*, 66 Judicature 147 (Sept./Oct. 1982).

286. H. T. Chen & Peter H. Rossi, *The Multi-Goal, Theory-Driven Approach to Evaluation: A Model Linking Basic and Applied Social Science*, 59 Soc. Forces 106–22 (Sept. 1980). For an update of this approach, see John S. Brekke, *The Model Guided Method for Monitoring Program Implementation*, 11 Evaluation Rev. 281 (June 1987).

287. The Conference of State Court Administrators and the National Center for State Courts have jointly developed that approach. It is set out in the *State Court Caseload Statistics: Annual Report* series and *State Court Model Statistical Dictionary 1989*.

288. David Neubauer, Judicial Process: Law Courts and Politics in the United States (1991); Barry Mahoney et al., Changing Times in Trial Courts: Caseflow Management and Delay Reduction in Urban Trial Courts (National Center for State Courts 1988).

289. Commission on Trial Court Performance Standards, Trial Court Performance Standards with Commentary (National Center for State Courts 1990).

290. *Id.*; *see* Standards 2.3, 4.4, and 4.5, pp. 12, 20.

291. Thomas Henderson & Cornelius Kerwin, Structuring Justice: The Implications of Court Unification Reforms (The National Institute of Justice 1984); Larry Berkson & Susan Carbon, Court Unification: History, Politics, and Implementation (National Institute of Law Enforcement and Criminal Justice 1978).

292. Janice T. Munsterman et al., *Child Support Guidelines: Facing Modification and Custody Issues*, 15 St. Ct. J. 41 (1991).

293. Joan Jacoby, An Evaluation of the Expedited Drug Case Management Program: Summary of Results and Findings (Jefferson Institute for Justice Studies 1991).

294. Victor Flango & Craig Boersema, *Changes in Federal Diversity Jurisdiction: Effects on State Court Caseloads*, 15 U. Dayton L. Rev. 405 (1990).

295. The views and opinions expressed in this paper are solely those of the author and not necessarily those of the U.S. General Accounting Office.

296. See, for example, the Federal Sentencing Reporter (Nov.–Dec. 1992). This issue is devoted to critiques of the reports by the U.S. Sentencing Commission and the U.S. General Accounting Office regarding the federal sentencing guidelines' impact on sentencing disparity.

297. William Rhodes, Models of the Criminal Justice System: A Review of Existing Impact Models (Abt Associates Inc., June 1990).

298. For example, various versions of JUSSIM are now in use in San Diego and Santa Clara counties, Calif.; Dade County, Fla.; and Montgomery County, Md., among others.

299. 21 U.S.C. § 1501 (repealed), 28 U.S.C. § 509 note (1988).

300. We used number of defendants, rather than cases, as our workload measure because number of defendants is the only useful measure at the corrections stage and thus the only useful measure common to all four stages. A case, of course, may include more than one defendant. According to the Administrative Office of the U.S. Courts, there are an average of 1.4 defendants per federal criminal case and about 1.9 in drug cases.

301. Federal Criminal Justice System: A Model to Estimate System Workload (GAO/GGD-91-75, April 1991). GAO also developed a model for allocating attorneys among U.S. attorney offices based in part on weighted workload: U.S. Attorneys: Better Models Can Reduce Resource Disparities Among Offices (GAO/GGD-91-39, March 1991).

302. Such cases arise from accidents and other driving incidents in federal parks, on federal parkways, or in areas around military bases.

303. The Federal Probation Sentencing and Supervision Information System contains both sentencing and supervision data.

304. An important element of time is not only calendar time, but also judicial and staff time spent on each case. The judge and staff time, in turn, is an important element of total case cost.

305. I do mean actual costs, not the "charges" that hospitals and doctors include on the patient's bill.

306. The government almost always incurs both the cost of the investigation and the principal costs of litigation in criminal cases (even paying for many defendants' attorneys). Thus, offender-based tracking systems that include investigative costs can be designed and maintained, assuming that the same level of government—federal, state/local—incurred the

costs of the investigation. However, it is unlikely that one could have a system that captured civil case data prior to filing the case in court.

307. For civil cases, these data are generated at the time of initiating an action in federal district court by the filing attorney. When filing a case in federal court, the attorney must complete a form (JS-44) that includes coded information on the general nature of the suit and reference to a precise statutory section and subsection of the U.S. Code that links the case filing to a relevant cause of action. The clerk of court verifies and transcribes the information from the JS-44 to a more condensed format (the JS-5), which the clerk transmits to the Administrative Office.

308. Although the court's statistical year was shifted three months in 1992 to correspond to the court's fiscal year, for consistency all data used in this report are grouped according to the pre-1992 statistical year—a twelve-month reporting period ending June 30.

309. The Administrative Office's Guide to Judiciary Policies and Procedures: Statistics Manual, Vol. XI, Chap. V provides "Instructions for Completing District Court Report Forms." The following are the instructions for completing the pertinent sections of the JS-5 Reporting Form for nature of suit code and statutory cause of action:

Nature of Suit: Enter the three-digit statistical code representing the nature of the action filed. This data is available from the JS-44 Civil Cover Sheet completed by the attorney filing the case but should be verified by the clerk of court for accuracy. The nature of suit code reported should be consistent with the statutory citations contained in the "Cause" section of the JS-5 (see below). If more than one nature of suit is applicable, enter the code of the first listed complaint or most serious complaint, as determined by the clerk of court. (p. 9)

Cause: Enter the U.S. civil statute(s) under which the action is filed, and write a brief statement of the cause of action. This information must be entered for each case and is available from the JS-44 Civil Cover Sheet completed by the attorney filing the case. The clerk of court should verify the data for accuracy. For actions transferred into the district pursuant to Title 28 U.S.C. §1404(a) or 1407, also specify in this section the district from which the action was transferred. (Note: Do not include jurisdiction or venue citations in this item, unless the case is a diversity action and no other federal statutes apply. Otherwise, include only citations reflecting the nature of the action.) (p. 12)

310. One reason that the findings presented here must be considered preliminary is that it will be impossible to determine the absolute veracity of this assumption without subsequent, more labor-intensive work to ascertain whether or not there are identifiable biases between those filings that do report a cause of action as opposed to those that do not.

311. Free v. United States, 879 F.2d 1535 (7th Cir. 1989).

312. Judge Posner's decision, as well as concurrences by Cudahy and Coffey, discussed the magnitude of work imposed on the courts by that prisoners' small claims provision.

313. An analysis of the data for cases brought under 28 U.S.C. § 2671 in SY 1992, for example, shows that these filings were listed under twenty-two different NOS-Codes, including suits for personal injury, personal property damage, civil rights, and prisoner petitions. As a result, it would be virtually impossible to develop any meaningful estimate of the judicial impact of this statute using NOS-Code data.

314. Of the 660 cases brought under 20 U.S.C. § 1080 in SY 1992, 635 were listed under NOS-Code 152, 20 under NOS-Code 190 (Other Contract Actions), 3 under NOS-Code 890

(Other Statutory Actions), and 2 under NOS-Code 150 (Recovery of Overpayments and Enforcement of Judgments).

315. Of the 6,146 cases filed under NOS-Code 152 in SY 1992, 3,692 were brought under the purely jurisdictional statute 28 U.S.C. § 1345 ("U.S. Plaintiff"), 1,640 under 20 U.S.C. § 1083 ("Student Loan Information by Eligible Lenders"), 635 under 20 U.S.C. § 1080, and the rest under various other statutes.

316. An interesting fact emerged from our investigation of this program. It appears from telephone interviews of court personnel that the reason these cases were brought under 20 U.S.C. § 1083 (Student Loan Information by Eligible Lenders) as opposed to 20 U.S.C § 1080 (Default of Student Under Federal Loan Insurance Program) has to do with a glitch in a computer software package provided to the contract firms by the Department of Justice rather than some more portentous shift in litigation strategy or other underlying societal factor.

317. Weights used in our analysis were developed from a subset of cases collected as part of the District Court Time Study Project that exhibited information on statutory cause of action listings. This subset contained 4,753 criminal and 4,657 civil cases. These weights represent the average judge time required in cases brought under specific titles and sections of the U.S. Code. We thank John Shapard of the Center's Research Division and director of the District Court Time Study for his assistance in obtaining these data.

318. At the hearings, Judge Abner Mikva expressed this view from the federal bench: "You would be amazed how often we judges struggle with whether or not we can apply a remedy or go through to the legislative history to find out whether the Congress intended for a private litigant to use a particular statute. But civil RICO has been interpreted to mean . . . that this language in and of itself allows every private litigant to single-handedly go out and be the Attorney General of the United States and enforce all the other laws of the United States through the use of civil RICO." *Rico Reform: Hearings on H.R. 2517, H.R. 2943, H.R. 4892, H.R. 5290, H.R. 5391, and H.R. 5445 Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 99th Cong., 1st and 2d Sess. 529 (1985–1986) (testimony of Judge Abner Mikva).