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The Perils of Productivity

MARK SPOTTSWOOD*

ABSTRACT

This Essay urges that those who seek to minimize delay in litigation should proceed with greater caution. Productivity reform proponents usually assume that an increase in case processing speed can be purchased at little cost to other procedural values, but this may not be the case. Such reforms may lower the quality of lawyers' case preparation and worsen the quality of judicial decisions. The extent of these effects is unclear because the proponents of such changes have not made an effort to establish that increases in speed can be achieved without undermining the accuracy of litigation outcomes. Relatedly, it is common to assume that reductions in time to disposition usually result in increased litigant satisfaction and decreased litigation costs. These assumptions, however, are doubtful in theory and contrary to the existing empirical evidence. As a result, we should be quite cautious before assuming that a reform that speeds case processing is an improvement to the litigation process.

INTRODUCTION

The drafters of the original Federal Rules of Civil Procedure identified a set of goals that litigation rules should seek to maximize. In Rule 1, they asked courts to interpret the new rules so as to "secure the just, speedy, and inexpensive determination of every action and proceeding."¹ At the outset, the goal of making litigation more "just" was given central priority, and the drafters of the original rules gave us many innovations designed to increase the accuracy of litigation outcomes. The new combination of simplified pleading and broad access to discovery of facts in the control of one's opponents, for instance, made it less likely that litigants would lose based either on mere technicalities of the pleading

* Assistant Professor, Florida State University College of Law. I am grateful to Jay Kesten, Murat Mungan, Chad Oldfather, Mark Seidenfeld, Jordan Singer, Franita Tolson, Samuel Wiseman, and Mary Ziegler for useful discussions on this topic. I am also indebted to the many thoughtful participants at the *New England Law Review's* Symposium on measures of judicial productivity. Finally, special thanks go to Will Nilson for his excellent research assistance.

¹ FED. R. CIV. P. 1.

process or on lack of access to critical evidence.² In the words of one of the drafters, the new rules were meant to “substitute[] an open, business-like and efficient presentation of real issues for the traditional strategy of concealment and disguise.”³

Since then, however, the overall direction of rule reform has generally taken a different course. With occasional exceptions,⁴ changes to the federal rules of procedure (or to corresponding state rules) have rarely prioritized the goal of reducing outcome errors. Instead, reformers at both the state and federal level have focused their efforts on making litigation faster and less expensive.⁵ Indeed, as I write this Essay, the Committee on Rules of Practice and Procedure of the U.S. Judicial Conference is yet again considering a package of proposed amendments that aim to improve early case management, proportionality in discovery, and party cooperation. These proposals had their genesis in a variety of reform suggestions made during a 2010 conference at Duke Law School, and focused on ways to “reduc[e] cost and delay in civil litigation.”⁶ Even after decades of consistent reform efforts since the 1950s,⁷ and even though the overall time-

² See *id.* at 8, 26–37.

³ Edson R. Sunderland, *The Theory and Practice of Pre-Trial Procedure*, 36 MICH. L. REV. 215, 226 (1937).

⁴ The most obvious counterexample was the expansion of Federal Rule of Civil Procedure 23 in 1966. That expansion allowed the rule, which had previously authorized class action lawsuits only in a narrow set of historically derived categories, to authorize such suits in a broad new category of cases, so long as a judge concluded that common issues predominated over individualized ones and the class action would be a superior method of resolving the controversy. The hope was that this new provision would allow recovery in cases where the “amounts at stake for individuals may be so small that separate suits would be impracticable.” FED. R. CIV. P. 23(b)(3) advisory committee’s notes. This rule, in other words, was enacted so that plaintiffs with small but viable claims would not be deterred from filing their suits by the fact that the costs of suing individually were larger than the potential recovery. This new category of lawsuit would turn out to be both expensive and time-consuming, but by finding a way to allow these small-but-valid claims to be brought successfully, the new rule arguably promoted the goal of making the system more “just.”

⁵ See generally Danya Shocair Reda, *The Cost-and-Delay Narrative in Civil Justice Reform: Its Fallacies and Functions*, 90 OR. L. REV. 1085, 1091–1102 (2012) (charting the repeated prominence of the “cost and delay narrative” in debates about rule reform, and the corresponding absence of reforms aimed at making outcomes more just).

⁶ Memorandum from Hon. David G. Campbell to Hon. Jeffrey S. Sutton (May 8, 2013), in COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY AND CIVIL PROCEDURE 259–60 (2013), available at <http://www.uscourts.gov/uscourts/rules/preliminary-draft-proposed-amendments.pdf> [hereinafter “Campbell Memorandum”].

⁷ See Michael Heise, *Justice Delayed?: An Empirical Analysis of Civil Case Disposition Time*, 50 CASE W. RES. L. REV. 813, 818 (2000).

to-disposition in most American civil courts has remained fairly steady,⁸ the focus on increasing the pace of litigation continues unabated.

Still, many might be willing to acknowledge that the issue of speeding litigation has been overemphasized relative to other factors, while seeing this as a fairly harmless vice. Who, after all, could object to cases being decided faster? It turns out, however, that increasing the pace of litigation may decrease the accuracy of litigation results, meaning that an overemphasis on speed may undermine the primary goal of the original rule makers. Moreover, speed alone is not as valuable as many people assume. Shortening time-to-disposition has no intrinsic value; rather, it is worthwhile if the reduction in delay leads to either happier litigants or reduced litigation costs. Neither of those things, however, follow automatically from a reduction in case processing time. As a result, the value of many proposals intended to speed the litigation process is doubtful, and the productivity movement should proceed with greater caution.

⁸ Easily accessible data from the federal courts stretches back approximately twenty years, and reveals no noticeable increase in case delay over that stretch of time. Compare UNITED STATES DISTRICT COURTS—NATIONAL JUDICIAL CASELOAD PROFILE, available at <http://www.uscourts.gov/viewer.aspx?doc=/uscourts/Statistics/FederalCourtManagementStatistics/2013/district-fcms-profiles-march-2013.pdf&page=1> (showing a median time to disposition of 8.4 months in federal civil cases in 2013), with U.S. DISTRICT COURT—JUDICIAL CASELOAD PROFILE, available at <http://www.uscourts.gov/viewer.aspx?doc=/cgi-bin/cms.pl> (reporting federal civil times-to-disposition ranging from seven to nine months from 1992 through 1997), and JAMES S. KAKALIK ET AL., JUST, SPEEDY, AND INEXPENSIVE? AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT 22–23 (1996) (measuring a median time-to-disposition below one year in civil cases in federal court during the early 1990s). A similarly stable pattern appears in available data on historical levels of delay in state court systems, although those courts do exhibit chronically higher levels of delay than is the case in the federal system. Compare Robert C. LaFountain & Neal B. Kauder, *An Empirical Overview of Civil Trial Litigation* 3, in 11 CASELOAD HIGHLIGHTS: EXAMINING THE WORK OF STATE COURTS (Feb. 2005) (surveying the subset of state tort cases that reached a jury trial verdict in 2001 and finding that times to disposition ranged from thirteen to thirty-one months, depending on case type), with Thomas Church et al., NAT'L CTR. FOR STATE CTS., JUSTICE DELAYED: THE PACE OF LITIGATION IN URBAN TRIAL COURTS (1978) (surveying a range of state courts and finding median times-to-disposition in tort cases ranging from 288 to 811 days, with nearly all jurisdictions reporting median times-to-disposition between one and two years), and HANS ZEISEL ET AL., DELAY IN THE COURT 56 (1959) (describing a median time-to-disposition of twenty-one months in routine personal injury cases in the state courts of New York during 1950, and finding that this level of delay, although higher than was average at the time, was not without historical precedent in that court system).

I. The Constant Push for Greater Judicial Productivity

Before I explore some of the reasons to doubt the utility of reforms that aim to decrease case processing time, it may help to get a sense of the lay of the land. In this section, I will discuss some of the major productivity reforms that have been tried in the federal and state court systems. These reforms include active and early case management by judges, the use of incentives designed to make judges process cases more quickly, the use of discovery cut-off dates and firm trial dates to pressure lawyers to do their share of the work more quickly, and structural reforms designed to make it easier to balance workloads among judges by “unifying” previously separated courts.

A. Productivity Reforms in the Federal System

In 1990, Congress, in an effort spear-headed by then-Senator Joseph Biden, enacted what is probably the most prominent effort to heighten judicial productivity in our nation’s history. Relying on a report from the Brookings Institution that decried the rising costs of American litigation,⁹ Senator Biden and other members of the Judiciary Committee promoted the legislation as “the only way to make judges manage their caseloads effectively.”¹⁰ To this end, they sought to implement a two-pronged approach: In the final version of the legislation as enacted, Congress required individual district courts to work together with local attorneys to formulate plans to speed case processing in an attempt to encourage innovation in case management techniques.¹¹ And at the same time, Congress also imposed a shaming penalty on judges who failed to use available techniques to process their dockets quickly. Pursuant to the Civil Justice Reform Act (“CJRA”), the Administrative Office of the U.S. Courts now publishes a report twice a year that “discloses for each judicial officer,” the number of motions and bench trial decisions that have been pending for more than six months, as well as the number of cases that have

⁹ See generally *Foreword to JUSTICE FOR ALL: REDUCING COSTS AND DELAY IN CIVIL LITIGATION* (1989). The quality of evidence used to document this problem was quite poor, consisting generally of responses to leading survey questions. In fact, the only empirical evidence cited in the Brookings report actually contradicted its central claim that delay was rising rapidly in the federal courts. See Linda S. Mullenix, *Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences for Unfounded Rulemaking*, 46 STAN. L. REV. 1393, 1415–18, 1417 n.121 (1994).

¹⁰ Stephen Labaton, *Biden’s Challenge to Federal Courts*, N.Y. TIMES, April 16, 1990, at D2, available at 1990 WLNR 2977428.

¹¹ Michael A. Perino, *Drafting Mediation Privileges: Lessons from the Civil Justice Reform Act*, 26 SETON HALL L. REV. 1, 3–5 (1995).

persisted on the court's docket for more than three years.¹² The CJRA, in other words, attempted to spur judges both to employ a toolkit of management techniques to speed the processing of cases on their dockets, and to do their own work at a faster pace.

The case management aspect of the CJRA failed to deliver the promised results and was allowed to sunset. Ten "pilot" jurisdictions were singled out for early implementation of the Act's case processing reforms so that the RAND Corporation could study its effects, but the results were underwhelming. Eighty-five percent of the judges in the pilot jurisdictions reported that their participation in the study had little effect on caseload management, suggesting that these reforms were either too weak to spur independent federal judges to change their behavior, duplicative with efforts they had already undertaken on their own, or both.¹³ It should thus be unsurprising that the RAND team detected "little effect on time to disposition [or litigation] costs" when comparing pilot districts to districts that had not yet implemented the reforms.¹⁴ Parsing their data more finely, they did detect some impact of particular case management techniques on both cost and delay: Early judicial case management efforts, for example, tended to reduce overall case processing time at the expense of heightened litigation cost, while shortened discovery cutoff dates reduced both lawyer work hours and time to disposition.¹⁵ So this first prong of Congress's attempt at speeding and cheapening litigation may have had a beneficial effect by clarifying some of the impacts of management techniques that were already part of the judicial toolkit. But at a more fundamental level, it illustrated the inherent challenges in trying to reshape the ways that judges exercise their broad discretion over case processing decisions.

The second prong, with its shaming penalty, was more effective and is still in effect. According to the RAND report, over the five year period following the implementation of the new rule requiring disclosure and publication, the total share of federal cases that had been pending for more than three years fell from 6.8% to 5.2%.¹⁶ Quite notably, this happened even though overall federal judicial workload, as measured by the total number of pending civil cases, was *increasing* over the same period.¹⁷ Even though

¹² 28 U.S.C. § 476 (2012).

¹³ See Heise, *supra* note 7, at 820; Jeffrey J. Connaughton, *Judicial Accountability and the CJRA*, 49 ALA. L. REV. 251, 253 (1997) (observing that "Congress tried to give judges a new pair of Nikes," but that "[s]ome said, 'thanks, but I've already got a pair,'" while "others decided to stick with their old pair of Keds.").

¹⁴ KAKALIK ET AL., *supra* note 8, at 14, 22.

¹⁵ *Id.* at 13, 15–17.

¹⁶ *Id.* at 24.

¹⁷ *Id.*

federal judges have salary and tenure protections, it seems, they still work hard to protect their reputations, and at least some of them will work faster to avoid being publicly embarrassed. Thus, even after Congress allowed most of the provisions of the CJRA to expire in 1996,¹⁸ the reporting requirement has continued in force to this day, and the Administrative Office continues to publish its “list of shame” twice a year.¹⁹ In short, in its brief experiment with productivity reform, Congress failed to achieve significant efficiency gains through its case management reforms, which try to alter the dynamics of litigant and lawyer behavior, but it was somewhat more successful at prompting judges to do their own work at a faster pace.

Judges and lawyers, of course, also have an interest in increasing the efficiency of the justice system, so it should come as no surprise that members of the federal judiciary and its bar have continued to pursue their own efforts to speed case processing. Some of these efforts have been quasi-legislative, enacted through the civil rulemaking process. For example, in 1993 the Civil Rules Committee ushered in a new regime in which parties were obligated to engage in automatic mandatory disclosures early in the life of a case, without waiting for judicial orders or discovery requests.²⁰ Reformers hoped that this change might reduce adversarialism and expense in the discovery process and ultimately “accelerate the preparation and disposition of actions.”²¹

More recently, the Civil Rules Committee has circulated a new package of proposed amendments, once again with the aim of reducing cost and delay in the litigation process. One proposed reform shortens the default period in which plaintiffs may serve process on defendants from 120 to 60 days.²² Another provision would require judges to issue scheduling orders

¹⁸ See Hon. William G. Young & Jordan M. Singer, *Bench Presence: Toward a More Complete Model of Federal District Court Productivity*, 118 PENN. ST. L. REV. 55, 66 n.52 (2013).

¹⁹ See, e.g., DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, CIVIL JUSTICE REFORM ACT OF 1990: REPORT OF MOTIONS PENDING MORE THAN SIX MONTHS, BENCH TRIALS SUBMITTED MORE THAN SIX MONTHS, BANKRUPTCY APPEALS PENDING MORE THAN SIX MONTHS, SOCIAL SECURITY APPEAL CASES PENDING MORE THAN SIX MONTHS, AND CIVIL CASES PENDING MORE THAN THREE YEARS (Mar. 31, 2013), available at <http://www.uscourts.gov/uscourts/statistics/cjra/2013-03/CJRAMarch2013.pdf>.

²⁰ See FED. R. CIV. P. 26(a)(1)(C)–(E); Steven S. Gensler, *Some Thoughts on the Lawyer’s Evolving Duties in Discovery*, 36 N. KY. L. REV. 521, 528–30 (2009); Linda S. Mullenix, *Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795, 803–08 (1990).

²¹ William W. Schwarzer, *The Federal Rules, the Adversary Process, and Discovery Reform*, 50 U. PITT. L. REV. 703, 723 (1989).

²² See Campbell Memorandum, *supra* note 6, at 261.

thirty days earlier than currently required.²³ A third proposal deviates from current practice by allowing parties to request document discovery before the parties first meet to discuss the overall sequencing of discovery under Rule 26(f).²⁴ Most of the remaining changes attempt to limit the overall quantity of discovery that parties can obtain. Some provisions make explicit powers that were already implicit in the rules, while others adjust default limits on discovery requests that were subject to variation by court order in any event.²⁵ The overall tenor of the recommended changes is clear: The current Advisory Committee believes that litigation, especially at the pleading and discovery stages, should be conducted at a faster pace.

Other innovations have remained primarily local affairs. In several “rocket dockets,” for instance, local rules and standing orders have been used to set “early” and “firm” trial dates.²⁶ The hope is that lawyers will conduct discovery more efficiently and experience heightened pressure to settle cases promptly in the face of a looming trial that cannot be continued to a later date.²⁷ Probably the most radical court in this respect is the Eastern District of Virginia, in which trials are typically scheduled to occur within seven months after the filing of a complaint.²⁸ The result of this local policy is dramatic. The median time to disposition for civil cases in that district as measured in 2013 was five months—compared with a national average of eight and a half months. The effect on cases that reach a jury trial is even starker: The Eastern District of Virginia has a median time to trial of nine months, which is less than half the national average of twenty-six months.²⁹

B. *Productivity Reforms in State Court Systems*

Although academics have paid less attention to state court productivity evaluation, members of the bar and organizations such as the National Center for State Courts (“NCSC”) have devoted extensive effort to trying to

²³ *See id.*

²⁴ *See id.* at 263.

²⁵ *Id.* at 264–69 (making the implicit power to shift costs in discovery, which “is being exercised with increasing frequency,” explicit in the text of the newly proposed rule, and establishing shorter “presumptive numerical limits” on a variety of discovery devices).

²⁶ Carrie E. Johnson, *Rocket Dockets: Reducing Delay in Federal Civil Litigation*, 85 CALIF. L. REV. 225, 232–33 (1997).

²⁷ *See* BROOKINGS INST. REP., JUSTICE FOR ALL: REDUCING COSTS AND DELAY IN CIVIL LITIGATION 19–20 (1989).

²⁸ Johnson, *supra* note 26, at 236.

²⁹ *See* UNITED STATES DISTRICT COURTS—NATIONAL JUDICIAL CASELOAD PROFILE 1, 25 (June 2013), available at <http://www.uscourts.gov/uscourts/Statistics/FederalCourtManagementStatistics/2013/district-fcms-profiles-june-2013.pdf>.

understand and fight the causes of delay in state court litigation.³⁰ In pursuing this effort, reformers operate on a freer canvas than those who would increase the pace of federal lawsuits. There are fewer constitutional limits on state court reform, and where they exist, state constitutions are far easier to amend.³¹ This is a happy reality because any sensible analysis would give priority to state court productivity improvements. The vast majority of American litigation, after all, takes place in state courts, including many of our gravest civil and criminal matters. Furthermore, the mere fact that state court systems vary in their structure and design gives reformers a chance to try new ideas on a small scale and compare the results with the status quo ante in other jurisdictions. Thus, looking towards the state courts gives us a chance to see a wider array of potential productivity reforms in action.

Academics and other reformers have expressed concerns over the productivity of state court systems for quite some time. In a classic examination of case processing, focusing on New York City's trial courts in the 1950s, Hans Zeisel, Harry Kalven, and Bernard Buckholz highlighted the fact that routine personal injury cases took, on average, twenty-one months from the time of filing to disposition, with an even longer average of thirty months in the small subset of cases that required the trial stage.³² In their exploration of ways to reduce this figure, they created an interesting inventory of potential productivity reforms. First, since cases involving jury trials generally take longer than other kinds of cases, they proposed abolishing jury trials in negligence cases and encouraging plaintiffs to waive their right to a jury in other kinds of cases.³³ They also explored several means of increasing the settlement rate, which has the potential to drastically speed up case processing; these reforms ranged from requiring the use of impartial medical experts, requiring defendants to pay pre-judgment interest, and increasing the involvement of trial

³⁰ See Stephen J. Choi et al., *Are Judges Overpaid? A Skeptical Response to the Judicial Salary Debate*, 1 J. LEGAL ANALYSIS 47, 65 (2009) (noting that, in recent times, there have been "almost no academic studies" of state court performance); *About Us*, NCSC, <http://www.ncsc.org/About-us.aspx> (last visited Apr. 1, 2014).

³¹ See Sean Blanda, *The 4 Differences Between the Federal and State Constitutions*, CONST. DAILY (Oct. 15, 2010), <http://blog.constitutioncenter.org/2010/10/the-4-differences-between-the-federal-and-state-constitutions/>.

³² See ZEISEL ET AL., *supra* note 8. This delay, although not without historical precedent, was somewhat higher than had typically been the case over the past half-century in the New York City courts that they studied. *See id.* at 20–21 (noting higher delays in two prior periods, one in the early 1920s and the second in the early 1950s, but lower levels of delay in most other periods in the preceding 50 years).

³³ *See id.* at 69.

judges as active managers of the litigation process.³⁴ Finally, they recommended several means of directly increasing judicial availability, such as giving existing judges incentives to spend more time on the bench, reassigning judges from areas with lighter caseloads to areas that experienced greater demand, or adding more judges to the court system.³⁵ Since then, numerous other researchers, many operating under the umbrella of the NCSC, have promoted a similar agenda, both by documenting the extent of delay in state courts across the country and by proposing a wide variety of reforms aimed at speeding the processing of civil and criminal cases.³⁶

Broadly speaking, the productivity reforms promoted at the state level fall into two major categories. First, many have followed the same strategy that dominated in the arena of federal courts reform, and promoted active judicial case management as a way to make litigation more efficient. Second, many reformers fought for more state court “unification,” arguing that a good deal of delay and expense could be eliminated if state courts adopted a simpler structure and employed more generalist judges with broad jurisdiction, rather than specialist judges limited to specific areas of law.

The case-management solution to reducing delay frames the problem to be solved as one of lawyerly tardiness. In their detailed text on best practices in case flow management, David Steelman and his coauthors promote the idea that inefficiency in case processing arises primarily because judges leave too much control in the hands of the parties and their attorneys.³⁷ The proposed solution is to require judges to “accept responsibility for the movement of cases from the time that they are filed, ensuring that no case is unreasonably interrupted in its procedural

³⁴ *Id.* at 105, 142.

³⁵ *See id.* at 174, 181, 206, 209.

³⁶ *See, e.g.,* THOMAS CHURCH ET AL., *supra* note 8, at 4–5 (1978) (noting variation in civil case average-time-to-disposition measures ranging from 288 to 811 days, with median times to jury trials as high as 1,332 days); DAVID C. STEELMAN ET AL., CASEFLOW MANAGEMENT: THE HEART OF COURT MANAGEMENT IN THE NEW MILLENNIUM 137–43 (2000) (arguing that problems of delay still plagued the courts, and exploring explanations for the persistence of delay, including failures of case management, resource scarcities, and a lack of judicial commitment to speeding the pace of litigation); Thomas B. Marvell & Carlisle E. Moody, *The Effectiveness of Measures to Increase Appellate Court Efficiency and Decision Output*, 21 U. MICH. J.L. REFORM 415, 415 (1988) (examining the productivity of state appellate courts over a ten-year period).

³⁷ *See* STEELMAN ET AL., *supra* note 36, at 6. As the authors put it at one point, a combination of firm deadlines and frequent meetings between the court and the attorneys should be used “to ensure that attorneys retain a sense of urgency about case preparation and case progress.” *Id.* (assuming, of course, that attorneys will not be sufficiently motivated by a desire to help their clients resolve their disputes to keep cases moving on their own).

progress from initiation through completion of all court work.”³⁸ They single out two reforms as particularly suited to keeping litigants on track: First, courts should intervene early after a case has been filed to meet with the parties and establish ongoing control over its processing, establishing a schedule of regular meetings so that counsel cannot let the case fall into limbo.³⁹ Second, this process should also involve setting “firm and credible trial dates,” which are rarely subject to continuance, so that attorneys feel compelled to complete discovery and other case preparation activities on time.⁴⁰ Given that nearly all cases will be settled or resolved by a pretrial order during the window between filing and trial, the authors intend these two reforms to function as the “hammer and anvil of pretrial case flow management,” forcing the parties to process their cases efficiently and prompting timely settlement.⁴¹

Another reform effort has focused on simplifying the jurisdictional and organizational structure of state trial divisions, replacing balkanized groups of specialist judges with a single cadre of generalists.⁴² State courts have historically been organized in idiosyncratic ways, with overlapping levels of responsibility among differing geographic subdivisions (such as city, county, and state courts) as well as “specialty” courts with limited subject matter jurisdiction over particular types of cases (such as domestic relations and traffic cases). Starting in the 1950s, a number of state courts have become caught up in the “wave of reform” known as the “unification movement.”⁴³ Unification advocates point to the possibility that a state court system with a simple, unitary structure may be able to deploy its resources more nimbly, so that fewer cases linger on the docket of one over-burdened subdivision while judges and staff in other areas sit idle. Many state court systems have been centralized and simplified along these lines. Those who proposed such reforms as a means of increasing court efficiency have, however, found that such structural reforms have limited impacts. Formal unification does not equal practical unification, and many courts end up informally designating “specialist judicial officers to hear routine, high volume cases” even when the state has a formal policy

³⁸ *Id.* at 3.

³⁹ *Id.* at 3–4.

⁴⁰ *Id.* at 6.

⁴¹ *Id.* at 22 (internal quotation marks omitted).

⁴² See, e.g., INGO KEILITZ ET AL., A STUDY OF COURT CONSOLIDATION IN MAHONING COUNTY, OHIO: FINAL REPORT 10 (2011); MARY ANNE LAHEY ET AL., ANALYSIS OF TRIAL COURT UNIFICATION IN CALIFORNIA: FINAL REPORT 3 (2000); DAVID B. ROTTMAN & WILLIAM E. HEWITT, TRIAL COURT STRUCTURE AND PERFORMANCE: A CONTEMPORARY REAPPRAISAL (1996); ROBERT W. TOBIN, CREATING THE JUDICIAL BRANCH: THE UNFINISHED REFORM 133 (1999).

⁴³ See KEILITZ, *supra* note 42, at 4.

mandating that all judges be generalists.⁴⁴ Perhaps for this reason, one study of the impacts of unification on efficiency and other metrics in various state court systems was unable to detect any consistent relation between unified court structures and increases in court efficiency.⁴⁵

Thus, reformers at the state level, like those who focus on the federal system, have frequently emphasized the importance of increasing the speed of the litigation process. Some seek to make judges push lawyers to work faster through case management, while others seek to increase judicial output through simpler and more flexible court structures. But similar to efforts to reform the federal litigation system, these advocates have rarely expressed concern that increased litigation speed might come at an unacceptable cost.

II. Why Productivity Is Perilous

It may seem strange to argue against productivity in judging; indeed, some might think it akin to critiquing puppies, sunshine, or ice cream. But although the consumption of ice cream, in moderation, is an unqualified good, if we try to maximize our consumption at all costs we will end up obese, depressed, and diabetic. So, too, we risk undermining other dispute resolution values if we promote speed in judging without attending carefully to its potential costs. To be clear, the argument I will make in this section is not that delay in litigation is never problematic, or that a reduction in time-to-disposition cannot have real benefits. But given the widespread enthusiasm for reductions in delay, I believe it is valuable to reflect on the downsides that may arise from increases in litigation speed.

Before we go further, it may help to offer a few clarifications regarding the meaning of terms like “productivity” and “accuracy.” In my usage, the term *accuracy* connotes a close correspondence between the real-world facts that gave rise to the case and what a relevant decision-maker believed those facts to be.⁴⁶ Thus, when a case is decided by a jury trial the outcome is accurate if the jury has a correct picture of the facts that gave rise to the case, and inaccurate when they are confused or misled on important points. Likewise, if a case is settled before trial, then the settlement amount is accurate if both of the lawyers who negotiated the settlement amount possessed a fairly complete picture of the underlying dispute. By contrast, if one side lacks knowledge of important facts and thus agrees to a deal that does not fairly capture the underlying merits of

⁴⁴ See ROTTMAN & HEWITT, *supra* note 42, at 6.

⁴⁵ *Id.* at 70.

⁴⁶ In a prior paper, I explore the concept of accuracy in litigation outcomes in much more depth and propose one protocol by which it could be measured meaningfully. See generally Mark Spottswood, *Evidence-Based Litigation Reform*, 51 U. LOUISVILLE L. REV. 25, 64–80 (2012).

their case, we can say that the settlement outcome was inaccurate.⁴⁷

When I refer to *productivity*, by contrast, I use it to refer to a court's overall case processing speed. Simply put, a productive court is one that decides a lot of cases in a given stretch of time, and an unproductive court is one where the judges are (comparatively) asleep at the switch. This has been a fairly standard use of the term in the relevant literature.⁴⁸ By contrast, the paper that sparked this conference urges researchers to adopt a broader understanding of the term that defines a productive court as one that strikes an optimal balance on many metrics of judicial performance, including accuracy and efficiency.⁴⁹ I have no quarrel with such efforts, but in this essay I will stick to more standard usage to avoid potential confusion. Thus, in the arguments below, the term productivity will refer primarily to case processing speed, rather than a broader conception of optimal judging.

First, and most obviously, an increase in case processing speed may come at a cost to outcome accuracy. For one thing, judges who work fast may work less carefully, and even if they are trying hard to be fair they may find themselves drawing more heavily on intuitions and stereotypes than if they had more time to decide. For another, judges who put pressure on attorneys to increase the pace of their work may buy increased speed at the cost of poorer attorney investigation and preparation. The extent to

⁴⁷ In a useful contribution to this symposium, Chad Oldfather notes that in some cases, the question of accuracy may be indeterminate, because the underlying dispute is so murky that it may be impossible, with any amount of investigation, to reach inter-subjective agreement regarding the real underlying facts of the case. See Chad Oldfather, *Against Accuracy (As a Measure of Judicial Performance)*, 48 NEW ENG. L. REV. 493, 494 (2014). Although I agree that this will sometimes be the case, it does not undermine the overall utility of measuring accuracy, given that many cases will be either rightly or wrongly decided, in a way that is clear to most objective observers. This point becomes more obvious if one looks, not at the cases that are decided following a hotly disputed trial on the merits, but at a pre-trial stage where only a partial picture of the facts was available to the relevant decision-maker. See, e.g., David M. Studdert et al., *Claims, Errors, and Compensation Payments in Medical Malpractice Litigation*, 354 NEW ENG. J. MED. 2024, 2029–31 (2006) (measuring the accuracy of outcomes in medical malpractice cases based on independent physician review of insurer case-files, and determining that approximately one-quarter of those cases either gave no compensation to a deserving claimant, or compensated a claimant who had not been injured by medical negligence).

⁴⁸ See Young & Singer, *supra* note 18, at 62–67 (surveying studies of court productivity and showing that productivity “has commonly been understood as a function of how quickly (and sometimes how cost-effectively) courts resolve the cases on their dockets”).

⁴⁹ See *id.* at 69 (urging that a “comprehensive analysis” of productivity “must transcend pure efficiency measures and account as well for the court’s unique role as a public forum for dispute resolution and its ability to provide accurate results and a visibly fair process for all parties”).

which such trade-offs arise in practice is unknown because (except in a few isolated areas of the law) we virtually never make an effort to measure the accuracy of litigation, but we should treat these downsides with real concern. Especially given the widespread reforms that have already been aimed at the problem of delay, and the fact that current delay levels do not seem alarming by comparison to some other historical periods,⁵⁰ we should be reluctant to take such risks unless we can be confident that we are not buying speed at the cost of justice.

Second, and less obviously, reducing delay may not deliver the benefits that many proponents expect. Common sense may suggest that litigants will generally be happier if their cases are resolved more quickly, but there are reasons to doubt this based on both theory and empirical data. Likewise, although some reforms that increase the speed of litigation may reduce overall litigation costs, other productivity reforms tend to raise, rather than lower, those costs. Accordingly, even in cases where there is no trade-off between speed and accuracy, reductions in delay may not accrue any real benefits for participants in the process or society at large.

A. *Potential Trade-offs Between Speed and Accuracy in Litigation*

In a previous section, I surveyed a number of popular approaches to reducing delay in the courts. First, we might unify the structure of court systems and generalize judicial duties so that the resources we have are distributed more evenly. Second, we might encourage judges to put more pressure on litigants and their lawyers to do their part of case processing more quickly. Third, we might put pressure on the judges themselves to hurry their own share of the work. Unfortunately, each of these productivity-enhancing reforms may lead to a decline in the quality and accuracy of judicial work. The extent of such effects is presently uncertain because the interrelation of accuracy and judicial speed has been little studied to date. But even our ignorance, if clearly confronted, should make us pause before enthusiastically promoting judicial productivity as an end in itself. Most of us, I suspect, would ultimately prefer the slow provision of substantive justice to the speedier application of arbitrary or unjust authority. Accordingly, I will examine the potential accuracy costs of each of these productivity reforms in turn.

First, consider the push towards court unification, which has been an increasingly popular strategy for increasing state court efficiency. As discussed above, this has proven less sure than some reformers hoped as a means of speeding case processing, in part because judges often find informal ways to specialize even if they are formally designated as

⁵⁰ See *supra* notes 7–8 and accompanying text (collecting historical evidence on rates of delay in federal and state courts).

generalists. Such arrangements, if taken too far, may reduce the efficiency advantages of unification, as judges may become more likely to resist being reassigned in response to new pressures, seeing this as a violation of settled expectations.

But if we consider the relation between accuracy and speed, it will appear that judges are right to resist the full extent of unificationist proposals. The law presents itself in dizzying varieties, especially in state courts of general jurisdiction, and fully generalist judges must constantly shift gears between differing rules of substantive law as well as unique (and potentially complicated) factual contexts.⁵¹ The cognitive costs of such switching are high, and may well come at a cost to judicial accuracy and the quality of decision-making. If forced to be broad generalists, judges will rarely be able to bring deep expertise to bear on a problem in front of them. Some may plunge ahead without devoting much time to learning the subtleties of new areas as they arise, risking significant errors. Others may prefer to spend significant amounts of time educating themselves on each new and unfamiliar question. The latter situation may well obviate any efficiency benefits that flow from flexibility in assigning judges to cases, while the former might both produce some delays of its own (in the form of reversals on appeal) as well as degrade the accuracy of judicial determinations. Thus, it would appear that judges know something that reformers have ignored: Forcing all judges to be generalists, even if it were possible, might bring less speed than we would hope, and the speed it produces might come at a cost to decisional quality. The end result is that the right amount of court unification is a balance point between extremes, rather than something to be pursued to its logical limit.⁵²

Second, there is the strategy of putting increased pressure on litigants and their lawyers to speed their share of case processing tasks, which has achieved broad buy-in at the federal level as well as an increasing foothold in the states. Yet again, it seems that some amount of this may purchase faster case processing at little costs, but it can easily be taken too far. Some amount of case delay may arise as a simple result of agency costs: Lawyers who work on contingency may have a large enough portfolio of cases that they do not feel much distress arising out of delay in any single case, and may be more willing than their clients to trade more delay for a higher

⁵¹ The demands of determining who should be awarded custody of a child in a divorce dispute, for example, require a very different set of knowledge and skills than are brought to bear in a complex commercial dispute.

⁵² Far more could be said here, given the many arguments for and against specialist judging in general. See generally Chad M. Oldfather, *Judging, Expertise, and the Rule of Law*, 89 WASH. U. L. REV. 847, 847–50 (2012) (urging that strong claims regarding the relationship between specialization and accuracy in judging be treated with caution given the lack of empirical data and the complex theoretical questions in play).

ultimate recovery. The situation is even worse with lawyers paid by the hour; they have a straightforward incentive to increase the overall volume of litigation work, which may include dragging cases on for longer than is necessary, so long as it does not offend clients to the point that the lawyer loses repeat business. So if judges can put modest amounts of pressure on lawyers to work faster, they might hope to reduce this agency gap to some extent.

The problem, however, is that if pressed too far, lawyers may compensate for increased pressure to work quickly by reducing the amount of work they invest in particular cases. Legal business does not always flow in a steady stream, and lawyers may find themselves facing multiple overlapping deadlines at one time due to circumstances outside their control. Judges who adopt “rocket docket” levels of case management pressure often insist that deadline extensions be given very rarely, so as to avoid giving lawyers the impression that they can prolong litigation through repeated requests for continuances. But in practice, such a strict strategy necessarily risks denying extensions to lawyers who are truly underprepared. Here, again, the agency problem raises its head: Clients may be ill-prepared to determine whether a disappointing result in a case was due to a lawyer’s inadequate preparation or to other factors. As a result, over-pressured lawyers may react by preparing some cases less carefully when their professional life grows too hectic.

Third, there is the option of pressuring judges to work faster, whether by means of the CJRA’s relatively mild shaming sanctions or through more direct threats to their job security in the state systems. This is perhaps the most direct route to increasing the speed of case processing, as judges have control both over their own productivity, and, through case management techniques, that of litigants. But altering judicial workloads may have unpredictable impacts on the quality of judicial decision-making. To see why, consider a number of possible ways that judges might respond to productivity incentives.

Most existing judicial productivity incentives are discontinuous. For example, judges only make the CJRA list if they have pending motions or cases that are too old, *as of the bi-annual reporting date*. Judges, being human, do not always work at the same pace. Rather, like many of us, they may find themselves working faster under pressure of an imminent deadline, and then slowing down when the pressure relaxes. This does, in fact, appear to be the case in federal trial courts: A search of Westlaw reveals that a substantially larger number of opinions and orders are filed by federal trial judges in the month preceding the deadline, as opposed to the month after it.⁵³ Judges, therefore, do not always work faster at a steady

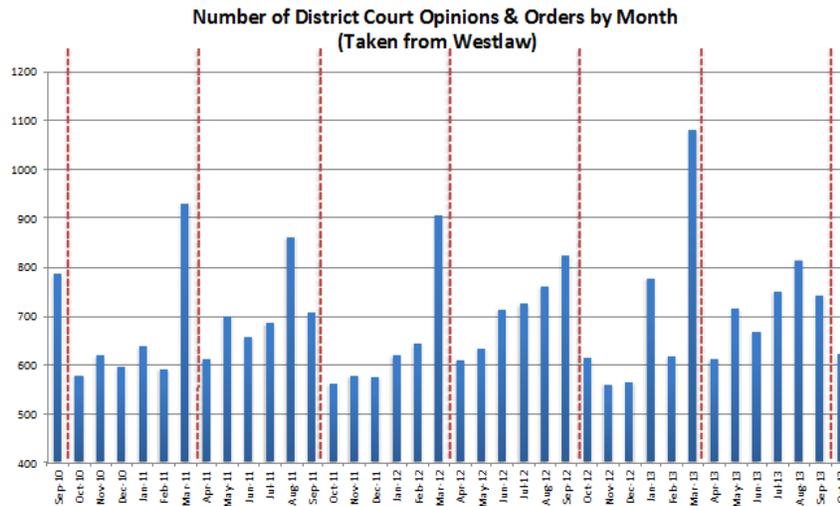
⁵³ A search for every “memorandum opinion and order”—a standard heading for a wide

pace when given productivity incentives. Instead, many of them seem to be as human as the rest of us; they procrastinate until a deadline will take effect, and then work faster to make up the difference.⁵⁴

array of district court decisions—entered during the relevant months can confirm this fact relatively quickly. Within the last year, there were 824 such opinions filed during September 2012 (when the September 30 CJRA deadline was looming) but only 616 in October of that year (when the next one was far in the future). Similarly, there were 1081 such opinions logged in March 2013, but only 614 filed in April 2013. This disparity (1905 motions in “high pressure” months vs. 1230 in “slow” months) amounts to an increase of over 50% of overall output. The figure above illustrates this effect going back over the last several years, with the red lines indicating reporting deadlines. Others have reported a similar finding in a study using docket data, which is more comprehensive than Westlaw’s partial sample of court opinions. *See* INSTITUTE FOR THE ADVANCEMENT OF THE LEGAL SYSTEM, CIVIL CASE PROCESSING IN THE FEDERAL DISTRICT COURTS: A 21ST CENTURY ANALYSIS 78–79 (2009), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/IAALS,%20Civil%20Case%20Processing%20in%20the%20Federal%20District%20Courts.pdf> (documenting a similar result in a study of 7700 civil cases during a one-year period from late 2005 through late 2006). These exact numbers were produced using Westlaw Classic. *Id.*

⁵⁴ Those who look closely at the chart may notice a slightly odd phenomenon: The rise in workload is much sharper preceding the March 31 deadline than it is leading up to the September 30 deadline. My tentative hypothesis is that this phenomenon is an artifact of the tendency of federal judges to hire new law clerks each year whose terms of service start in late August or early September. Judges who expect their new clerks to need some “warm-up” time may push their departing clerks to pick up the slack. And indeed, that is what we see in the data: Each March involves a much higher publication rate than each February, but August sometimes beats out September in terms of numbers of opinions filed. *Id.*

Unforeseen Effects (CJRA)



This presents the question in a starker form: If we were litigants, should we be indifferent as to whether the judge decided our case during a “slow” month or a “busy” month? Or should we prefer one over the other? Interestingly, the answer is not obvious, because an increased workload might influence judges in different ways.

Most obviously, judges who are working significantly faster may make more mistakes. Although reformers no doubt hope that judges will work longer hours, giving up leisure and family time in pursuit of productivity, some may simply allocate less time per case. Pressed for time, they may take shortcuts in their review of the relevant facts and authorities, or rely more heavily on the work of law clerks while taking less time to review their work. Some of those errors may be caught by parties, and give rise to appeals. If this results in a significant increase in the reversal rate, then the apparent gain in speed from deciding the motion quickly may come at a cost to the broader goal of speedy resolution of the entire controversy. Conversely, if those errors are not reversed, either because the parties or the court of appeals miss them, or because they occur in an area where appellate courts defer to district court judgment, then some increased speed has been obtained at the cost of lowered accuracy.

Of course, this is not the only possibility. Some judges may have a strong commitment to their institutional mission and may make great sacrifices to prevent any loss in quality as their workload rises. Others may find that their current workload offers ample time for leisure, and find it

less aversive to give up some of that leisure time when workloads temporarily rise.⁵⁵ It may even be the case that some judges work better when they get busier. Judge Posner examined the relation between positive external citations to appellate cases and appellate workloads, and discovered that a higher caseload led to higher quality decisions on that measure, at least within the range of variation encountered in the federal courts of appeal.⁵⁶ Perhaps the imposition of modest levels of stress encourages a level of focus and attention that is less likely to be brought to bear when judges have a larger capacity of idle time.⁵⁷

But the possible effects of increased judicial speed go beyond their impacts on judicial attention and diligence. One additional possibility arises out of the reality of *judicial* agency costs. District judges may have conflicting preferences: They would like to get their way and decide cases in what they feel is the correct way, but they would also like to avoid reversal.⁵⁸ To some extent, judges may be able to resolve this tension by creative decision-making. If district judges search (consciously or unconsciously) for outcomes that are likely to escape effective appellate scrutiny, they might be able to subtly violate a theoretically binding legal rule without getting caught. Or similarly, judges might search for reasons beyond what the parties offered to help claims pass procedural thresholds, relatively secure in the knowledge that the parties will not be able to appeal such determinations until much later (and knowing that settlement, if it occurs, will likely moot any appeal completely). But especially when the parties have not sought to help the judge find such “creative” solutions, finding such strategies may take additional time and effort. Making judges *busier* might also make them less *creative*, and if we wish to encourage judges to be more obedient and less independently interventionist, decreasing the amount of time they have to decide might actually be a good thing.⁵⁹

One final way that productivity reforms may impact the accuracy of judicial decision-making is by altering the cognitive processing style of judges as they decide cases. I have written, in other contexts, about the

⁵⁵ Cf. RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 85–86 (1996) (noting judicial complaints about workload sometimes amount to “crying wolf” and how courts often have more hidden capacity than they may care to admit).

⁵⁶ *Id.* at 235.

⁵⁷ I am grateful to Chad Oldfather for pointing out this intriguing possibility in correspondence.

⁵⁸ See Joanna Shepherd, *Measuring Maximizing Judges: Empirical Legal Studies, Public Choice Theory, and Judicial Behavior*, 2011 U. ILL. L. REV. 1753, 1758–59 (surveying empirical literature that suggests that district judges act strategically to limit the likelihood of appellate reversal).

⁵⁹ Whether such “obedience” should factor into our conception of accurate or just decision-making is a complex question that I cannot address in the short space of an essay.

interacting involvement of two different modes of reasoning when judges or juries decide cases.⁶⁰ One set of mental resources, sometimes known as “System 1” for short, lets us make decisions swiftly and with little effort. The other set of resources, known as “System 2,” requires more expenditure of mental effort, but also enables us to think through problems in a clear, linear fashion.⁶¹

In ordinary life, we draw on either system to some extent, but our moods can shift the balance between these different modes of problem solving. A slightly depressed person, for instance, is likely to draw more heavily on the slow, deliberative processing style of System 2, while a happy person will be more prone to the intuitive “snap-judgments” that may arise from System 1.⁶² Likewise, because System 2 requires some expenditure of internal effort to employ, people who are stressed, tired, or hungry will tend to use it more sparingly, and to lean more heavily on the impulses that flow from System 1 thinking.⁶³ And in fact, it has been observed that judicial decisions vary drastically based on swings in the judge’s mood: In one study of Israeli judges making parole determinations, the likelihood of judicial leniency was quite high when a judge had recently eaten and rested, but plunged dramatically the longer he had been sitting on the bench without a break.⁶⁴ Given that most people experience negative changes in their mood when pushed to work harder, it seems likely that increasing judicial workloads will also alter the ways that judges perceive and analyze the cases in front of them, encouraging them to process each case in a less reflective, more intuitive way.

It might initially appear that the obvious thing to do is to lower judicial workloads so that judges, experiencing less stress, are more likely to draw on their System 2 resources. Careful deliberation, after all, is often thought of as a core virtue of judging. But the realities are messier than this simple idea. In many contexts, a snap-judgment can out-perform deliberation. For

⁶⁰ See, e.g., Mark Spottswood, *The Hidden Structure of Fact-Finding*, 64 CASE W. RES. L. REV. 131, 131 (2013).

⁶¹ For an excellent and accessible introduction to this set of ideas, which are known collectively as “Dual Process” cognitive theories, see generally DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* (2011).

⁶² Joseph P. Forgas, *Affect in Legal and Forensic Settings: The Cognitive Benefits of Not Being Too Happy*, in *EMOTION AND THE LAW: PSYCHOLOGICAL PERSPECTIVES* 13 (2010).

⁶³ See Martin S. Hagger et al., *Ego Depletion and the Strength Model of Self-Control: A Meta-Analysis*, 136 PSYCHOL. BULL. 495, 495–96 (2010) (conducting a meta-analysis of studies on self-regulation, and finding significant negative correlations between the ability to engage in effortful self-control tasks, on the one hand, and low levels of blood glucose, as well as physical or mental hunger, on the other).

⁶⁴ See Shai Danziger et al., *Extraneous Factors in Judicial Decisions*, 108 PROCEEDINGS OF THE NAT’L ACAD. OF SCI. 6889, 6890 (2011).

instance, when asked which of two foreign cities was larger, or which of two stocks was likely to perform better, many people get the answer right more often when they “went with their gut” than when they analyzed the question analytically.⁶⁵ In such situations, we often do not have enough information to reason analytically, and doing so is as likely to lead us astray as to help us. The unconscious mind, therefore, can often implement useful shortcuts that our conscious, deliberative reasoning does not have access to. Unfortunately, it can also fall prey to certain kinds of systematic errors, and is more likely to rely on stereotypes that we would reject if we were to consider them consciously.⁶⁶ On the flip side, numerous studies have shown situations in which encouraging people to slow down and think harder—in other words, to call upon System 2 resources—improves the quality of their decisions.⁶⁷ Situations involving formal reasoning, such as math or logic problems, are especially likely to fall into this category.

Thus, once again, we find ourselves at an impasse. In some kinds of cases, judges would make more accurate decisions if the stress of a higher workload forced them to make more snap decisions. On other questions, they would probably benefit from having more time to decide, so that they could think through complicated doctrinal steps in a systematic way. In the end, it seems, an increase in workload might benefit some aspects of judicial work, but it also has potentially large downsides in terms of the accuracy of the decisions that judges make. Accordingly, productivity reformers run a risk of undermining the accuracy of case outcomes if they put strong pressures on judges to work faster, to function as broad generalists, or to take too strong a hand in case management.

B. *The Interaction Between Speed and Perceived Fairness*

Having seen that increases in speed may often come at the cost of accuracy, some readers may still feel that the trade-off will often be worthwhile. It is not the sole function of the litigation system to determine the right answer. We also wish to deter future misbehavior and ensure that members of the public comply with legal commands. But if we wish to achieve those goals, deciding cases accurately will not be enough; we must also operate the litigation system in a way that commands public trust and

⁶⁵ See GERD GIGERENZER, GUT FEELINGS: THE INTELLIGENCE OF THE UNCONSCIOUS 7–8, 27–30 (2007) (describing studies in which intuition outperformed analysis).

⁶⁶ See KAHNEMAN, *supra* note 61, at 109–84 (surveying cognitive errors that can arise from intuitive judgments).

⁶⁷ See Jonathan St. B. T. Evans, *Dual-Processing Accounts of Reasoning, Judgment, and Social Cognition*, 59 ANN. REV. PSYCHOL. 255, 264–65 (2008) (describing studies in which cognitive errors were increased under conditions where it was harder to access System 2 resources).

respect.⁶⁸ And more generally, our respect for the people involved in the litigation process should lead us to try and minimize the amount of distress they feel as a result of engaging with the litigation system. Accordingly, we have every reason to reduce, to the extent we can, any perception that the litigation process is unfair to its participants.

It is commonplace to assume that, all other things being equal, reducing delay makes litigants more satisfied with the overall process. Thus, it might seem obvious that one benefit of increases in litigation speed is an increase in litigants' satisfaction and in their perceptions that the overall process is fair and trustworthy. It turns out, however, that there are reasons to doubt, as a matter of theory, that a faster process will necessarily be preferable from the perspective of litigants. And although the empirical data on this point are limited, some evidence suggests that litigants do not necessarily prefer faster case processing when they actually experience it. Thus, we should be cautious before assuming that a faster process is the one that well-informed litigants would prefer.

First, let us consider the theoretic relation between trial duration and litigant satisfaction. It seems intuitively obvious that if litigants found the process of litigation unpleasant, then they would prefer that trials be wrapped up as soon as possible, and thus give higher ratings to procedures that were faster. But human psychology is a funny thing, and one of its quirks is the phenomenon known as "duration neglect." A variety of studies have shown that in some scenarios, people will remember an unpleasant experience more positively if it is longer than if it were shorter. For example, participants in one experiment experienced two episodes in which their hands were immersed in painfully cold water. In the first version of the exposure, they held their hands in 14-degree Celsius water for 60 seconds. In the second, they held their hands in the water for 90 seconds, with the first 60 seconds being at the same 14-degree temperature, and with the water then being subtly warmed to a (slightly less painful) 15 degrees. Strikingly, when given a choice the participants preferred the 90-second version of the procedure, even though it included all of the pain from the 60-second version, plus a bit extra!⁶⁹ A similar result was observed in a study of people's reactions to painful colonoscopies of varying

⁶⁸ See TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 64, 101 (2006) (providing evidence that people are more likely to obey the law when they view legal institutions as legitimate sources of authority, and that people's perceptions that legal procedures are fair is an important determinant of their views of the system's legitimacy); Charles Nesson, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 HARV. L. REV. 1357, 1359 (1985).

⁶⁹ See Daniel Kahneman et al., *When More Pain is Preferred to Less: Adding a Better End*, 4 PSYCHOL. SCI. 401, 401 (1993).

lengths.⁷⁰ To explain this and other similar findings, the researchers developed the theory that our memories of past events tend to follow the “peak-end rule”: we remember most clearly the most intense aspects of an ongoing experience as well as its end, and we tend to give less attention to its overall duration.⁷¹

Once we take duration neglect into account, the connection between reducing delay and increasing litigant satisfaction with the process becomes more tenuous. We can start with two reasonable assumptions: First, most litigants will find the vast majority of the litigation process unpleasant, so that at any given moment, they would rather the lawsuit be completed than that it continue. Second, the amount of unpleasantness varies during the progress of the case, so that some experiences are much more unpleasant than others. Being deposed by an adversary’s attorney, for instance, is no doubt more stressful for most clients than merely waiting an extra day while the lawyers process discovery.

When we combine these assumptions with the “peak-end rule” explanation for duration neglect, we can see that some reforms that shorten litigation will nevertheless cause litigants to experience greater displeasure when they remember the process. One important component of many delay-reduction reforms is the expectation that judges will use their discretionary case management toolkit to put increased pressure on attorneys and litigants to settle their cases. For example, this is one of the central rationales of the “rocket docket” approach to litigation, in which courts signal a firm commitment to early trial dates so as to prevent lawyers from putting off settlement talks until further down the road. Many litigants, however, may find it very unpleasant to feel pressured by judges and their own attorneys to settle cases when they feel they have not had an opportunity to be heard by a court on the merits of their claims.⁷²

⁷⁰ See Donald A. Redelmeier & Daniel Kahneman, *Patients’ Memories of Painful Medical Treatments: Real Time and Retrospective Evaluations of Two Minimally Invasive Procedures*, 66 PAIN 3, 3 (1996).

⁷¹ See KAHNEMAN, *supra* note 61, at 380. Kahneman has speculated that this effect might not arise in situations where people both have pre-existing expectations regarding the duration of an event, and find it easy to monitor the length of the event in question. See Michael J. Liersch & Craig R.M. McKenzie, *Duration Neglect by Numbers—And Its Elimination by Graphs*, 108 ORG. BEHAV. & HUMAN DECISION PROCS. 303, 303, 305 (2009) (discussing a view developed in Daniel Kahneman & Shane Frederick, *Representativeness Revisited: Attribute Substitution in Intuitive Judgment*, in HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT 49 (Gilovich et al., eds., 2002)).

⁷² See E. ALLAN LIND, *ARBITRATING HIGH-STAKES CASES: AN EVALUATION OF COURT-ANNEXED ARBITRATION IN A UNITED STATES DISTRICT COURT* 63 (1990), available at <http://130.154.3.14/content/dam/rand/pubs/reports/2007/R3809.pdf> (noting that litigants whose cases were assigned to mandatory arbitration expressed greater satisfaction with the

Moreover, settlement usually ends a case in a more immediate and final way than a decision on the merits, which is usually subject to some amount of appellate process. Thus, even losing litigants who have their cases heard on the merits may derive some satisfaction from having their case heard by a decision-maker. They are also likely to have some time to get used to the fact that they are likely to lose before the process is finally complete. As compared with a litigant whose last moments in litigation involve being pressured by persons in positions of trust and authority to compromise their own positions without being heard, they may be less distressed about the process at the end of litigation. And given the phenomenon of duration neglect, this may mean that they find the overall process more satisfactory, *even if* the sum of all the distress they felt during the course of the process would be greater if measured in a moment-to-moment fashion.

Or consider another popular approach, which is to put pressure on judges to manage their own part of the process more quickly. This, too, may lead to litigants experiencing greater distress at the “peak” moments or at the end of their cases, even if the cases are shorter than they would otherwise be. As discussed above, this may lead judges to procrastinate until near the point when a delay measurement is made, and then hustle to get more cases out the door more quickly. It is quite plausible to think that such hurried decisions may feel less fair to litigants than if the court had more time to issue a decision. Some judges might substitute short, unpublished orders for more reasoned opinions, leading litigants to think that their cases were not being taken seriously. And even judges who took the time to craft full opinions might devote less time to evaluating each of the arguments raised by a party, or might give more cursory explanations for why those arguments were being rejected. Once again, we see the risk that a delay-reduction measure might lead to a reduction in a litigant’s ability to feel like they had been fully heard by a decision-maker, which could mean that the final moments of a case were more unpleasant than they would otherwise be. Here, again, we might find that such litigants would rate the overall process as less fair, *even if* they avoided some unpleasant period of waiting for the court to decide their case.

Of course, the fact that these things are possible in theory does not guarantee that they arise with any frequency in reality. The duration neglect studies I have referenced all involve relatively short-duration events,⁷³ and it may be the case that the link between duration and

process than those whose cases remained in the ordinary litigation process, and crediting that satisfaction, in part, to the greater likelihood of having one’s case heard by a decision maker rather than settled out of court).

⁷³ Both logistics and ethics militate against experiments that require exposing human

suffering is more straightforward when events last years rather than minutes or hours. But although the empirical evidence that is available on this question is fairly minimal, it does lend some support to the idea that at least some reductions in delay do not lead litigants to view the process in a more positive light. Allan Lind and his co-authors performed a comparative study of the factors at play in litigants' judgments of the overall fairness of the litigation process they experienced in tort cases.⁷⁴ One of their surprising findings was the failure to detect any consistent connection between the actual duration of cases and the extent to which litigants felt that the overall process was fair or satisfactory.⁷⁵ In fact, the researchers discovered that the extent to which litigants subjectively experienced the process as slow had "only a very weak correlation" with the actual length of cases, and even the subjective assessments "did not show any consistent relationship to procedural justice judgments."⁷⁶ These results, moreover, are largely consistent with an earlier study, which found some relationship between subjective evaluations of delay and fairness judgments, but no connection between fairness judgments and the actual duration of cases.⁷⁷ At least in the tort cases studied by these authors, the common-sense assumption that litigants are happier when the process is faster has less empirical support than the duration neglect account I advanced above. Accordingly, the desire to improve litigants' satisfaction or perceptions that the system is fair provides little justification for reforms that aim to speed up the process.

C. *The Interaction Between Speed and Litigation Costs*

Finally, we must also consider the relationship between increased speed and overall litigation costs. Once again, it seems commonplace to assume that a faster lawsuit is a cheaper lawsuit, and at the extremes this is obviously true. A suit that settles shortly after the filing of a complaint, for instance, will clearly be cheaper than a similar one that is litigated through trial and an appeal, in large part because of the accumulation of billable hours in the latter scenario. But this is of only limited relevance to the productivity reform conversation, because most reforms aim for more

subjects to adverse events lasting years, so this limit on the experimental data should not be surprising.

⁷⁴ See E. Allan Lind et al., *In the Eye of the Beholder: Tort Litigants' Evaluations of Their Experiences in the Civil Justice System*, 24 LAW & SOC'Y REV. 953, 953-55 (1990).

⁷⁵ *Id.* at 970.

⁷⁶ *Id.* at 971.

⁷⁷ E. ALLAN LIND ET AL., *THE PERCEPTION OF JUSTICE: TORT LITIGANTS' VIEWS OF TRIAL, COURT-ANNEXED ARBITRATION, AND JUDICIAL SETTLEMENT CONFERENCES* 51, 77-78 (1989), available at www.rand.org/content/dam/rand/pubs/reports/2006/R3708.pdf.

incremental improvements in litigation speed. When we consider the sort of reforms that are commonly proposed, the cost-reduction benefits of faster litigation will sometimes (but not always) come to fruition.

Some productivity reforms appear to reduce overall costs. In a RAND study of the efficacy of various reforms piloted under the CJRA, for instance, it was observed that the “rocket docket” approach of setting early and firm trial dates yielded a “reduction of 1.5 to 2 months in estimated time to disposition but no further significant change in lawyer work hours.”⁷⁸ The authors also observed that the practice of scheduling earlier discovery cut-offs achieved a similar reduction in time while actually *reducing* overall lawyer work-hours.⁷⁹ So, some means of making cases go faster appear to have either no effects, or salutary effects, on overall litigation costs.

This is not always the case, however. One of the reforms analyzed in the same study was the currently popular practice of early judicial case management, in which judges set early meetings with counsel to plan the discovery process and to explore the possibility of early settlements. The case management approach, the researchers found, increases the speed of litigation but also increases attorney workload in the early phases of a case. As a result, the additional speed comes at the expense of higher overall litigation costs.⁸⁰

Other reforms have not been similarly studied, but are subject to fairly straightforward analysis. Giving judges stronger incentives to do their own work faster, such as through the CJRA’s shaming sanction, speeds up case processing. Given that parties do not pay judges for their work, and that most judges are paid on a salary system that does not adjust upward if they work more hours in a day, there appears to be little additional cost to either litigants or society from such a system, aside from the minimal administrative burdens of monitoring dockets for the number of old cases they contain. At the same time, it is not clear that speeding up opinion writing necessarily saves litigation costs. That might be the case for those orders, such as those resolving motions to dismiss a complaint, which happen to halt discovery or other expensive aspects of case processing when decided by the court. But it will not be true if the order that is issued more quickly allows the litigation to proceed further; nor if it is issued at a moment in the case when the attorneys have paused their efforts to await the court’s decision, such as when a motion for summary judgment is pending or when discovery has been stayed pending the disposition of a

⁷⁸ See KAKALIK ET AL., *supra* note 8, at 14.

⁷⁹ *Id.* at 16.

⁸⁰ *Id.* at 14.

motion to dismiss. Although such incentives may indeed reduce litigation costs some of the time, that may not transpire in the mine run of cases.

D. *Putting It All Together*

Ultimately, striking a balance between accuracy, perceived fairness, and costs requires a society to strike a normative balance that is beyond the limits of descriptive analysis. Although I have my own intuitions regarding the amount of accuracy and fairness we should be willing to pay for, I doubt very much that those who make policy are waiting eagerly to hear them. Nevertheless, it may be helpful to offer a few observations on the kinds of trade-offs that particular reform proposals may engender.

Before I begin, I wish to offer one brief normative suggestion: Delay should not, by itself, be treated as a terminal value for those who are involved in the litigation system, nor should it be reduced for its own sake. If a case takes longer to decide but the delay neither raises costs nor makes litigants unhappy, it is quite difficult to articulate why we should care about speeding it up. Rather, delay is worth fighting only when it has a harmful impact on more fundamental litigation values. If delay leads litigants with valid claims to avoid filing cases, then it undermines accuracy by increasing Type 2 errors in the system. If it makes litigants frustrated and angry with the process, then it undermines procedural fairness judgments and (potentially) the legitimacy of the system itself. And if it raises costs, then the resulting harm is obvious. But except in cases where a delay reduction proposal will improve the litigation system's performance on one of these other metrics, it does not seem worth entertaining seriously.

Of all the reforms discussed so far, only one—setting early cut-offs of the discovery process—has been empirically linked, not just to additional speed, but also to cost savings. But although discovery cut-offs can indeed speed case termination to some extent,⁸¹ they also seem particularly likely to involve harmful accuracy trade-offs. If parties are denied access to necessary discovery, then they may lack the ability to discover the facts needed to prove their cases at trial, to defeat dispositive motions, or to advocate for fair settlements. Of course, it is also possible that parties are routinely getting more discovery than they need—although the rules authorize judges to prevent this from happening if a party objects that discovery requests are too burdensome.⁸² But the point is that the downsides of such changes in terms of accuracy are potentially large, and we have good reasons to think that maintaining the accuracy of the system

⁸¹ See *id.* at 26 (reporting a significant impact, but failing to quantify the effect size).

⁸² See FED. R. CIV. P. 26(c) (authorizing the issuance of protective orders to limit undue burdens arising from discovery that is not cost-justified).

is worth some additional cost. Unless we can assure ourselves that such discovery cut-offs do not prevent a significant number of parties with meritorious cases from obtaining recovery, prudence suggests that this “reform” should be treated with great caution.

Now let us consider a currently popular alternative, early and active case management, which is an important part of the current Federal Rules reform proposal. Intensive and early case management does not reduce costs and may in fact increase overall litigation costs by making more work for attorneys.⁸³ Those higher financial costs, in turn, may lead to a decline in accuracy, if some plaintiffs with marginal claims end up being deterred from suing on what are now negative value claims. And although active management speeds litigation, it does not seem to do so in a way that will make litigants more satisfied with the process, given the phenomenon of duration neglect described above. If litigants mainly pay attention to the peak moments and final phases of litigation when forming their overall opinions of it, then two possibilities may arise from active and early management. When the management efforts are focused on establishing efficient discovery schedules and other technical matters, then they are unlikely to effect fairness judgments at all. When, instead, management is used to push litigants into a settlement they might not otherwise agree to, then they may find this kind of speedy litigation less pleasant than a more protracted affair, which might have allowed them more meaningful opportunities to have their case heard on its merits. Either way, it is hard to see that the early and active case management efforts are likely to help make litigation more accurate, more satisfactory to litigants, or more cost-effective.

These examples generalize. We currently lack the information necessary to state with confidence that any of the currently popular approaches to speeding case processing can improve *any* key litigation value without the risk of a significant detriment to one of the others. Until we can bridge this gap, further efforts to combat the “problem” of delay will remain a risky proposition.

CONCLUSION

In this Essay, I have attempted to throw cold water on the persistent popularity of proposals that aim to reduce delay in litigation, both at the federal and state levels. Speeding litigation has no value in itself; rather, we should pursue productivity reforms only if they can make litigation outcomes more just, make the process feel fairer to litigants, or reduce its overall costs. Unfortunately, many reform proposals bear a significant risk

⁸³ KAKALIK ET AL., *supra* note 8, at 26–28.

of degrading the accuracy of litigation. Due to the psychological phenomenon of duration neglect, they are also less likely than proponents assume to increase litigants' satisfaction with the process. Finally, many of these proposals also fail to realize any meaningful cost savings. Until we can better understand the trade-offs involved in speeding up the litigation process, further efforts of this kind amount to gambling with other people's well-being, and should be viewed with far more skepticism.